

**THE ROLE OF FORENSIC EVIDENCE ON MURDER CASES UNDER THE
CRIMINAL JUSTICE SYSTEMS OF BURUNDI AND UGANDA**

A THESIS

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KAMPALA INTERNATIONAL UNIVERSITY**

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DECLARATION A

I, **Irakoze Chadia Clarisse**, declare that this Thesis is my original work and to the best of my knowledge it has not been presented for a Master's Degree or any other academic award in any university or institutional of learning.

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Name of Candidate

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APPROVAL

I certify that I have supervised and read this thesis and that in my opinion, it conforms to the acceptable standards of scholarly presentation and it is fully adequate in scope and quality as a thesis in partial fulfillment for the award of Degree of Master of Laws of Kampala International University, Uganda.

.....

Name of Supervisor

.....

Signature of Supervisor

.....

Date

DEDICATION

I dedicate the success of this study to my parents, to my brothers and sisters, and all friends who contributed in my journey of studies and giving me encouragement during the development of this study. Their ideas and moral support gave me strength and energy to accomplish this study.

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LIST OF ABBREVIATIONS

| | |
|-------|---|
| AAS | Atomic Absorption Spectrophotometry |
| CIID | Criminal Investigation and Intelligence Department |
| CLRC | Criminal Law Review Commission |
| DNA | Deoxyribonucleic Acid |
| DPP | Director of Public Prosecutions |
| DSC | Differential Scanning Calorimetry |
| FTIR | Fourier Transform Infrared |
| HPLC | High Performance Liquid Chromatography |
| IO | Investigating Officer |
| OPJ | Judicial Police Officer |
| PM | Post-Mortem |
| SEM | Scanning Electron Microscopes |
| SOCO | Scene of Crime Officer |
| TGA | Thermogravimetric Analysis |
| TLC | Thin Layer Chromatography |
| UNIIB | United Nations Independent Investigation on Burundi |
| XRD | X-ray Diffraction |

ABSTRACT

The research analyses the impact of forensic evidence on the investigation and prosecution of murder cases under the criminal justice systems of Burundi and Uganda. In Burundi as in Uganda, many murders case have been recorded in the past years until today, and some perpetrators have been apprehended. Many of these crimes, however, remain unsolved because of lack of sufficient evidence on which to charge the perpetrators. The lack of scientific methods of investigation heading to over-reliance on testimonial evidence has raised genuine concerns over time. In that breath, this study undertook to evaluate the importance or role of forensic evidence in the investigation and prosecution of murders case. The main objective is to analyse and evaluate the role and the place of forensic evidence in the investigation and prosecution of murder in the criminal justice systems of Burundi and Uganda. The methodology used in this study was doctrinal research based on the library materials involving primary source and secondary source. The research identified some gaps in the procedural laws of both jurisdictions, in particular of the absence of a proper way to carry out investigations on murder cases. The study further establishes that in Burundi no method of forensic science is used in criminal investigations of murder and for this reason the investigations are always done based on the traditional method of testimonies. In Uganda some forensic methods are used but the police staff in charge of conduct criminal investigation are not properly equipped in terms of training and other technical abilities relevant to examine different evidences collected on the crime scene. More so, there is lack of adequate equipment and other investigative tools. The research recommends that Burundi and Uganda, should improve the way of conducting criminal investigations using forensic science by investigating and prosecuting different crimes especially murder cases.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Forensic science can be explained as a study and application of science to matters of law.¹ Forensic science, or forensics, applies a scientific approach and technical methods in the study of traces that originate in a criminal activity, or litigious in civil, regulatory or administrative matters. It helps justice to determine the causes and circumstances of this activity.

Forensic means that belongs, which is connected or which is used in the courts of justice, comes from the Latin forum, the place public, place of the judgment in the ancients (forensics: of the forum). Forensic science can be used to solve a variety of crimes, or at least, to assist investigators. They derive their origin from the principle of Locard according to which all contact leaves traces.²

Forensic evidence is evidence obtained through scientific methods such as ballistics, blood testing and DNA testing and used in court. Medico-legal evidence often helps to establish the guilt or innocence of possible suspects. The analysis of forensic evidence is used in the investigation and prosecution of civil as well as criminal proceedings. Forensic evidence can be used to link crimes that are believed to be related to each other. For example, genetic evidence can link an offender to multiple crimes or crime

¹ P. Saumya, *Importance of Forensic Science in Law – A Study*, scholararticles. Published 1st, September, 2015. From <http://www.scholararticles.wordpress.com>, accessed on 26th, July, 2017.

² H. White John, David Lester, *The Utilization of Forensic Science and Criminal Profiling for Capturing Serial Killers*, vol. 209, 2011. From [http://www. Serialkiller.org/forensic science](http://www.Serialkiller.org/forensic%20science), accessed on 1st, June, 2017.

scenes. This link between crimes helps police authorities to narrow the range of possible suspects and establish crime patterns to identify and prosecute suspects³

Forensic sciences are defined as the set of scientific principles and techniques applied to criminal investigation, to prove the existence of a crime and to assist the justice in determining the identity of the author and his mode of operation. It is involved in all legal processes, from the understanding of crimes and offenses, to the presentation of evidence and their probative value before a court. The collection and processing of data form the basis of a wide range of activities.⁴

The criminal investigation process resembles a battle between the police and the perpetrator over crime related information. In committing crime, the offender emits signals, or leave behind information of various sorts (fingerprints, eyewitness, descriptions, murder weapon, etcetera), which the police attempt to collect through investigative activities. When the perpetrator is able to minimize the amount of information he leaves behind and the police are unable to recognize the evidence left at the crime scene, the perpetrator will not be apprehended and therefore the perpetrator wins the battle. If the police are able to collect a significant number of evidence from the perpetrator, the perpetrator will be identified and apprehended, and the police win.⁵

Forensic science is a broad subject that combines several branches of learning used to investigate crime scenes and to gather evidence to be used in the prosecution of offenders in court.⁶ In the past, the main fields used in forensic science were biology, chemistry and medicine. Over time, however, forensic science included various

³ [Http://definitions.uslegal.com](http://definitions.uslegal.com), accessed on 8th, May, 2018

⁴ H.W. Cyril, T. R. John, *Forensic Science and Law, Investigative Applications in Criminal, Civil and Family Justice*, 2006, p. 35-37

⁵ M. Willmer, *Crime and Information Theory*, Edinburgh, Scotland University of Edinburgh press, 1970, p. 40

⁶ [Http://definitions.uslegal.com](http://definitions.uslegal.com), accessed on 8th, May, 2018

branches such as toxicology, forensic cyber science, handwriting, fingerprints, ballistics, forensic psychology, anthropology, geology, forensic engineering and odontology.⁷

This study is initiated to assess the importance of forensic science in investigating murder cases. Forensic science applies scientific technology to provide accurate information that reflects events at the scene of the crime.⁸ Forensic scientists must appear before the courts as expert witnesses. Forensic science services begin by recognizing and collecting evidence at the crime scene, proceeding by applying the scientific analysis of such evidence and presenting the findings to the court.⁹

Criminal justice is the system of practices and institutions of government aimed at maintaining social control, deterring and mitigating crime, or punishing those who violate the law with criminal sanctions and rehabilitation efforts.¹⁰ The criminal justice system consists of three main parts: law enforcement (police); adjudication (courts); and corrections (jails, prisons, probation, and parole). In a criminal justice system, these distinct agencies operate together both under the rule of law and as the principal means of maintaining the rule of law within society.¹¹

Since the colonial period, in Burundi, the judicial system has moved from customary law to positive law and adopted the civil law system, following the example of the Belgians who were colonialists. At independence, positive law covers all branches of law, with the exception of certain private and civil matters.¹²

⁷ H.W. Cyril, T. R. John (n 4)

⁸ [Http://www.upf.ug](http://www.upf.ug), accessed on 26th, July, 2017: Uganda Police takes leap into scientific Investigations, Published December 17, 2013 by Police Information Reformation Centre, journal article.

⁹ Ibid.

¹⁰ [Http://www.Criminal.Findlaw.com](http://www.Criminal.Findlaw.com), accessed on 11th, April, 2017.

¹¹ Ibid.

¹² Syldie Bizimana, *the Burundi Legal System and Research*, a research paper, 2007

Since 1993, Burundi has had two decades in which violence against people has been numerous, sometimes systematic, spread throughout the country and at all levels of society. Many of these abuses have not yet been judicially processed. During the crisis that rocked Burundi, public institutions suffered interruptions in functioning and a serious crisis of legitimacy. Judicial institutions were particularly shaken during this period.¹³ Serious new murder cases have been observed in those two last years ago (2015-2017), and Burundian justice system had showed inability or unwillingness to conduct credible and thorough investigations.

Burundi adopted a new penal code that abolished the death penalty in 2009. It provides for provisions against torture and other inhuman or ill-treatment by improving to comply with the provisions of the Rome Statute by punishing international crimes Which are defined in the same way as in the Rome Statute.¹⁴ The promulgation of Act No. 1/14 of 18 October 2016 on the withdrawal of the Republic of Burundi from the Rome Statute establishing the ICC gives rise to a regression in the fight against impunity.

As a result of this penal code, a revised Criminal Procedure Code was promulgated on 3 April 2013. With regard to the legal guarantees of the accused, the code states that "freedom is the rule and detention is the exception". This latter principle, was set out in the procedure of the penal code for twice to emphasize how it is a fundamental right of anyone to enjoy freedom.¹⁵

Furthermore, in accordance with the provisions of the Criminal Code criminalizing torture, the Code of Criminal Procedure provided for the invalidity of the proceedings and for any confession obtained under duress.¹⁶ In this way, the new criminal procedure transmits an intention to humanize the criminal justice system by devoting a certain number of legal guarantees of the accused. However, uncountable cases of arbitrary

¹³ Ibid.

¹⁴ The Penal code of Burundi 2009, article 204 to 209

¹⁵ The Criminal Procedure Code of Burundi 2013, article 52 and Article 110

¹⁶ The Criminal Procedure Code of Burundi 2013, article 180 §2

detention which increase the overcrowding of prisons continue to be observed despite the provisions of the Penal Code.

Despite the presence of the penal code and the criminal procedure, in Burundi criminal investigations do not bring any improvement or a solution to the crimes that are committed from day to day. The investigation rarely brings new evidence to the police investigation. The vast majority of evidence consists of reported words: confessions or testimonies. The written requisition of the public prosecutor is often limited to stating the legal maximum of punishment or the article in which the conduct is incriminated. In Burundi, an overwhelming majority of evidence allowing for the truth are proofs by reported word: testimonies, confessions, denunciations.¹⁷ There is no physical evidence or forensic evidence that is used in any criminal case. And this implies that the burden of witnesses, whether they be witnesses for the prosecution or for the defense, may be sufficient to condemn or to exonerate a person. Pressures on witnesses are strong and there is an ambiguous relationship between witnesses and defendants, victims, community and institutions.

The absence of alternative evidence to the testimony also nourishes the desire for vengeance on the part of the condemned: without decisive testimony, no condemnation. The responsibility for the conviction may thus be incarnated in the person of the prosecution witness.¹⁸

The Republic of Uganda has a long history of extreme violence and ethnic conflict.¹⁹ The conflict in Uganda has persisted since the successful overthrow of government in 1986 by a rebel group led by current President Yoweri Museveni. Since President Museveni and his National Resistance Movement took power and installed a "no-party" political system, there have been several rebel movements based in northern Uganda. The most powerful, the Lord's Resistance Army (LRA), a sectarian Christian militant

¹⁷ J. MORICEAU *Study on the Function of the Criminal Chain in Burundi*, Research carried out under the responsibility of, Bujumbura - February 2011. From <http://www.rnc-ong.be>, accessed on 20th, July, 2017.

¹⁸ Ibid.

¹⁹ R. Quinn Joanna, *Ethnic conflict in Uganda*, working papers, 2004 p. 2

group led by Joseph Kony, continues to fight the government. The conflict has been the scene of numerous serious human rights violations, including summary executions, massacres of civilians, torture and mutilation, recruitment of child soldiers, rape and sexual abuse, forcible displacement, and the destruction of civilian property.²⁰

The Uganda criminal Justice system is composed of the judiciary, the police, the prison and the probation services. The Police department is under the supervision of the Ministry of Internal Affairs.²¹ The Uganda Police force on top is headed by the Inspector General of Police who is assisted in the administration of the force by a Deputy Inspector General and Senior Assistant Commissioners of Police.²² Setting aside major components of Uganda's Criminal justice system are local councils, which are the smallest political administrative units in villages. These local councils have local council courts, which settle local disputes including minor criminal's offenses. There are also local defence units, which are attached to local villages to handle security matters in the villages. Today, local defence units have taken up some of the police duties such as maintaining law and order among others.²³ The major responsibility to investigate crime in respect of general offences under the Penal Code Act lies with the Uganda Police under its investigatory department known as Criminal Investigation Department (CID).²⁴

The Constitution of 1995 mandates the Uganda Police under the Criminal Investigations Department (CID) as the lawful organ of the State that is responsible for carrying out criminal investigations.²⁵ Since the CID is mandated by law, and given the fact that successful completion of a criminal investigation ends with a successful prosecution and conviction, all criminal investigations have to be carried out in line with specific rules and procedures, which are meant to maintain the credibility of the evidence extracted

²⁰ <http://www.haguejusticeportal.net>, accessed on 18, April, 2017

²¹ Police Act (commencement: 14th, Oct., 1994), Cap 303, art. 8 (2) (a), p. 6438

²² Constitution of the Republic of Uganda (As at 15th February, 2006), Chapter 12, art. 213 (3), p. 158

²³ P. A. HENRY, The judiciary of Uganda, Structures and Functions of Judiciary, Report Paper, 2012, p.2

²⁴ M. SSEKAANA, *Criminal procedure and practice in Uganda*, Law Africa, 2010, p. 95

²⁵ The constitution of the Republic of Uganda, Article 212

and at the same time preserve the rights and freedoms of the suspects being investigated, with regard to the Constitutional right for suspects to be pronounced 'innocent until proven guilty'.

Uganda's Penal Code provides for 15 capital offences: nine separate offences grouped under the collective heading "treason" and offences against the state, rape, defilement, murder, aggravated robbery and aggravated kidnapping. Death is a mandatory punishment for six of the treasonous offences and a discretionary sentence for the remaining felonies at the same go.²⁶

The Police Annual Crime Report 2014 indicates a significant increase in the number of homicides: In 2014, the number of homicide cases reported and investigated were 2,421 reflecting an increase of 4.1%. Incidents of suspected ritual murders increased from 12 cases in 2013 to 13 cases in 2014 giving an increase of 8.3%.²⁷

Unfortunately, even with the existence of constitutional laws such as the Penal Code Act, the Procedure Code Act, and many gender-based laws, crime occurrence in Uganda continues to manifest various ways by both first-time criminals as well as serial convicts. The courts continue to have big backlog while handling cases which to a great extent is attributed to lack of evidence while dealing with highly sensitive cases of crime.²⁸

The Ugandan legal system still does not provide an effective response to punish past and present human rights violations or prevent future violations. Due to defective and careless investigation and weak prosecution, a large number of terrorists and criminals have been released by courts, which is not only lowering the image of judiciary but also encouraging the criminals. Impunity leads to more killings and is often a symptom of worsening conflict and the breakdown of law and judicial systems. The competent

²⁶ [Http://www.Country-data.com](http://www.Country-data.com), accessed on 12th, April, 2017.

²⁷ Annual Crime Report 2014, p. 26

²⁸ B. Iyamuremye, *Institute of forensic sciences will ease crime investigation*, Daily Monitor. Published Monday, 30th, December, 2013. Kampala, Uganda.

authorities have failed to take the necessary steps to conduct full investigations and prosecute those responsible for the numerous unsolved case of torture, disappearance and murder. Unsolved cases have devastating effects on the family members and friends of the victims.²⁹

Many cases, and/ or evidence brought against suspects in court can be unsuccessful or dismissed on grounds that the investigating team did not follow the rules of procedure. Evidence that is obtained without full observation of the rules and procedures of criminal investigation can easily be discredited by the defendant as unlawful and therefore may not be admissible in court, thus rendering investigations futile.³⁰

There is an area where Burundi and Uganda must operate at an ever faster pace every day, it is the development of the collection and analysis of scientific evidence. This is because the major crimes today are committed with the application of modern science. So that the police force has no choice but to keep pace and stay ahead of the criminals to acquire and apply modern scientific knowledge. This is the basis of this research which will provide a detailed analysis of the impact of forensic evidence in the investigation and prosecution of the murder cases in Burundi and Uganda.

1.2 Statement of the Problem

In Burundi, an overwhelming majority of the evidence allowing the manifestation of the truth is evidence by reported word: testimonies, confessions, denunciations. Strictly material evidence is most often missing from the files: no footprint, no ballistic report, sometimes only the weapon of the crime or the stolen object is seized.

Unsolved crimes, unsuccessful prosecutions, unpunished offenders and wrongful convictions discredit the criminal justice system and are the consequences of failures in the criminal investigation process in Burundi.

²⁹ Ibid.

³⁰ Holmes, Ronald, *Profiling Violent Crimes: An investigative tool*, Published by Sage Publications, University of Louisville and University of Central Florida, In USA, 1989, p. 44.

The main causes of the failed investigations in murder cases in Burundi are the political and security influence: there are cases where politicians, civil servants and prominent security personnel influence investigations especially those that involve them or their relatives and friends; The lack of regional and central police forensic laboratories and lack of expertise and understaffing of detectives, is the major problem which conduct to those failures investigations.

In Ugandan, in 2013, the number of homicide cases investigated were 2,326 compared to 1,910 cases in the year 2012. This reflects a 17.8% increase. This is attributed to increase in cases of Murder by shooting, aggravated domestic Violence, Mob Action among others.³¹ The National Police receive little training and lack the resources to respond appropriately to crimes, or conduct investigations, and the technical skills learned by murders, on how to erase or destroy evidence behind their tracks.³²

1.3 Objectives of the Research

The study sets different objectives:

1.3.1 General objective

The main objective of this study is to analyze the role and the place of forensic evidence in the investigation and prosecution of murder in the criminal justice systems of Burundi and Uganda.

³¹ Annual Crime and Traffic/Road Safety Report 2013

³² Ibid.

1.3.2 Specific objectives

- (i) To analyze the various rules and procedures of criminal investigations in murder cases under the criminal justice systems of Burundi and Uganda.
- (ii) To examine the role and impact played by forensic evidence in investigations and prosecutions of murder under the criminal justice systems of Burundi and Uganda.
- (iii) To analyze if the use of forensic evidence is relevant in investigation of murder cases.

1.4 Research Questions

- (i) What are the various rules and procedures involved in criminal investigation in murder cases under the criminal justice systems of Burundi and Uganda?
- (ii) Does murder investigation avail itself with forensic evidence?
- (iii) Is the use of forensic evidence relevant in investigation of murder cases?

1.5 Scope of the Study

This study was conducted within the Penal Code Act, cap 120 laws of Uganda, Evidence Act cap 6 laws of Uganda, and the Criminal code of Burundi and Criminal Procedure Act of Burundi and Uganda. It focused on cases of murder perpetrated in Burundi and Uganda but especially in Burundi. The latter because serious murder cases have been perpetrated in the years ago, and that there were no effective criminal investigations about killings which have been conducted, in order to arrest the perpetrators. It was limited to analyzing the impact of forensic evidence in investigation and prosecution of murder, for this it did not cover other offences.

1.6 Significance of the study

The findings of this study are useful in many different ways and are applicable to many different persons as follows:

To the police criminal investigation personnel, the findings of the study will contribute towards demonstrating the importance of forensic science in criminal investigation and conducting self-evaluation to determine their rate of success in criminal investigation.

To the policy makers, the findings of the study are useful in assessing the applicability of rules and procedures laid out by the legal instruments of criminal investigations.

To the general community, the study findings will contribute towards directing the people in community policing, so that they may have an idea about the importance of respecting a crime scene of murder in order that vital evidence is not lost or tampered with.

The researcher improved on the understanding of what forensic evidence is, the content of its legal framework in Burundi and Uganda in particular. As law student, the researcher analysed the challenges faced by police investigators from collecting evidence in murder cases.

1.7 Methodology

Generally, there are several methods of research but mainly, what are often used are quantitative, qualitative, mixed approach, doctrinal et non-doctrinal research. Quantitative research is based on the measurement of quantity, it is systematic scientific investigation that can be expressed in terms of quantity. Qualitative research, on the other hand, is concerned with qualitative phenomenon, it focuses on subjective information, such as feelings, experiences or opinions: data that cannot be quantified scientifically. The mixed research involves the mixing of qualitative and quantitative methods. Doctrinal research, is research about what the prevailing state of legal

doctrine, legal rule, or legal principle is, and the non-doctrinal research is concerned with people, social values and social institutions.

This research was doctrinal. The researcher chose to rely on this kind of research because it contributes in our understanding of law, legal concept or doctrine, and legal processes in a better way. The basis tools of a doctrinal are statutory materials, case reports, standard textbooks and reference books, etcetera. Thus, it was based on library materials involving both primary and secondary sources. The primary sources that the study relied on include, the 2007 Penal Code Act cap 120 Laws of Uganda and the 2009 Criminal Code of Burundi, the Criminal Procedure Code Act of Uganda and the 2013 Criminal Procedure Act of Burundi, the 1967 Evidence Act cap 6 Laws of Uganda, and the secondary sources were on the already published materials such as journal articles, murder cases, working papers and books by visiting libraries and using online source where data will be sought.

1.8 Literature Review

Forensic science in its broadest definition is the application of science to law. As our society has grown more complex, it has become more dependent on rules of law to regulate the activities of its members. Forensic science applies the knowledge and technology of science for the definition and enforcement of such laws. In the arena of criminal justice, laws are continually being broadened and revised to counter the alarming increase in crime rates. In response to public concern, law enforcement agencies have expanded their patrol and investigative functions, hoping to stem the rising tide time. At the same time, they are looking more and more to the scientific community for advise and technical support for their effort. Science does occupy an important and unique role in the criminal justice system, a role that relates to the

scientist's ability to supply accurate and objective information that reflects the events that have occurred at a crime.³³

Imagine a world where criminals run freely. Detectives and police officers collect evidence much the same way as they do today, but there is one main difference: Science is not used. Due to the lack of scientific analysis, there would not be a lot of useful evidence. Without the use of science, criminals could not be convicted of their crimes, ranging from common theft to a homicidal rampage, unless there was an eyewitness present at the crime scene when the crime occurred. Murderers would continue killing, thieves would continue stealing, and drug traffickers would continue dealing. Fortunately, in today's world, science is used in solving crimes. Clues some criminal leaves behind can be traced to themselves through scientific evidence. This field of science dealing with criminal investigation is known as forensic science, which roughly means the application of science to law. Forensic science can be used to determine many things from the evidence when it is collected properly without any contamination.³⁴

Stuart and Nordby, argued that due

'to the great importance of forensic science in the conviction of criminals, the basic ideas and concepts need to be taught to officers of local police departments so that evidence can be collected without contamination in order to keep criminals, from continuing to commit crimes that linger on forever in the minds of the victim's families and the nation's psyche. Throughout history, evidence has been used to convict criminals of the crimes that they have committed. Today's society has improved upon the methods of the past to bring about more precise and accurate techniques. These techniques are more commonly known as the field of forensic science'.

³³ S. Richard, *Criminalistics, An Introduction to Forensic Science*, 8th Edition, Published by Stephen Helba, New Jersey, USA, 2004, p. 1-2

³⁴ Ibid.

Stuart and John argued that because when a crime has been committed, it is first and foremost the policemen who first come to the scene of crime and are required to collect anything that might be evidence of crime. That why it is important that officers follow appropriate collection procedures for forensic evidence.³⁵ For Burundi, however, its local police department have not yet been taught basic ideas or concepts about forensic science.

Richard Saferstein writes a more specific definition than what was previously given in his book *Criminalistics: An Introduction to Forensic Science*, which says that forensic science is the

“application of science to those criminal and civil laws that are enforced by the police agencies in a criminal justice system.”

The origin of this type of science cannot be accurately pinpointed.³⁶ According to H. J. Walls' article “Whither Forensic Science?” it started as a hobby of a few scientists who liked to become mixed up in the proceedings of the police and “enjoyed the kind of problems this association brought them.” We do not know how forensic science originated and came together or how it came to be connected to the police investigations and court rulings.³⁷

The relationship between forensic science and the criminal investigation is very important. Klinker has explained that the relationship between forensic science and criminal investigation is like an employee- employer that is,

³⁵ H. Stuart James, J. Jon Nordby, *Forensic Science: An Introduction to Scientific and Investigative Techniques*, CRC press LLC, 2000 N.W Corporate Blvd., 2003, p. 1-9.

³⁶ Ibid.

³⁷G. Manson (Bardsley), *The importance of forensic evidence in criminal investigation*. Forensic article, 2001

"Forensic science is employed in order to investigate cases or questions that are of interest to the legal system and to help solve legal disputes".³⁸

Criminal investigation thus reconstructs a model of reality as faithfully as possible by gathering evidence to determine whether a criminal offense has occurred and, if so, the identity of the person or persons responsible for it. Forensic evidence is very important, but we cannot ignore either that there are cases where these forensic evidences have resulted in contradictions instead of bringing solutions.

Forensic sciences are not often approached in academic areas. Lambert, in his thesis, has based on an empirical study and explored the position in Michigan of forensic science as a subject in of law.³⁹ The result was that the collection of evidence, latent evidence and fingerprints, crime scene documentation and interview techniques are important or very important areas. These areas are often addressed in advanced legal science courses and are generally considered as areas of specialization in law enforcement and forensic science. The reason that causes many people not to be interested is probably due to two factors: First, these areas tend to be managed by a roughly trained staff who tend to have graduate degrees in the complicated sciences; Second, many law enforcement officials have little experience in these areas and therefore cannot understand their importance in a criminal investigation. The problem with this Lambert' study is because it was limited to Michigan only and did not extend to other areas, which could have given us some information on forensic science as a subject in of law in others region's universities. In Africa, unfortunately, very few countries have schools or institutes or even universities that teach or have cursus in the

³⁸ M. Klinker, *Forensic science expertise for international criminal proceedings: an old problem, a new context and a pragmatic resolution*. The International Journal of Evidence & Proof, Vol.13, 2009, P.102-129.

³⁹ E. Lambert, T. Nerbonne, P.L. Watson, J. Buss, A. Clarke, N. Hogan, S. Barton, J. Lambert, *The Forensic Science Needs of Law Enforcement Applicants and Recruits: a survey of Michigan law enforcement agencies*. Journal of Criminal Justice Education, Vol. 14 No. 1, Spring, 2003

forensic sciences. This prevents Africa from progressing in the use of forensic sciences in criminal cases that occur every day.

In the same educational framework, Fradella Owen and Burke wrote that the evolution of forensic science in the criminal justice system requires criminal justice educators to develop the study of forensic science and the traditional social science curriculum.⁴⁰ The objective of this article was to increase the body of knowledge to guide and inform the policy and practice of forensic sciences and recommends the formation of an interdisciplinary forensic study program, including a discussion of the needs, Components of a set of educational practices and overcoming potential barriers.

In the modern application of the law, all legal professionals cannot progress without the help of the scientific and technical police to enforce judicial decisions. At the present time, there is no doubt that the success or failure of a survey rests on the collaboration between the police forensic technicians and the investigators in common with the magistrates, from the place where the crime was committed to the condemnation of the criminal. The physical evidence found on crime scenes is of paramount importance in the field of criminal investigation. Although they are not sufficient by themselves, they can corroborate the statement of eyewitnesses, link the facts; associating the culprit with the crime scene and finally putting the victim back on the scene of the crime. Julian and Kelty in their work demonstrated the importance of forensic science at various stages of the criminal justice process; that is, from the crime scene to the courts and to demonstrate the value of social science research (especially criminological research) in the area of forensic science.⁴¹

⁴⁰ H.F. Fradella, S.S. Owen and T.W. Burke (). *Building Bridges between Criminal Justice and the Forensic Sciences to Create Forensic Studies Programs*. Journal of Criminal Justice Education, Vol. 18, No. 2, 2007, July.

⁴¹ R. Julian and S. Kelty (2012). *Forensic Science and Justice: From Crime Scene to Court and Beyond*. Current issues in Criminal Justice, Vol. 24 No. 1, July.

Obviously, expert witnesses have become common use in many criminal justice systems. As the complexity of trials increases, expert witnesses are often called upon to assist the trier of fact by giving their opinion in light of the specialized knowledge they have acquired. There is no doubt that the trend towards increased use of expert witnesses goes hand in hand with the more liberal approach to the admissibility and acceptance of this type of evidence by all parties in the criminal justice system. As Merlino examined, Forensic experts also work hard to ensure that their methods are transparent and efficient in the courts and that judges receive the information they need to make their decisions.⁴² But this, is not relevant in the way of what is doing in Burundi. This latter doesn't use any forensic technic and doesn't even have a forensic expert, which means that the police or the court rely only on witnesses' testimony. Any scientific evidence is used to support the testimony or to verify it, which is very dangerous because the suspect is judged only on the basis of testimony.

One of the most well-known elements of forensic science is DNA. Several criminal cases have been resolved in recent years thanks to DNA, a molecule that codifies the unique genetic heritage of each and allows since the late 1980s to identify an individual with certainty. For years, DNA has elucidated many cases of murders. As was said by Hails, one of the fundamental elements of judicial proceedings is the presentation of evidence in a court of law. Physical evidence; Such as forensic evidence in the form of deoxyribonucleic acid (DNA), are all that can be combined with the five senses to prove a fact that is at issue.⁴³

The value of the evidence is very important, no one can prove that a crime has been committed or not committed if evidence hasn't been found. It supports witnesses' testimony and connects a suspect to the crime in question.

Hails continued to explain that tangible evidence, that everything that is physically palpable, all that can be perceived by sight, or whether it can be macroscopic,

⁴² M. L. Merlino, V. Sprnger, E. Sahota, & L. Haines, *Meeting the challenges of the daubert trilogy: refining and redefining the reliability of forensic evidence*, *Tulsa Law Review*, 2008, p.417-445.

⁴³ J. Hails, *Criminal evidence*, 5th ed. California: Thomson Wadsworth, 2005, p. 53-55.

microscopic or trace elements, whether at the time of the investigation or before the crime is committed and physically mobile items.⁴⁴ These tend to prove beyond doubt a certain elementary uncertainty to be true, or conversely, false. DNA, like so many other forensic evidence, are useful in establishing the scope of a crime scene, such as placing a suspect on a crime scene and thus establishing a connection with a weapon, testimony of witnesses.

There are cases, however, where the criminal has been able to erase his traces or has checked before committing the crime of not leaving any imprint. In similar cases, scientists cannot connect crime to crime, because if there are no traces or fingerprints, DNA cannot be held.

The manner in which evidence is processed will influence the role it is able to play in solving a particular crime. The validity of the evidence depends on the care taken by the investigator collecting it.

With DNA advances, DNA traces can now be found on well-preserved seals. Yet unknown today, some traces of this can be traced to new techniques: DNA fingerprints can now be detected on a single cell and analyzes on more and more supports.⁴⁵ According to Lehman and Phelps, DNA can consist of human or fluid tissues such as saliva, sperm and hair, is one among many evidence that can be collected in a crime scene and more later compared to that taken from a suspect.⁴⁶ Lerner and Lerner argue that the evidence gathered at the crime scene can link a suspect to a crime or eliminate a person as a suspect.⁴⁷

Several authors, from Merlino to Lehman, have put a strong emphasis on the importance of DNA as mentioned above, but the importance of the latter doesn't mean that it could be sufficient to convict a person accused, there are some cases where

⁴⁴ Ibid.

⁴⁵ [Http://www. La-croix.com](http://www.La-croix.com), accessed on 10th, July, 2017

⁴⁶ J. Lehman& S. Phelps, *DNA evidence, West's Encyclopaedia of American Law*. 2nd edition. Gale Cengage, 2005, p. 31

⁴⁷ K.L. Lerner, (Editor) & B.W. Lerner, *Evidence, World of Forensic Science*, Gale Cengage, 2006, p. 22-23

more evidences are required in order to charge someone with murder. DNA is not always able to confirm that someone is guilty of something. He can, however, confirm someone's innocence and it has to do with the science behind that.

Bennet and Hess argued that the manner in which the evidence is gathered has a direct impact on the integrity or effectiveness of the evidence. They continue to develop that the preservation or protection of the integrity of physical evidence is an ongoing responsibility from the time it is discovered to the moment it is presented in court or until the final settlement of the case determines its disposition.⁴⁸ To ensure that evidence gathered at the scene of crime is accepted in court, all criminal justice actors, including law enforcement officials, lawyers, forensic analysts and investigators, should be sure that the biological evidence they consider has been properly stored, processed, stored and monitored to avoid contamination, premature destruction or degradation.⁴⁹ According to Evert, the correct handling of physical evidence is essential because the court must be satisfied that the evidence has not been altered or falsified at any time.⁵⁰ This requires that the police should have the necessary equipment to better collect and protect the evidence taken at the scene of crime, to prevent the evidence gathered from being lost or contaminated.

As Fowler argued, crimes can take various forms and succeed in establishing how and the perpetrator depends on highly qualified people and strictly specialized processes. DNA is often the link between the crime and the aggressor. In the process, this evidence passes through a chain of evidence and the evidence goes through several storage activities before, during and after analysis. The criminal investigation can thus be characterized as multidisciplinary and depends entirely on the efficient and effective collection and management of the evidence.⁵¹

⁴⁸ W. Bennet, & K.M Hess, *Criminal Investigation*. Thomson Wadsworth, 2004, p. 16

⁴⁹ Ibid.

⁵⁰ Evert, Inspector. Personal communication. 22 February 2008. *Journal articles*

⁵¹ S. Fowler, *A Crime Scene investigator in the Police Force*. Biological Sciences Review, 2006, p. 5-7

Paul B. Weston and Kenneth M. Wells, in their book, *Criminal Investigation: basic perspectives*, wrote extensively about criminal investigation procedures. They cover all the major aspects of criminal investigation procedure such as the criminal investigation function of the police, the elements of investigations and investigating major crimes.⁵² On the criminal investigation function of the police, Weston and Wells state that

'evidence is the only means of satisfying the tries-of -fact of the truth or untruth of allegations and accusations made by the parties in their pleadings...the legal significance of evidence rests in its influence on the judge or the jury'.⁵³

This is relevant in line with the work of the police in Burundi (but not in murder cases) as in Uganda, since investigators are intended to collect evidence that can be admissible in court to prove or disapprove the allegation. It is the objective and purpose of carrying out the investigation by state organs such as CID unity of Uganda in Police to find evidence that can meet judicial standard in the process of criminal justice. This, however, remains a myth for Burundi, because until now it does not have an organ or department in charge of conducting strictly criminal investigations.

On arrest, Weston and Wells state that

'today it's no longer believed that legally significant evident can be developed after arrest has been made. Investigators are now assembling evidence beyond the strong suspicious or probable cause level, basic to any lawful arrest, before they attempt to arrest the major suspect in the case'.⁵⁴

The above principle is not relatively practicable in Burundi and Uganda due the fact that investigative resources and expertise are limited, that is why the traditional method of

⁵² B. Paul Weston and Kenneth M. Wells, *Criminal Investigations: Basic perspectives*, Prentice Hall Inc., Upper Saddle River-USA, 2003

⁵³ Chap 1, p. 3

⁵⁴ Chap 12, p. 185

arresting before investigation is more preferred. This research intends to explore and make recommendations that will improve the way forensic evidence should be carried out during a criminal investigation in Burundi and Uganda with a view of bringing it in line with the above statement.

From the analysis of present literature material, some major gaps have been revealed:

The Burundian local police department have not yet been taught basic ideas or concepts about forensic science, and Africa, very few countries have schools or institutes or even universities that teach or have cursus in the forensic sciences. This prevents Africa from progressing in the use of forensic sciences in criminal cases that occur every day. Burundi doesn't use any forensic technic and doesn't even have a forensic expert, which means that the police or the court rely only on witnesses' testimony. Any scientific evidence is used to support the testimony or to verify it, which is very dangerous because the suspect is judged only on the basis of testimony and it doesn't have an organ or department in charge of conducting strictly criminal investigations. In Burundi and Uganda due the fact that investigative resources and expertise are limited, that is why the traditional method of arresting before investigation is more preferred.

1.9 Organizational layout

The study consists of five chapters. The first one is the introductory chapter, which offer basic information regarding the background, objectives, and other preliminary elements of the study. The second chapter deals with the legal and institutional framework on homicide. The third chapter examines procedures for investigating homicides in a comparative way. The fourth chapter analyses the practicability and the applicability of the forensic evidence in murderous investigations. The fifth and final chapter gives a summary of research findings that were obtained from the study. It also offers conclusions and recommendations.

CHAPTER TWO

THE LEGAL AND INSTITUTIONAL FRAMEWORK ON HOMICIDES

2.0 Introduction

In this chapter the researcher defined, firstly the term Murder as a homicide, looked at the ingredients of the offense of murder, prosecution of murder cases. And secondly, presented, under the criminal justice system of Burundi and Uganda, how this term is defined and how it's prosecuted.

2.1 Definition and components of Murder

The simple definition of murder is voluntarily giving death to a person.

In general, in order for a person to be found guilty of a criminal offense he or she must have committed an illegal act (*actus reus*) and must have the necessary "state of mind" (*mens rea*) to constitute the offense criminal. The prosecution must establish the two elements of the criminal offense, the *actus reus* and the *mens rea*, beyond a reasonable doubt.⁵⁵

Actus reus is the Latin word meaning "guilty act". It goes without saying that a person must have done the illegal act before she was found guilty of a crime. The culpable act may be an action by a person or an action that it fails to do, that is, an action that the person is required to do, but does not do.⁵⁶

Mens rea is the Latin word meaning "guilty state of mind".⁵⁷ In Burundi, we demand for most criminal offenses that the person has the necessary "state of mind" or *mens rea* for committing the offense before being found guilty.

The *actus reus* of murder consists of the unlawful killing of a human being in the Queen's peace. The *mens rea* of murder is malice aforethought, which has been

⁵⁵ J.C. Smith & Brian Hogan, *Criminal Law Cases and Materials* 5th Edition. Butterworth & Co Publishers Ltd; 2nd Revised edition.

⁵⁶ [Http://www.e-lawresources.co.uk/The-law-of-murder.php](http://www.e-lawresources.co.uk/The-law-of-murder.php) accessed on 13th, April, 2018

⁵⁷ Ibid.

interpreted by the courts as meaning intention to kill or intention to cause grievous bodily harm.⁵⁸

2.1.1 Causing death

It must be proved that the defendant caused the death of the deceased person. The most common source of problems of causation in the criminal law is homicide. The leading cases have been considered, below:

The 'year-and-a-day' rule is peculiar to homicide. The rule was applied in *Dyson* D's daughter, Lily, was born on 6 August 1906. Lily was assaulted by D on 13 November 1906 (D was sentenced to four months' imprisonment for that) and again on 29 December 1907 (D was sentenced to six months' imprisonment for that).⁵⁹ Lily died on 5 March 1908 and D was charged with manslaughter. The trial judge directed the jury that D could be convicted of manslaughter, in effect, if Lily's death had been caused either by the injuries inflicted in November 1906 or those inflicted in December 1907. The CCA quashed D's conviction for manslaughter for which he had been sentenced to ten years' imprisonment. Lord Alverstone CJ said that the trial judge had overlooked a 'somewhat recondite rule of law' that unless the deceased dies within a year and a day of the injury a charge of homicide would not lie.

The jury could properly have returned a verdict of manslaughter had they been directed and found that death had been accelerated by the injuries inflicted in December 1907 but the direction left it open to them to convict of manslaughter if they had found that death was caused by the injuries inflicted in November 1906— injuries inflicted more than a year and a day before Lily's death.

The reason for the 'somewhat recondite rule of law' (A Year and a Day in Homicide') lies in the procedure which governed the 'appeal of felony, in effect a private

⁵⁸ Ibid.

⁵⁹ (1909) 1 Cr App Rep 13, CCA.

prosecution for felony.⁶⁰ A period of limitation was set, a year and a day, within which the appeal (the prosecution) had to be commenced. Initially time ran from the day of the death but by the fourteenth century the judges decided that time ran from the date of the injury causing the death. The rule changed its nature; designed as a limitation period for bringing a prosecution it became part of the substantive law of homicide. Later writers, such as Coke, seeking a rational basis for the rule, saw the explanation 'as lying in the difficulty of proving, after a lapse of such a time, whether the victim had died from the initial injury or from natural causes.

The Criminal Law Review Commission (CLRC) recommended (Fourteenth Report, Offences against the Person, Cmnd 7844, para 39), a recommendation incorporated in the draft Criminal Code Bill, that the rule should be retained because otherwise a person would remain almost indefinitely at risk of a prosecution for murder. The present law, the CLRC thought, operated satisfactorily since the defendant could be charged with causing grievous bodily harm or attempted murder, both of which carry life imprisonment. The CLRC said:

" A killing cannot amount to murder unless death occurs within a year and a day of the infliction of injury. The longer the gap between the injury and death the more difficult it is to decide whether the injury is a cause of death. We reaffirm the view expressed in our Working Paper (paragraph 44) that, although with the advance of medical science it is arguably no longer necessary to retain the year-and-a-day rule, it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. A line has to be drawn, somewhere and in our opinion the present law operates satisfactorily. When death follows over a year after the infliction of injury the killer does not necessarily escape justice. He may be charged with attempted murder or causing grievous bodily harm with intent, both of which are punishable, and, if our recommendations are accepted, will continue to be punishable, with life imprisonment. Accordingly, we recommend that a killing should not amount to murder unless death follows before the expiration of a year after the day on which the injury was inflicted ".

⁶⁰ Ibid.

In the majority of cases of murder, the act which causes death (for example, the firing of a gun) and the infliction of injury (for example, the entry of a bullet into the victim's body) occur almost at the same time. In some cases, however, this is not so the act which later causes injury may occur a substantial period of time before the actual infliction of injury.

A decision therefore has to be made whether time should run from the act or the infliction of injury. A case that directly raises the issue is where a person places in a deserted building a booby-trap bomb which explodes more than a year later, killing a person instantly. If time were to run from the placing of the bomb, the killing could not be murder; it could be murder if time ran from the explosion. In such a case it would be wrong if a verdict of murder could not be returned. We have already explained that the year-and-a-day rule exists only to avoid uncertainties which may arise in cases where a person survives the infliction of injury upon him for a substantial time.' In view of this, we recommend that time should run from the infliction of injury as opposed to the act which causes death. Where pre-natal injury is inflicted, time should run from birth.

2.1.2 A person in being

The victim of homicide must have been born and not have died before the defendant's act took effect. Although this principle is discussed exclusively in connection with homicide, it is probably applicable to offences against the person generally.⁶¹ As to birth, the Committee (14th Report) wrote:

The common law definition of birth (for the purposes of offences against the person) has not been the subject of judicial review or comment for a long time. The last reported case on the subject that we can trace occurred in 1874. We have examined not only the common law test of birth but also the statutory formulation in the Infant Life (Preservation) Act 1929 which provides that the offence of child destruction may apply only to the killing of a child 'before it has an existence independent of its mother'.

⁶¹ Ibid.

In our opinion the test of independent existence should be adopted. It also seems to us right that there should be an ascertainable point up to which the killing of a child would be child destruction under the Infant Life (Preservation) Act 1929 after which the law of homicide would apply. We therefore recommend that for a killing to constitute murder (or manslaughter or infanticide) the victim should have been born and have an existence independent of its mother.

2.1.3 The death

The study considered whether there should be a statutory definition of death.⁶² A memorandum issued by the honorary secretary of the Conference of Medical Royal Colleges and Faculties in the United Kingdom on 15 January 1979 refers to an earlier report of the Conference which expressed their unanimous opinion that 'brain death' could be diagnosed with certainty. The memorandum states that the report published by the Conference has been widely accepted and says that the identification of brain death means that a patient is truly dead, whether or not the function of some organs, such as a heartbeat, is still maintained by artificial means.

Brain death is said to be when all the functions of the brain have permanently and irreversibly ceased. We are however extremely hesitant about embodying in a statute (which is not always susceptible of speedy amendment) an expression of present medical opinion and knowledge derived from a field of science which is continually progressing and inevitably altering its opinions in the light of new information.

If a statutory definition of death were to be enacted there would, in our opinion, be a risk that further knowledge would cause it to lose the assent of the majority of the medical profession. In that event, far from assisting the medical profession, for example in cases of organ transplants, the definition might be a hindrance to them. Moreover, while there might be agreement that the statutory definition was defective, there might be differences of view about the proper content of any new definition. An additional reason

⁶² Ibid.

for not recommending a definition of death is that such definition would have wide repercussions outside offences against the person and the criminal law.

A legal definition of death would also have to be applicable in the civil law. It would be undesirable to have a statutory definition confined only to offences against the person, which is the extent of our present remit. For these reasons therefore, we are not recommending the enactment of a definition of death.

2.2 Murder: the mental element

The mental element required for the crime of murder, as for the crime of manslaughter, has varied over the centuries.⁶³ Broadly, it may be said that from Coke's time (when the judges were prepared to treat killing by any unlawful act as murder) there has been a steady contradiction of the definition of murder but for the unfortunate decision in *DPP v Smith*. Reporting in 1953 the Royal Commission on Capital Punishment (Cmd 8932) found it 'impractical' to frame a satisfactory definition of murder but it did recommend that the reach of murder be curtailed by the abolition of the doctrine of 'constructive' murder. Under this doctrine a person was guilty of murder if he caused death during the commission of a felony involving violence (example: rape, robbery) or if he caused death while resisting an officer of justice. The RCCP's recommendation was embodied in s 1 of the Homicide Act 1957. This must be the starting point of a discussion of the mental element in murder though it tells us much more of what the mental element, is not and tells us precious little about what it is. Section 1 provides

(1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

(2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a

⁶³ Ibid.

lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence.

The section uses the expression 'malice aforethought' to describe the mens rea of murder. Traditionally the mens rea of murder was described as malice aforethought but the term is unhelpful: 'malice' does not mean ill will and aforethought' tells us no more than that the mens rea must not come as an afterthought. It is simply a label used to refer to those mental states (whatever they are) that suffice for murder.

2.2.1 Intention to kill

The section refers to two kinds of malice aforethought 'express and 'implied'. 'Express' malice must be a reference to whatever was considered as express malice at common law.⁶⁴ What that was has nowhere been judicially defined nor has there been any explanation of it in the case law since the Homicide Act. What did Parliament (or the draftsman) have in mind when it was enacted that express malice sufficed for murder? The term was used by the institutional writers to denote those whose conduct was intentional. The earlier writers (Hale, Hawkins) did not restrict the term to those who intentionally caused death, but it now appears that the term 'express malice' means 'with intent to kill', and 'implied malice' means 'with intent to do serious bodily harm'.

The leading cases on intention are now *Moloney*, *Hancock* and *Nedrick*, but the earlier decision of the House of Lords in *Hyam* still requires consideration.

Before turning to *Hyam*, one other decision of the House of Lords, *DPP v Smith* calls for a comment.⁶⁵ D, fearing that P, a police officer, was about to discover stolen goods in his car, drove off at high speed with P clinging on to the bonnet. D drove at increasing speed for 130 yards, during which time his car struck three oncoming vehicles, until P was finally thrown off into the path of another vehicle and killed. Restoring D's conviction for murder, Viscount Kilmuir LC, with whom all their lordships concurred, said:

⁶⁴ Ibid.

⁶⁵ ([1960] 3 All ER 161),

'The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question 'is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.'

Few cases can have attracted such a barrage of hostile criticism from the commentators. It was considered in, though not formally overruled by *Hyam*, *Moloney* and *Hancock*. Lord Diplock did say in *Hyam* that it was wrongly decided, and Lord Bridge in *Moloney* and Lord Ackner in *Hancock* said that insofar as it laid down an objective test it did not represent the common law. Another view expressed (by Lord Hailsham in *Hyam* among others) was that there was no need to overrule it because its effect had been modified by s.8 of the Criminal Justice Act.⁶⁶

The issue had to be met, as it were, head on, in *Frankland and Moore*.⁶⁷ The appellants had been convicted on a Smith direction on the Isle of Man at a time when the Isle of Man had no provision equivalent to s. 8. Since the common law is the same in this matter as the common law of England, it was necessary to decide whether Smith correctly stated the common law. It was forthrightly held that it did not. While decisions of the Privy Council cannot overrule decisions of the House of Lords, it seems safe to assume that the decision in Smith would no longer be followed.

⁶⁶ 1967.

⁶⁷ 1987] AC 576, PC).

In the case of *Hyam v Director of Public Prosecutions*, House of Lords (Lord Hailsham of St Marylebone LC, Viscount Dilhorne, Lord Diplock, Lord Cross of Chelsea and Lord Kilbrandon), the facts appear in the speech of Lord Hailsham.⁶⁸

Lord Hailsham LC: 'The facts are simple, and not in dispute. In the early hours of Saturday, 15 July 1972, the appellant set fire to a dwelling-house in Coventry by deliberately pouring about a half-gallon of petrol through the letterbox and igniting it by means of a newspaper and a match. The house contained four persons, presumably asleep. They were a Mrs. Booth and her three children, a boy and the two young girls who were the subjects of the charges. Mrs. Booth and the boy escaped alive through a window. The two girls died as the result of asphyxia by the fumes generated by the fire. The appellant's motive (in the sense in which we should use the word 'motive') was jealousy of Mrs. Booth whom the appellant believed was likely to marry a Mr. Jones of whom the appellant herself was the discarded, or partly discarded, mistress. Her account of her actions, and her defence, was that she had started the fire only with the intention of frightening Mrs. Booth into leaving the neighborhood, and that she did not intend to cause death or grievous bodily harm'.

2.3 Standard of proof in murder cases

'The prosecution must prove, beyond all reasonable doubt, that the accused intended to (kill or) do serious bodily harm to Mrs. Booth, the mother of the deceased girls. If you are satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause (death or) serious bodily harm, then the prosecution will have established the necessary intent. It matters not if her motive was, as she says, to frighten Mrs. Booth.'

The judge explained that he had put brackets round the words 'kill or' and 'death or' because he advised the jury to concentrate on the intent to do serious bodily harm rather than the intent to kill.

⁶⁸ [1974] 2 All ER 41,

There were other Passages in the summing-up to the same effect, but this was the vital passage, and the judge reduced it to writing and caused the jury to retire with it into the jury room. As the case proceeded, it is the only passage in the judge's summing-up to which we need draw attention and gives rise to the only point which was argued before your Lordships' House. The Court of Appeal dismissed the appeal 'not without some reluctance' and in giving leave to appeal to the House of Lords, certified that it involved the following point of law of general public importance, namely, the question: 'Is malice aforethought in the crime of murder established by proof beyond reasonable doubt that when doing the act which led to the death of another the accused knew that it was highly probable that that act would result in death or serious bodily harm?'⁶⁹

This is the only question which, in our view, it is necessary to consider and the whole appeal is, therefore, within a fairly narrow compass.

Having considered *DPP v Smith* and s 8 of the Criminal Justice Act his Lordship continued:

We know of no better judicial interpretation of '*intention*' or '*intent*' than that given in a civil case by Asquith, *Cunliffe v Goodman* when he said:

'An "intention", to my mind, connotes a state of affairs which the party "intending"—we will call him X—does more than merely contemplate.⁷⁰ It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.'⁷¹

If this be a good definition of 'intention' for the purposes of the criminal law of murder, and so long as it is held to include the means as well as the end and the inseparable consequences of the end as well as the means, we think it is clear that 'intention' is clearly to be distinguished alike from 'desire' and from foresight of the probable

⁶⁹ [19731] 3 All ER 842

⁷⁰ [1950] 2 KB 237 at 253, [1950] 1 All ER 720 at 724])

⁷¹ 1967 (see Frankland, above, p 394),

consequences.⁷² As the Law Commission pointed out in their disquisition on *Director of Public Prosecutions v Smith*, a man may desire to blow up an aircraft in flight in order to obtain insurance moneys.⁷³ But if any passengers are killed he is guilty of murder, as their death will be a moral certainty if he carries out his intention. There is no difference between blowing up the aircraft and intending the death of some or all of the passengers. On the other hand, the surgeon in a heart transplant operation may intend to save his patient's life, but he may recognise that there is at least a high degree of probability that his action will kill the patient. In that case he intends to save his patient's life, but he foresees as a high degree of probability that he will cause his death, which he neither intends nor desires, since he regards the operation not as a means to killing his patient, but as the best, and possibly the only, means of ensuring his survival.

We do not, therefore consider, as was suggested in argument, that the fact that a state of affairs is correctly foreseen as a highly probable consequence of what is done is the same thing as the fact that the state of affairs is intended. The highest that it can be put in the context of the present set of facts is that what was intended was to expose the inhabitants of the house to the serious risk of death or grievous bodily harm and not actually to cause death or grievous bodily harm. we do not think that these propositions are identical.

But this, again, does not dispose of the matter. Another way of putting the case for the Crown was that, even if it be conceded that foresight of the probable consequences is not the same thing as intention, it can, nevertheless, be an alternative type of malice aforethought, equally effective as intention to convert an unlawful killing into murder.

This view, which is inconsistent with the view that foresight of a high degree of probability is only another way of describing intention, derives some support from the way in which the proposition is put in *Stephen's Digest* where it is said that malice

⁷² J.C. Smith & Brian Hogan, *Criminal Law Cases and Materials* 5th Edition

⁷³ pp 14, 15, para 18 (12 December 1966)]

aforethought for the purpose of the law of murder includes a state of mind in which there is:

'knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or a wish that it may not be caused'.

If this is right, Ackner J's direction can be justified on the grounds that such knowledge is itself a separate species of malice aforethought, and not simply another way of describing intention.

We must, however, qualify the negative answer we have proposed to the question certified as of general public importance. For the reason we have given, we do not think that foresight as such of a high degree of probability is at all the same thing as intention, and, in my view, it is not foresight but intention which constitutes the mental element in murder. It is the absence of intention to kill or cause grievous bodily harm which absolves the heart surgeon in the case of the transplant, notwithstanding that he foresees as a matter of high probability that his action will probably actually kill the patient. It is the presence of an actual intention to kill or cause grievous bodily harm which convicts the murderer who takes a very long shot at his victim and kills him notwithstanding that he thinks correctly as he takes his aim that the odds are very much against his hitting him at all.

But what are we to say of the state of mind of a defendant who knows that a proposed course of conduct exposes a third party to a serious risk of death or grievous bodily harm, without actually intending those consequences, but nevertheless and without lawful excuse deliberately pursues that course of conduct regardless whether the consequences to his potential victim take place or not? In that case, if our analysis be correct, there is not merely actual foresight of the probable consequences, but actual intention to expose his victim to the risk of those consequences whether they in fact occur or not.

Is that intention sufficient to reduce the crime to manslaughter notwithstanding a jury's finding that they are sure that it was the intention with which the act was done? In

ouropinion, it is not, and in this our opinion corresponds with the opinion of the Commissioners on the Criminal Law, when they said, 'Again, it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill, or from willfully doing an act of which death is the probable consequence And again in latter passage, It is the willful exposure of life to peril that constitutes the crime'.⁷⁴ The heart surgeon exposes his patient to the risk, but does everything he can to save his life, regarding his actions as the best or only means of securing the patient's survival. He is, therefore, not exposing his patient to the risk without lawful excuse or regardless of the consequences. The reckless motorist who is guilty of manslaughter, but not murder, is not at least ordinarily aiming his actions at anyone in the sense explained in *Director of Public Prosecutions v Smith*. If he were, it is quite possible that, as in *Director of Public Prosecutions v Smith*, he might be convicted of murder. In the field of guilty knowledge, it has long been accepted both for the purposes of criminal and civil law that 'a man who deliberately shuts his eyes to the truth will not be heard to say that he did not know it'. (See per Lord Reid in *Southern Portland Cement v Cooper*), Cannot the same be said of the state of intention of with actual appreciation of the risks and without lawful excuse, willfully decides to expose potential victims to the risk of death or really serious injury regardless of whether the consequences take place or not.⁷⁵ This seems to me to be the truth underlying the statement of the law in Stephen's Digest, the summing-up of Cockburn CJ in *Desmond* [(1868) Times, 28 April], and of Avory J in *Lumley* and of those phrases in *Director of Public Prosecutions v Smith* in which it seems to be said that a rational man must be taken to intend the consequences of his acts.⁷⁶ It is not a revival of the doctrine of constructive malice or the substitution of an objective for a subjective test of knowledge or intention. It is the man's actual state of knowledge and intent which, as in all other cases, determines his criminal responsibility. Nor, for the like reason, does this set up an irrebuttable presumption. It simply proclaims the moral truth that if a man, in full

⁷⁴ (8 March 1839),

⁷⁵ [[1974] 1 All ER at 374] 2 WLR at 158.)

⁷⁶ [(1911) 76 JP 208]

knowledge of the danger involved, and without lawful excuse, deliberately does that which exposes a victim to the risk of the probable grievous bodily harm (in the sense explained) or death, and the victim dies, the perpetrator of the crime is guilty of murder and not manslaughter to the same extent as if he had actually intended the consequence to follow, and irrespective of whether he wishes it.

That is because the two types of intention are morally indistinguishable, although factually and logically distinct, and because it is therefore just that they should bear the same consequences to the perpetrator as they have the same consequences for the victim if death ensues. For the reasons we have given in our opinion the appeal fails and should be dismissed.

Viscount Dilhorne said that whether or not knowledge that certain consequences are highly probable is to be treated as intent (he was inclined to think it was), it had been established for at least 100 years that such knowledge amounted to malice aforethought. The jury had not been misdirected. Lord Cross took a similar view but was not prepared to decide without further argument whether intention to cause, or foresight of the probability of, serious bodily harm was sufficient. On the footing that Vickers, was rightly decided, he would dismiss the appeal. Lord Diplock, with whom Lord Kilbrandon agreed, dissenting, held that an intention to do serious bodily harm was not enough. There must be an intention to do an act likely to endanger life. Appeal dismissed.

2.4 Intention to cause grievous bodily harm

Section 1 of the Homicide Act 1957 tells us not only that express malice suffices for murder but also that implied malice suffices.⁷⁷ As with express malice the reference to implied malice is simply a reference, and an unhelpful one, to whatever was understood to be meant by 'implied malice'.⁷⁸ The term was again one frequently used by the institutional writers who gave various interpretations of it.

⁷⁷ United Kingdom

⁷⁸ [(1911)76 JP 208]

Added to this vocabulary was another variant called 'constructive malice'. This expression does not appear in the text of section 1 but the marginal note to the section (which is not part of the section) reads 'Abolition of constructive malice'. Another expression commonly used at that time was the 'felony- murder' doctrine. This appears to be one limb of the constructive malice doctrine which was abolished by s 1(1) of the Homicide Act.

Example given, the appellant broke into the cellar of a shop which was occupied by an old woman of seventy-three, a Miss Duckett, intending to steal money. At the shop Miss Duckett carried on a prosperous business of grocer and tobacconist, and she lived alone on the same premises in two rooms above the shop; she was a small woman and the appellant, who lived in lodgings a short distance away, knew that she was deaf. While the appellant was in the cellar Miss Duckett came down the stairs leading to it and saw the appellant. She asked him what he was doing and came towards him, whereupon the appellant attacked her with his fists and struck her several blows; she fell down. The medical evidence was that Miss Duckett was struck by ten to fifteen blows and was kicked in the face by the appellant, and that death was caused by shock due to general injuries; the medical evidence was also that the degree of force necessary to inflict the injuries sustained by Miss Duckett would be moderately severe to quite slight force.

The appellant now appealed against his conviction *inter alia* on the ground that the judge misdirected the jury when he told them that malice aforethought could be implied if the victim was killed by a voluntary act done with the intention of causing grievous bodily harm.

2.4.1 Abolition of "constructive malice"

'Constructive malice' is an expression that has crept into the law, I do not think that it will be found in any particular decision but it is to be found in the text-books and is something different from implied malice. The expression 'constructive malice' is generally used and the best illustration of constructive malice which is generally given is

that if a person caused death during the course of his carrying out a felony which involved violence, that always amounted to murder. There were cases in which a man was not intending to cause death, as for instance where a mere push was given which would never have been considered in the ordinary way as one which would cause death, but the person pushed fell down and most unfortunately struck his head or fell down the stairs and broke his neck, yet if the act were done, for example, in the course of burglary, it amounted to murder. Take the case of rape. If a man raped a woman and in order to overcome her resistance proceeded to strangle her, the fact that he might only have used a moderate degree of violence in the strangling, in holding her throat, would have been no defence. If he did cause death it would have been murder because he caused death during the commission of the offence of rape. Another instance of constructive malice which was always held sufficient to amount to murder was the killing of a police officer in the execution of his duty. If a prisoner was resisting arrest, although he might use only a moderate degree of violence on a police officer, yet if he caused the death of the officer from some unusual or perhaps extraordinary reason, he was guilty of murder. Murder is, of course, killing with malice aforethought and 'malice aforethought' is a term of art. Malice aforethought has always been defined in English law as either an express intention to kill such as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on him, or an implied intention to kill, as where the prisoner inflicted grievous bodily harm, that is to say, harmed the victim by a voluntary act intended to harm him and the victim died as the result of that grievous bodily harm. If a person does an act on another which amounts to the infliction of grievous bodily harm he cannot say that he did not intend to go so far. It is put as *malum in se* in the old cases and he must take the consequences. If he intends to inflict grievous bodily harm and that person dies, that has always been held in English law, sufficient to imply the malice aforethought which is a necessary constituent of murder.

It will be observed that S.1 preserves the implied malice as well as express malice and the words 'where a person kills another in the course or furtherance of some other offence' cannot in our opinion refer to the infliction of the grievous bodily harm, if the

case which is made against the prisoner is that he killed a person by having assaulted the person with intent to do grievous bodily harm and from the bodily harm which he inflicted that person dies. The furtherance of some other offence must refer to the offence that he was committing or endeavoring to commit other than the killing, otherwise there would be no sense in it. It was always the English law that if death were caused by a person in the course of committing a felony involving violence that was murder. Therefore, in this particular case it is perfectly clear that the words 'where a person kills another in the course or furtherance of some other offence' must be attributed to the burglary which the appellant was committing. The killing was in the course or furtherance of that burglary. He killed that person in the course of the burglary because he realized that the victim recognized him and he therefore inflicted grievous bodily harm on her, perhaps only intending to render her unconscious, but he did intend to inflict grievous bodily harm by the blows he inflicted on her and by kicking her in the face, of which there was evidence.

Section 1(1) of the Act of 1957 then goes on:

'The killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.'

It would seem clear, therefore, that what the legislature is providing is that where there is a killing, though it may be done in the course or furtherance of another offence, that other offence must be ignored. The other offence is not taken into consideration. What has to be considered are the circumstances of the killing; and if the killing would amount to murder by reason of the express or implied malice then that person is guilty of capital murder. It is not enough that he killed in the course of the felony unless the killing is done in a manner which would amount to murder ignoring the felony which is committed. It seems to the court, therefore, that here you have a case of a burglar attacking a householder to prevent recognition. The householder died as the result of blows inflicted on her—blows or kicks or both—and if s1 of the Act of 1957 had not been passed there could be no doubt that the man would have been guilty of murder. He is guilty of murder because he has killed a person with the necessary malice

aforethought being implied from the fact that he intended to do grievous bodily harm, we will now briefly refer to the summing-up of Hinchcliffe, which the court thinks is quite impeccable.

The court desires to say quite firmly that in considering the construction of s 1(1), it is impossible to say that the doing of grievous bodily harm is the other offence which is referred to in the first line and a half of the sub-section. It must be shown that independently of the fact that the accused is committing another offence, that the act which caused the death was done with malice aforethought as implied by law. The existence of express or implied malice is expressly preserved by the Act of 1957 and, in our opinion, a perfectly proper direction was given by Hinchcliffe, to the jury, and accordingly this appeal fails and is dismissed.

2.5 Prosecution of Murder Cases in Burundi and Uganda

In all societies around the world, murder is considered one of the most serious crimes and the definition of murder differs from country to country.

2.5.1 The offense of murder in Burundi

Article 211⁷⁹ defines murder as any act by which a person voluntarily gives death to another person. He is punished with perpetual penal servitude.

Murder which is intended either to prepare or facilitate an offense or a crime, or to promote the flight or to ensure the impunity of the perpetrator or the accomplice of a crime or offense is punishable by servitude criminal offense in perpetuity.

The article 212⁸⁰ stipulates that the murder of fathers, mothers or other legitimate ascendants, as well as the murder of the natural father or mother is called parricide. He is punished with penal servitude for life.

⁷⁹ Penal code of Burundi 2009

⁸⁰ Penal Code of Burundi 2009

The murder of his children, brothers or sisters who are legitimate or natural, is also punished with perpetual criminal servitude.

The murder committed by the legitimate or natural father or mother of a newborn child is described as infanticide. He is punished with perpetual penal servitude.

The Penal Code of Burundi, in its article 213 defines assassination as a murder committed with premeditation. He is punished with perpetual penal servitude. There is premeditation when the purpose of carrying out the homicide was formed before the action.

Murder committed by means of substances which may cause death more or less promptly in any manner whatever which these substances have been employed or administered, is termed poisoning. He is punished with the penalty of life imprisonment.⁸¹

2.5.2 Manslaughter

Is guilty of manslaughter who caused death by default of foresight or precaution, by clumsiness, carelessness, negligence or breach of a duty of safety or prudence imposed by law or regulation but without intent to strike at the life of others.⁸²

Anyone who involuntarily caused the death of a person is punished by a penal servitude of three months to two years and a fine of fifty thousand francs to five hundred thousand francs or one of these penalties only.⁸³

In Makamba, Monday, October 2, 2017, the Court of First Instance (TGI) of Makamba condemned, in a flagrant affair, Mr. Niyogusenga Adronis, a 19-year-old, living on the hill Kanzege commune and Province of Makamba, to a 20-year prison sentence, for

⁸¹ Article 214 of Penal Code of Burundi 2009

⁸² Article 225 of Penal Code of Burundi 2009

⁸³ Article 226 of Penal Code of Burundi 2009

killing his friend, stabbing him to death, on Friday, September 29, 2017, because the latter, his friend, wanted to reconcile him to his parents.

In Burundi, in this murder case, Mr. Niyogusenga was angry, and it was these emotions that took over. Immediately, he regretted his act. According to Article 213 of the Code of Criminal Procedure, the penalty for intentional homicide is life imprisonment. But, in this case, the TGI was tolerant, considering manslaughter.⁸⁴

2.6 Offense of Murder in Uganda

In Uganda the offense of murder is governed by the Penal Code Act chapter 120

Section 188⁸⁵ provides for the offense of Murder.

That any person who of malice aforethought causes the death of another person by an unlawful act or omission commits murder.

2.6.1 Punishment of murder

That any person convicted of murder shall be sentenced to death.⁸⁶

2.6.2 Punishment of manslaughter

That any person who commits the felony of manslaughter is liable to imprisonment for life.⁸⁷

⁸⁴ [Http://www.Burundi-agnews.org/justice/](http://www.Burundi-agnews.org/justice/) accessed on 13th, April, 2014

⁸⁵ Penal Code Act Cap 120 laws of Uganda

⁸⁶ S.189 Penal Code Act Cap 120 laws of Uganda

⁸⁷ S.190 Penal Code Act Cap 120 laws of Uganda

2.6.2.1 Malice aforethought

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—

- (a) An intention to cause the death of any person, whether such person is the person actually killed or not; or
- (b) Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.⁸⁸

2.6.3 Explanation of Killing on provocation

When a person who unlawfully kills another under circumstances which, but for this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in section 193, and before there is time for his or her passion to cool, he or she commits manslaughter only.⁸⁹

2.6.3.1 Definition of Provocation

(1) "Provocation" means and includes, except as stated in subsections (3) to (5), any wrongful act or insult of such a nature as to be likely—

- (a) When done or offered to an ordinary person; or
- (b) When done or offered in the presence of an ordinary person to another person—
 - (i) Who is under his or her immediate care; or

⁸⁸ S.191 Penal Code Act Cap 120 laws of Uganda

⁸⁹ S.192 Penal Code Act Cap 120 laws of Uganda

(ii) To whom he or she stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person—

(a) To another; or

(b) in the presence of another to a person— (i) who is under the immediate care of that other; or (ii) to whom that other stands in any such relation as aforesaid, the former is said to give to that other provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.⁹⁰

2.7.4 Diminished responsibility

(1) Where a person is found guilty of the murder or of being a party to the murder of another, and the court is satisfied that he or she was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder, the court shall make a special finding to the effect that the accused was guilty of murder but with diminished responsibility.⁹¹

⁹⁰ S.193 Penal Code Act Cap 120 laws of Uganda

⁹¹ S.194 Penal Code Act Cap 120 laws of Uganda

(2) On a charge of murder, it shall be for the defence to prove that the person charged was suffering from such abnormality of mind as is mentioned in subsection (1).

(3) Where a special finding is made under subsection (1), the court shall not sentence the person convicted to death but shall order him or her to be detained in safe custody; and section 105 of the Trial on Indictments Act shall apply as if the order had been made under that section.

(4) The fact that one party to a murder is by virtue of this section not liable to be sentenced to death shall not affect the question whether any other party to it shall be sentenced to death.

2.6.5 Definition of causing death

A person is deemed to have caused the death of another person though his or her act is not the immediate or sole cause of death in any of the following cases,

(a) If he or she inflicts bodily injury on another person in consequence of which that person undergoes surgical or medical treatment which causes death.⁹² In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) If he or she inflicts a bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his or her mode of living;

(c) if by actual or threatened violence he or she causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such

⁹² S.196 Penal Code Act Cap 120 laws of Uganda

violence which in the circumstances would appear natural to the person whose death is so caused;

(d) If by any act or omission he or she hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) If his or her act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

2.6.5.1 Limitation as to time of death

(1) A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.

(2) Such period is reckoned inclusive of the day on which the last unlawful act contributing to the cause of death was done, and when the cause of death is an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the omission ceased.

(3) When the cause of death is in part an unlawful act and in part an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the last unlawful act was done or the day on which the omission ceased, whichever is the late.⁹³

2.7 Criminal Justice System definition and components

Criminal justice is about society's formal response to crime and is defined more specifically in terms of a series of decisions and action by a number of agencies in response to a specific crime or criminal or crime in general. There are four key sub-systems of criminal justice:

a. Law enforcement: involving the police and prosecuting agencies.

⁹³ S198 Penal Code Act Cap 120 laws of Uganda

- b. Courts: making decisions about pre-trial detention, adjudication on the guilt of the defendant, deciding on the sentence for those convicted and ensuring that the rights of the defendant are respected.
- c. Penal system: involves probation, prisons and other agencies that punish and incarcerate and/or seek to monitor; control and reduce offending behavior.
- d. Crime prevention: involves the above agencies who deal with individual offenders along with a wider group of agencies, some private, others governmental, who plan crime-free environments or seek to change the conditions that lead to criminal behavior.⁹⁴

2.7.1 Functions and aims of the criminal justice system

In exploring what a criminal justice system aims to do, we need to distinguish between the goals of the system as whole, and the functions of the different agencies who make up the system. Cross-system goals include:

- a. Public protection: by preventing and deterring crime and terrorism, by rehabilitating offenders and incapacitating others who constitute a persistent threat to the community.
- b. Justice and the rule of law: upholding and promoting the rule of law and respect for the law, by ensuring due process and proper treatment of suspects, arrestees, defendants and those held in custody, successfully prosecuting criminals and acquitting innocent people accused of a crime.
- c. Public order: maintaining law and order
- d. Punishment: sentencing criminals with regard to the principles of just deserts.
- e. Denunciation: registering social disapproval of censured behavior of criminal acts.
- f. Victim services: aiding and advising the victims of crime.

⁹⁴ Malcom D., Hazel C., Jane T. (2010), Criminal Justice, 4th Ed., Edinburgh Gate, England, p. 8

g. Public confidence: maintaining public confidence so that the public system of criminal justice is perceived as dealing effectively and fairly with the threats to the public from criminals such that citizens do not feel the need to engage in private acts of vengeance and vigilantism.

2.7.2 Criminal Justice of Burundi

The Burundian criminal justice system involves a large number of institutional actors (judges, public prosecutors (OMP), judicial police officers (OPJ), etc.) and non-institutional actors (lawyers, witnesses, defendants, etc.). These different actors act and interact within a strict legislative framework, which divides criminal procedure into a certain number of defined stages in which each actor is called upon to play a specific role.

The main stages and actors of the Burundian criminal chain are:

a. The finding of the offense, usually made by the victim and members of the population.

The judicial investigation, carried out by the judicial police (PJ) under the control of the public prosecutor.

b. The investigation, conducted by the public prosecutor's office, which interrogates the accused in particular, may place him in detention under the supervision of the judge, and hear witnesses.

c. The judgment phase, characterized by public hearings at the end of which the judge makes a decision.

d. Execution of the judgment in which the convicted person pays a fine and / or is serving his sentence in an institution managed by the administration penitentiary under the control of the public prosecutor. It is at this stage that compensation for the harm suffered by the victims is organized.

The function of the criminal courts decides whether a person has committed a criminal offense, and, if so, they sentence that person to a penalty.

A criminal offense is a behavior that is prohibited because it is contrary to the essential values of our society or because it is contrary to fundamental rules of living together. For example: stealing, killing, beating others, driving while intoxicated, hiding income from the tax authorities.

The list of criminal offenses is given by law. Most of these offenses are found in the Penal Code of Burundi. Burundian law also specifies the conditions that must be met in order to deal with a criminal offense.

When a person is accused of having committed an offense, the first role of the criminal courts is to check whether all these conditions are fulfilled. The courts do not judge on the basis of their personal impressions or opinions, but they must apply the law. A person can only be found guilty if all the elements of the definition of the offense are met. The court must thus give the right "qualification" to the facts that have been committed.

For example: A person is charged with murder. She beat another person, who died. According to the law, one of the conditions of the offense of "murder" is "the intention to kill". If the court finds that, following the investigation, there is no evidence that the perpetrator intended to kill, he will not be able to characterize the facts as murder. He will have to find another criminal offense that corresponds to the facts committed. For example, he will convict the author of "assault causing death without intent to give". When the court finds that the accused person is guilty of the offense, his or her second role is to sentence: it may be a prison sentence, a fine, a work term, etc. The law gives him a "fork", i.e. a minimum and a maximum, and the court chooses within it, in particular according to the seriousness of the acts committed or the personality of the person. author of the facts.

As in civil matters, criminal courts can never intervene on their own initiative. It is the public prosecutor who accuses a suspect, who summons him to court and asks the judges to pronounce a sentence.

2.8 The Court System of Burundi

The legal system of Burundi is based on German and French civil codes and customary law. In 1987 there were 64 tribunals of first instance. The Court of Appeal and the Supreme Court are located in Bujumbura.

The 1992 Constitution established a number of new courts, including a constitutional court to review all new laws for conformity to the constitution. It also created a High Court responsible for resolving charges of high level crimes by high level government officials. A military court had jurisdiction over crimes by members of the military.

Article 205⁹⁵ provides that Justice is rendered by the courts and tribunals in all the territory of the Republic in the name of the Burundian People.

The role and the attributions of the Public Ministry are fulfilled by the Prosecuting Magistrates.

The judges of the [Ordinary] Tribunals of Residence and the officers of the police, however, may fulfill vis-a-vis these tribunals the duties of the Public Ministry under the surveillance of the Prosecutor of the Republic. An organic law establishes the organization and the judicial competences.

2.8.1 The organization of Burundian criminal courts with their fields of competence.

In Burundi, the High Court (TGI) is the common law jurisdiction at first instance: it hears disputes that are not specifically assigned to another jurisdiction. In addition, he has special skills, some of which are exclusive.

The organization of the jurisdictional system in criminal matters is based on a division of jurisdiction between:

⁹⁵ Constitution of the Republic of Burundi 2005

I. the police court;

II. the correctional court;

III. the Assize Court

Each of these jurisdictions has jurisdiction depending on the gravity of the offense, which may be a contravention, offense or crime, as well as the age of the offender when the offender is a minor. When the offender is under the age of 18, the case falls within the jurisdiction of special criminal courts, namely the juvenile judge, the juvenile court or the Assize Court of Appeal minors.

2.8.1.1 The police Court

The police court is a formation of the district court. He is competent to judge the contraventions, whatever their class (thus from the 1st to the 5th). Until 1 July 2017, the police court had jurisdiction only for the 5th class offenses. Those of the first 4 classes fell under the jurisdiction of the local judge, now disappeared. The police court rules a single judge.

2.8.1.2 The Correctional Court

The correctional court is a formation of the tribunal de grande instance. This jurisdiction is competent in matters of crime (theft, breach of trust, assault and battery, fraud, etc.).

The court sits collegially during the course of the correctional proceedings but may in certain cases decide to single judge when the law provides (in case of offense provided for by the Highway Code in particular).

2.8.1.3 The Assize Court

The Assize Court is a court of competent jurisdiction over crimes, which constitute the most serious offenses in the Penal Code (murders, rapes, torture or acts of barbarism, etc.). There is one for each department.

It is composed of three magistrates, namely the president of the court and his two assessors, as well as nine jurors (whose number is increased to 12 in case of appeal) who are not professionals but people drawn lots from the electoral lists.

2.8.1.4 Appeal and cassation

It is in principle possible to appeal a judgment of the police court or the criminal court. The alleged offender may also appeal to the Court of Cassation against a decision of the Court of Appeal (or the judgment rendered at first instance when the appeal is not possible). It is the Criminal Division of the Court of Cassation that is then competent to deal with the case.

In case of appeal following a judgment rendered by a court of assizes, it is brought before another assize court then called appeals court of assizes. It will judge the case again before 12 jurors (and not 9 as at first instance). The judgment of the Assize Court of Appeal may itself be the subject of an appeal in cassation.

2.9 The court system of Uganda

The Judiciary is an independent legal organ comprised of Courts of Judicature as provided for by the Constitution. The Judiciary is entrusted to administer justice through courts of judicature including the Supreme Court, the Court of Appeal, the High Court and other courts or tribunals established by Parliament. The highest court in Uganda is the Supreme Court. The Court of Appeal is next in hierarchy and it handles appeals from the High Court but it also sits as the Constitutional Court in determining matters that require Constitutional interpretation. The High Court of Uganda has unlimited original jurisdiction.

Subordinate Courts include Magistrates Courts, and Local Council Courts, Qadhis'courts for marriage, divorce, inheritance of property and guardianship, and tribunals such as

those established under the Land Act (Cap 227), Communications Act (Cap 106) and Electricity Act (Cap 145), and Tax Appeals Tribunal Act.

2.9.1 Supreme Court

The Supreme Court is the highest Court in Uganda and is the final court of Appeal. The Supreme Court only decides cases on appeal from lower courts save for presidential election petitions, where the Supreme Court has original jurisdiction, which means that any aggrieved candidate in a presidential election has to petition the Supreme Court directly.⁹⁶ The decisions of the Supreme Court form precedents which all lower courts are required to follow.

The Supreme Court bench is constituted by the Chief Justice and not less than six Justices. Five Justices are sufficient to hear most cases, but when hearing appeals from decisions of the Court of Appeal, a full bench of seven justices has to be present. The decisions of the Supreme Court form precedents that all lower courts are required to follow.

2.9.2 Court of Appeal / Constitutional Court

The Court Appeal was established by the 1995 Constitution.⁹⁷ It is an intermediary between the Supreme Court and the High Court and has appellate jurisdiction over the High Court. It is not a Court of first instance and has no original jurisdiction, except when it sits as a Constitutional Court to hear constitutional cases.

The Court of Appeal consists of: The Deputy Chief Justice and such number of Justices of Appeal not being less than seven as Parliament may by law prescribe.

Cases coming before the Court of Appeal may be decided by a single Justice. Any person dissatisfied with the decision of a single Justice of Appeal is, however, entitled to

⁹⁶ Article 130 constitution of the Republic of Uganda

⁹⁷ Article 137 constitution of the Republic of Uganda

have the matter determined by a bench of three Justices of Appeal, which may confirm, vary or reverse the decision. Cases decided by the Court of Appeal can be appealed to the Supreme Court, but the Court of Appeal is the final court in election petitions filed after Parliamentary elections or elections provided for by the Local Government Act. When deciding cases as a Constitutional Court it sits with a bench of five judges.

2.9.3 High Court

The High Court of Uganda is the third court of record in order of hierarchy and has unlimited original jurisdiction, which means that it can try any case of any value or crime of any magnitude.⁹⁸ Appeals from all Magistrates Courts go to the High Court. The High Court is headed by the Principal Judge who is responsible for the administration of the court and has supervisory powers over Magistrate's courts.

The High Court has five Divisions: The Civil Division, the Commercial Division, the Family Division, the Land Division and the Criminal Division.

Subordinate Courts include the Chief Magistrates Court, Industrial Court Magistrates Grade I and II Local Council Courts levels 3-1 (sub county, parish, and village).

2.9.4 Magistrate Courts

Magistrate's Courts handle the bulk of civil and criminal cases in Uganda. There are three levels of Magistrates courts: Chief Magistrates, Magistrates Grade I and Magistrates Grade II. These are subordinate courts whose decisions are subject to review by the High Court.⁹⁹ Presently the country is divided into 26 Chief Magisterial areas administered by Chief Magistrates who have general powers of supervision over all magisterial courts within the area of their jurisdiction.

⁹⁸ Article 138 constitution of the Republic of Uganda

⁹⁹ Article 129 constitution of the Republic of Uganda

2.9.5 Tribunals

Specialized courts or tribunals form part of the judicial structure e.g. Industrial Court, Tax Appeals Tribunal, NPART Tribunal, Land Tribunals, Tax Appeal Tribunal and the Human Rights Tribunal. A parallel judicial system exists for the military with a hierarchy of courts established under the NRA Act and Regulations. The only link from the military system to the mainstream judicial system arises from an appeal from the Court Martial Appeal Court (the highest appeal court in the military system) to the Supreme Court where a death sentence or life imprisonment has been meted.¹⁰⁰

Conclusion

Article 223¹⁰¹ establishes an [office] of General Prosecutor of the Republic, before the Supreme Court, of which the members are appointed in the same manner as the judges of the Supreme Court.

Article 120¹⁰² establishes the office of the Director of Public Prosecutions (DPP). He or she is appointed by the President on the recommendation of the public Service Commission, and with the approval of Parliament.

The person appointed must be qualified to be a judge of the High Court. In *Uganda v Uwera Nsenga*, Gaswaga J observed; Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or should be.¹⁰³ Although the police may advise on the possible charges while forwarding the police not binding on the DPP See Art. 120 (6)¹⁰⁴ of the police generally ends at the point the file is forwarded to the DPP".¹⁰⁵

¹⁰⁰ Article 129 constitution of the Republic of Uganda

¹⁰¹ The constitution of the Republic of Burundi

¹⁰² 1995 constitution of Uganda

¹⁰³ The Uganda Criminal Justice Bench Book 1st Edition 2017

¹⁰⁴ 1995 constitution of Uganda

¹⁰⁵ Criminal session No.312 of 2013

Constitution gives the DPP power to control all criminal prosecutions. The Director of public Prosecutions is the constitutional Authority for all prosecutions in the Country; he's not under the direction or control of any person or authority.¹⁰⁶

¹⁰⁶ Obey Christopher and 14 others vs Uganda HCMiscApp.No.3of 2016

CHAPTER THREE

PROCEDURES FOR INVESTIGATING HOMICIDES: A COMPARATIVE ANALYSIS

3.0 Introduction

Murder is a great desolation for survivors of the victim and society in general and must be taken very seriously by the police.

The discovery of the body of the victim, which is generally reported by someone; is the outbreak of the investigation. Very often the person who has discovered the body of the victim is invited to stay and a law enforcement team arrives at the scene with a medical team.¹⁰⁷ But the conduct of the criminal investigation into a murder differs from country to another.

3.1 Burundi

In Burundi, there is no specific inquiry into the murder case, the investigation is carried out as for all the other offenses.

3.1.1 Investigation by the Judicial Police

The judicial inquiry is the first phase of a criminal case. It's carried out by the judicial police, under the supervision of the public prosecutor. The investigation is of decisive importance for the continuation of the 3-point procedure of view:

- a. This is the starting point for judicial proceedings in the vast majority of criminal cases,
- b. During the investigation a large number of persons suspected of having committed an offense are deprived of their liberty and placed in custody by the OPJ (judicial police officer),

¹⁰⁷ <http://www.wisegeek.com>, accessed on 24th, October, 2017

c. The collection of evidence at the time of the investigation has a decisive impact on the manifestation of the truth.¹⁰⁸

3.1.2 Objectives, Principles

The investigation consists in investigating the offenses committed by the judicial police on the territory, and to gather all the evidence necessary for the manifestation of the truth with a view to the future treatment of the case by the judicial institutions. In the course of the investigation, the OPJ "find out what offenses they have to investigate; they receive the denunciations, complaints and reports relating to these offenses¹⁰⁹.

3.1.2.1 The role of the OPJ in preliminary investigations

The preliminary investigation is an investigation carried out by the judicial police following the finding of an offense.

The OPJ has the following prerogatives:

- I. It receives denunciations, complaints and reports relating to offenses¹¹⁰;
- II. It shall record the VPs on the nature and circumstances of the offenses,
- III. It collects the evidence and indices for and against¹¹¹;
- IV. He shall hear witnesses and authors¹¹²;
- V. He makes seizures¹¹³;
- VI. He shall summon any person useful to the investigation. The notice must be in writing and specify the reason, the name, the place and the time of the convocation¹¹⁴;

¹⁰⁸ [Http://www.Burundi-agnews.org](http://www.Burundi-agnews.org), accessed on 2nd, October, 2017

¹⁰⁹ Article 3 of Burundian Code of Criminal of Procedure

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

VII. He may place a suspected person in custody¹¹⁵;

VIII. He shall immediately bring the alleged perpetrator before the judicial officer if the offense is punishable by more than one year's imprisonment or if there are fear of absconding.¹¹⁶

3.1.2.2 Obligations of the OPJ

The OPJ is subject to the following obligations:

I. Draw up a Minutes for Findings, Hearings and Interrogations in the in Article 4 of the CPP (Code of Criminal of Procedure) and for seizures¹¹⁷;

II. Immediately transmit to the public prosecutor the invitation to pay a transactional fine¹¹⁸;

III. Have a warrant for any search¹¹⁹,

IV. Investigate the cases referred to it by the Public Prosecutor¹²⁰ and the Attorney General¹²¹;

V. Inform the public prosecutor of the discovery of a dead person, if possible before going to the crime scene.¹²²

¹¹⁴ Art. 6 of Burundian Code of Criminal of Procedure

¹¹⁵ Art. 58 of Burundian Code of Criminal of Procedure

¹¹⁶ Art.8 of the CCP

¹¹⁷ Art. 6 of the CCP

¹¹⁸ Art. 11 of the CCP

¹¹⁹ Art. 20 of the CCP

¹²⁰ Art. 38 of the CCP

¹²¹ Art. 35 of the CCP

¹²² Art. 46 Of the CCP

3.1.2.3 The Prosecutor

The investigation is conducted under the direction of the public prosecutor. The Public Prosecutor "shall direct and control the activities of the judicial police, public officials having the status of officer or judicial police officer.

This direction is expressed mainly through 4 provisions:

- a. The Public Prosecutor may order an OPJ to investigate a case; The Public Prosecutor divests the OPJ by his arrival at the scene;
- b. The Prosecutor of the Republic shall immediately receive the Verbal Proceedings drawn up by the OPJs;
- c. The Public Prosecutor receives the files constituted by the OPJs on all investigations carried out (combination of Articles 5 and 41 of the CPP).¹²³

However, in practice, the following malfunctions can be noted:

- a. Existence of numerous offenses which are not brought to the attention of the OPJ and are not the subject of any proceedings;
- b. The sometimes-important role that the neighborhood and the local administration have to play in the detection of infringements and the gathering of evidence;
- c. The emphasis placed by the OPJ on testimonial evidence to the detriment of material evidence;
- d. The lack of immediate and systematic transmission of investigations to the PM, in particular for "inconclusive" investigations and those which have been the subject of a proposal for a transactional fine.¹²⁴

¹²³ Combination of art. 5 and 41 of the CPP

¹²⁴ J. Moriceau, *Study on the Function of the Criminal Chain in Burundi*, 2011, p. 40-41

3.1.3 Issues of the Quality of the Criminal Investigation

3.1.3.1 Impact on further processing:

In the opinion of many actors, if the preliminary investigation is poor or insufficient, the rest of the procedure is compromised. The manifestation of truth often leads to the presence of evidence whose collection requires rapid intervention, which can only be done during the police investigation.¹²⁵

The Judicial Police: Showcase of Judicial Institutions

The judicial police is the only criminal institution present at the municipal level. It is the first institution to intervene, the closest and sometimes the only institution institutional interlocutor of the population.¹²⁶

3.1.4 Searching for evidence

After finding the offense, the main job of the OPJ is to seek the evidence necessary to manifest the truth.

There are mainly two types of evidence: testimonial evidence (confession, testimonies) and the physical evidence (photos, fingerprints, weapon seized, etcetera).¹²⁷ The latter, however, is not used in Burundi; the investigations rely only on testimonial evidence which does not advance the investigations, and it also affects justice as many cases continue to accumulate.

3.1.4.1 The role of victims in the search for evidence

Sometimes the OPJ delegates to the "victims" the search for the evidence and the prosecution of the alleged perpetrator: *"In my case, I did not see the usefulness of the*

¹²⁵ Ibid., p. 42

¹²⁶ Ibid., p. 56

¹²⁷ Ibid., p. 33-35

*Police because I was given the arrest warrants of these people so that I bring them myself".*¹²⁸

3.1.4.2 The priority given to reported words

The importance of testimonial evidence is not to be questioned, and the physical evidence is sometimes specific to certain types of offenses.

However, the gap between the different types of evidence is important: in many investigations, the search for evidence is limited to recording a complaint, questioning and testimony.¹²⁹

3.1.4.3 The volatility of testimony and the risk of impartiality

Limiting the evidence to testimony places a heavy burden on witnesses. If their evidence is the only evidence against the accused, the conviction or acquittal depends on what they are going to say to the various authorities and at the hearing. As a result, the risk of bias against witnesses is high and they may be tempted to exert pressure, intimidation or blackmail on the persons prosecuted. A sense of accountability may arise between the witness and the victim or accused.¹³⁰

3.1.5 Investigation after transmission of the file to the Public Prosecutor's Office

In police practice, it is usual that once the file has been transmitted to the public prosecutor's office, the PJ is led to find or identify evidence that could encourage the manifestation of the truth: New testimony, seizure, etc. In this event, the officer must

¹²⁸ Ibid., p. 26

¹²⁹ Ibid., p. 26-28

¹³⁰ Ibid., p. 30

forward these additional investigations to the public prosecutor, who will decide to add them to the file.¹³¹

3.1.6 Instruction

The instruction is the phase that follows the judicial inquiry. It is led by the Ministry of public. In this phase it is decided whether the case will be judged or after. It is governed by Articles 22 to 101 of the Code of Criminal Procedure.

3.2 Uganda

When a criminal offence has been reported, the competent authority commences the criminal process by investigating the circumstances. In this phase, relevant evidence is collected and preserved for a possible trial. It should be noted that suspect equally has the right to collect evidence in his/her favor.

The investigating of an offence should generally consist of:

- a. proceeding to the spot/ scene of crime
- b. ascertaining of the facts and circumstances of the case
- c. discovery and arrest of the suspected offender
- d. collection of evidence relating to the commission of the offence
- e. formation of the opinion as to whether on the materials collected there is a case to place the accused before court for trial.¹³²

3.2.1 Scene of crime

A scene of crime is any place where an offence is committed whether wholly or partially. Whenever a serious crime, like murder, is committed police officers must

¹³¹ Ibid., p. 31-32

¹³² M. SSEKAANA, *Criminal procedure and practice in Uganda*, Law Africa, 2010 p. 114

ensure that the first police officer at the scene crime will cordon it pending the arrival of the most senior investigating officers. A scene of crime ceases to be a scene once the investigating officer is satisfied that all the evidence required to be collected from the scene has been taken into safe custody. A scene can extend to a wide area depending on the possibility of presence of evidential exhibits.¹³³

3.2.2 Duty of an investigating officer at scene

Whenever a senior investigating officer arrives at the scene of crime, he/she will automatically take over management of the scene by the following:

- a. determines whether the cordon is sufficient,
- b. extends or narrow down the cordon after determining the direction of entry exit from the scene by the subject,
- c. determines the witnesses to make statements,
- d. searches the scene carefully in order to establish any pieces of evidence that may be used as clues such as weapons, personal property, documents and any other material of evidence value,
- e. draws up a sketch plan of the scene,
- f. where necessary call for other technical support/personnel such as the photographers, finger print experts,
- g. where there is death involved then the investigating officer must deliver the body to the pathologist for an autopsy and produce report on PF 48.¹³⁴

¹³³ Ibid.

¹³⁴ Ibid.

3.2.3 Technical Evidence

Crimes today are being committed with increased sophistication requiring scientific methods of crime investigation. Modern investigations do rely on technical evidence to prove technical aspect of crime. Experts will normally be summoned to guide court on such technical aspects of the crimes committed.¹³⁵ These experts include pathologists, ballistic experts, government analysts, fingerprint experts, bomb experts, photographers, DNA experts.¹³⁶

3.3 United Kingdom

On receipt of a complaint as to an attempted murder or actual murder having occurred, the officer in charge of the Criminal Investigation Department at the nearest police station, immediately gives instructions to the available investigating officers and a Scene of Crime officer to immediately go to the crime scene, conduct it and make necessary investigation and arrests where necessary.¹³⁷

The two categories of officers that are meant to appear at the scene of crime; the Scene of Crime Officer or officers and the Investigating Officer.¹³⁸

The Scene of crime officer (SOCO) is mandated to seal or cordon off the crime scene, mark items found at the crime scene such as bullet shells, any dead bodies, skid marks or any vehicle or motorbike, any murder weapons, and draw a sketch map of the crime scene, take photographs of the crime scene. The same officer obtains and seals off any form of exhibits or materials to be used investigating and prosecuting crime, lastly the SOCO prepare a detailed report concerning the examined crime scene. The Investigating officer works (IO) works hand in hand with the (SOCO) in the carrying a full-blown investigation that is to collect and store any exhibits, attain information

¹³⁵ Evidence Act of Uganda, art. 43

¹³⁶ Ibid., p. 115

¹³⁷ <http://barefootlaw.org/how-police-gather-evidence-for-prosecution>, accessed on 24th, October, 2017

¹³⁸ The Uganda Criminal Justice Bench Book 1st Edition 2017

from any available witnesses by recording witness statement, making arrests of any identified suspects, ensures medical examinations and post mortem examinations are carried out by certified doctors and reports made. The investigating officer compiles a police file that contains documents including witness statements, exhibits lists, a scene of crimes report and sketch as drawn, photographs, postmortem reports, forensic reports and charge sheet where any suspects are arrested and charged.

The police file is forwarded to a resident state attorney to make and guide prosecution of crimes for example by approving any charges as preferred against any suspects arrested and consequently have the suspects taken to court for prosecution of offences.

3.3.1 Inquests

An inquest is a judicial investigation held to determine the cause of a person's death. An inquest is carried out when there is reasonable cause to suspect that a person died to violent or unnatural death caused or accelerated by the violence or any culpable or negligent conduct of any person other than the deceased. It's usually carried out when deaths are sudden or unexplained.¹³⁹ It may or may not require an autopsy carried out by a Coroner /Magistrates or a medical examiner. In every court where a chief magistrate, hearing inquests, there shall be kept an inquest book in which shall be recorded the result of every inquest heard by the coroner, together with the record of any other matter prescribed by the inquests Act.¹⁴⁰ The record of the proceedings of an inquest held including every finding, the depositions, and recognizance of the witnesses, if any, shall be transmitted by the coroner without delay to the chief registrar of the High Court, and the chief registrar of the book shall be retained at the station of the coroner.¹⁴¹

An inquest is a fact-finding procedure. *In Jordan V United Kingdom*, court noted that;

¹³⁹ The Uganda Criminal Justice Bench Book 1st Edition 2017

¹⁴⁰ Rule 2 the inquests (inquests Books) Rules, Statutory Instrument 11-1

¹⁴¹ Rule 2 the inquests (inquests Books) Rules,

"The procedure is a fact-finding exercise and not a method of apportioning guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and no, to extend his inquiry into the broader circumstances".¹⁴²

In *Keenah v United Kingdom*, court noted that given the fundamental importance of the right to life, the law required that a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life be carried out by an inquest.¹⁴³

In Jordan v United Kingdom court observed;

"The obligation to protect the right to life.... Read in conjunction with the State's general duty... to secure to everyone within its, jurisdiction the rights and freedoms defined in the Convention, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.¹⁴⁴The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility.¹⁴⁵ What form of investigation will achieve those purposes may vary in different circumstances? However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention.

They cannot leave it to the initiative of the next-of-kin either to dodge a formal complaint or to take responsibility for the conduct of any investigative procedures. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of that responsibility. The authorities must have taken the reasonable steps available to them to secure the

¹⁴² [2001]37EHRR 52

¹⁴³[2011] ECHR2266

¹⁴⁴ Paragraph 122 Keenan VS United Kingdom [2011] ECHR 2266

¹⁴⁵ [2001]37EHRR52

evidence concerning the incident, including inter alia eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.¹⁴⁶

3.3.2 Jurisdiction

Normally inquests are carried out by coroners.¹⁴⁷ All magistrates in Uganda are by virtue of their appointment Coroners and as such have powers to carry out inquests.¹⁴⁸

Inquests in specified areas may be carried out by any person appointed on notice in the Gazette by the Minister of Justice.¹⁴⁹

Inquests are carried out at the place where the dead body is lying notwithstanding that the death arose elsewhere. It is the Coroner in whose jurisdiction the body is lying has power to hold the inquest. Where the body is recovered from a river or any water, the inquest is carried out by the Coroner within whose jurisdiction the body was brought to land. Where the body has been destroyed by fire or is otherwise irrecoverable, the inquest is done by the Coroner where the death occurred.¹⁵⁰

The circumstances under which an inquest may be held are stated in S.4 of the Inquest Act Cap 11. They include the following:

- i) Where the Coroner is credibly informed that a person has died within his or her jurisdiction and that there is reasonable cause to suspect that such a

¹⁴⁶ Paragraph 105-107 Jordan Vs United Kingdom (2001)3737 EHRR52

¹⁴⁷ Any person under the inquests Act empowered to hold an inquest section 1

¹⁴⁸ S.2 Inquests Act cap 11

¹⁴⁹ S.2 Inquests Act cap 11

¹⁵⁰ S.7 Inquests Act

- person had died in prison or in police custody or which confined in a lockup in a mental home,
- ii) If the deceased died as result of a road traffic accident
 - iii) If the deceased died as a result of an accident in the factory or a mine.
 - iv) In Any case in respect of which he/she is directed to the High Court to hold an inquest;
 - v) In any other class of case in respect of which the Minister by statutory instrument has declared the inquest shall always be held.

It should however be noted that where the Coroner is made aware that criminal proceedings have made or are about be instituted against any person in respect of any death, he or she is prohibited from holding the inquest until the proceedings are concluded. The Corner will thereafter an inquest only if he or she thinks that the public will benefit from doing so. If he or she is of the contrary opinion, he or she will record such opinion, h or she will record such opinion in the inquest book.

3.3.2.1 Powers of the Coroner / Magistrate

A Coroner, under the Inquest Act, has powers inter alia;

- i) To order exhumation of the body of the deceased, where necessary¹⁵¹.
- ii) To prohibit the burial or cremation of any body lying within his or her jurisdiction until an inquest held.¹⁵²
- iii) To order a post mortem examination to be conducted by a government medical, officer, or if one is not available, by a medical practitioner within his other jurisdiction.¹⁵³

¹⁵¹ The Uganda Criminal Justice Bench Book 1st Edition 2017

¹⁵² S.5 Inquests Act

¹⁵³ S.8 Inquests Act

- iv) To summon witnesses and compel their attendance by warrant of arrest.¹⁵⁴

It is important to note that an inquest is more than just a post-mortem exercise.

During the inquest, the Coroner is required to record on oath all evidence available as the identity of the deceased, the time, place and manner of death.¹⁵⁵

A coroner is not bound by the law of evidence since an inquest is not a prosecution. The provisions of the Evidence Act, however, which relate to state and professional privilege may apply.¹⁵⁶ The Coroner takes evidence only from witnesses and suspects are not allowed to defend themselves. The evidence may be given by deposition, or by affidavit duly sworn by a witness and attested.¹⁵⁷ The law requires that a coroner records his/her findings after conclusion of the investigation.

What findings should indicate

- The name and sex of the deceased;
- The residence and occupation of the deceased;
- The place where and when the deceased was found and in what circumstances;
- The date of the deceased's death and
- The cause of death.¹⁵⁸

The cause of death may be a natural, accidental, misadventure, manslaughter, suicide, murder. The findings of the Inquest are entered in the inquest book which every Magistrates Court Must have.¹⁵⁹

¹⁵⁴ S.11 Inquests Act

¹⁵⁵ S.13 Inquests Act

¹⁵⁶ Benjamin Odoki, *A guide to criminal procedure in Uganda*, 3rd ed., law Development Centre, 2006, p.

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¹⁵⁷ S.17 Inquests Act

¹⁵⁸ S.23 Inquests Act

¹⁵⁹ S.23 Inquests Act

If the finding is that an offence has been committed, in connection with the death have been instituted, he or she must stay the inquest until the criminal proceedings are concluded.¹⁶⁰

Where the person suspected to have committed the offence is unknown, the Coroner/Magistrate sends the report to the Inspector General of Police and later to the Director of Public Prosecutions. The findings of the Coroner with the record of evidence are forwarded to the Registrar of the High court.

On application by the DPP to the High Court, the High Court may in the interest of justice order an inquest to be held concerning death of any person, direct any inquest to be reopened for the taking of further evidence and the recording of a fresh verdict upon the proceedings as whole, quash any Coroner's verdict substituting thereof some other verdict which appears to be lawful and in accordance with the evidence recorded and quash any inquest with or without a new inquest being held.¹⁶¹

3.4. France

When a crime is discovered, security forces must be notified by calling "17". In the countryside, or in a city of less than 20,000 inhabitants, the call arrives at the gendarmerie. In a more important city, it is at the police station of the national police. But under no circumstances to the municipal police. An investigator moves as quickly as possible to the scene, but the latter often arrives after the firemen. Indeed, if there is a chance to save the victim, it must be seized.¹⁶²

¹⁶⁰ S.12 Inquests Act

¹⁶¹ S.27 Inquests Act

¹⁶² J., P. Brodeur, G., Ouellet, *The criminal investigation*, An article in the journal *Criminology*, Volume 38, Numéro 2, Automne, 2005, p. 39–64

3.4.1 The technicians

The investigators alert the technicians of the scientific police. They are called ICTs (Criminal Identification Technicians) in the gendarmerie and GSI (Gestionnaire descène d'infractions) in the National Police. In any case, their mission is to collect the traces, fingerprints, and objects left by the delinquents. TIC and GSI are not only involved in the homicides, but also in suicides, bank robberies, burglaries, and so on.¹⁶³

3.4.2 The police scientists

Everything collected on site is sealed, in hermetically sealed containers, and shipped to the laboratory at the Criminal Investigation Institute of the National Gendarmerie (IRCGN), in Rosny-sous-Bois if it is the gendarmerie that conducts the investigation, or in one of the six laboratories of the technical and scientific police if it is the national police. In the institute and in the lab, highly specialized technicians and engineers analyze the contents of the seals.

3.4.3 The Prosecutor

As soon as the crime is reported, the investigators warn the public prosecutor. Sometimes the prosecutor himself moves to the scene of the crime or delegates an assistant (the prosecutor assistant). The prosecutor will receive all the reports written by the laboratories or the investigators; He will be the key man at the beginning of the investigation.¹⁶⁴

3.4.4 The investigating judge

If the investigation needs further investigation, the prosecutor appoints an investigating judge. This magistrate with extensive powers brings together all the elements

¹⁶³ Ibid.

¹⁶⁴ Ibid.

necessary to establish the truth. He is instructed, as one says, "to charge and discharge," that is, to prove the innocence and guilt of a suspect. It may seek the assistance of experts, including experts from the police of the forensic police, as well as any other expert registered with the courts.¹⁶⁵

3.4.5 The Trial

When the investigating judge has finished, the trial can start (it can also decide that the suspect is not to be tried: it is the non-place). For a crime, the trial takes place in court of assizes before three professional judges and a popular jury composed of nine citizens drawn by lot. The experts of the forensic police may be called to testify at the trial.¹⁶⁶

3.5 Different challenges to find evidence in Homicide cases in Burundi

Inadequate enabling laws, the Penal Code Act of Burundi is not modern enough to meet the challenges of investigations in this era. The lack of skilled personnel to carry out the analysis of fingerprints as and when they are received in the forensic laboratory has been cited. Lack of awareness by the public, police personnel and judicial officials of the values attached to forensic evidence.

3.5.1 Conclusion

To the enormous challenges faced by the sector, Computerization of fingerprints, Compulsory taking of fingerprints for all citizens, Creation of a national data bank of fingerprints, Continuous training of personnel dealing in the analysis of fingerprint specimen, Consideration of collection methods from the scene. The verification, processing, classification, storage and finally presentation of fingerprint impressions evidence before court stand out as challenges common today.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

CHAPTER FOUR

ANALYSIS OF THE PRACTICABILITY AND APPLICABILITY OF THE FORENSIC EVIDENCE IN MURDEROUS INVESTIGATIONS

4.0 Introduction

From different books, articles, web sites, the researcher came up with the following presentations. On the sources of forensic Evidence and applicability, the researcher found out that forensic pathologists, lawyers (Advocates) and already written material are a good source of data in this field. The primary source being the forensic Pathologists themselves, where objects or articles employed in the commission of crime are or expected to be always found in their Laboratory offices.

Another source of data in relation to finger print impressions was not further than their fingerprint data base and Records within the police department of Forensics.

Forensic evidence plays a decisive role in only a small proportion of cases that come before the criminal courts. Such evidence does nevertheless have a significant position in policing and the response to crime and, in a few serious cases, can be very important indeed. The evidence producing convictions is usually of a 'common sense' kind that is of a kind that self-evidently convicts in the eyes of lay people: 'There are very few cases where the result might have been quite different if there had been no experts'¹⁶⁷.

a. In most cases the evidence, the witnesses, in fact speak for themselves." There is, however, a great deal of routine expert work, and both this routine and the unusual case which does turn on forensic evidence are an untapped source for studying the relations between scientific knowledge and social authority.

b. For those used to thinking in terms of the autonomy of scientific communities, forensic practice is striking for the degree which scientific activity is subservient to legal activity.

¹⁶⁷ Roger Smith, *Forensic pathology, scientific expertise, and the criminal law*, 2009, p. 21

4.1 The objective of Criminal law in forensic evidence

The Criminal law is a very highly structured and powerful social institution. At the end of the day, the criminal trial seeks to achieve a clearly delineated and authoritative verdict, that is, to decide whether the prosecution, in the particular case, has sustained the charge to the standard of proof, which the law requires.

Forensic science or medicine therefore exist as applied sciences to satisfy this end. Historically, they have developed as areas of expertise responding quite specifically to legal and administrative demands; demands which long pre-date the existence of any expert communities. Thus, forensic experts form distinctive occupational groups by virtue of combining scientific expertise with expertise in satisfying the requirements of legal or administrative settings.¹⁶⁸

This latter expertise presupposes an agreement that legal and not scientific ends finally structure the production and application of knowledge.¹⁶⁹ To be sure, many legal people and most forensic experts trust or at least hope that legal and scientific knowledge will emerge the same both in a specific case and in an overall advancement of the criminal administration. After all medicine, science, and law 'all depend for success upon the establishment of reliable bases of fact'. But, finally, it is the courts that decide what is and what is not knowledge. Somewhat similar circumstances exist in all areas where the law draws on scientific expertise. Yet the subservience of scientific experts to ends which they do not define, on a routine and well-institutionalized basis, is particularly characteristic of the forensic areas.

4.2 The forensic experts

There is no easy way to characterize forensic expertise. What constitutes expert opinion in the criminal setting is itself always open to decision in court, though for the most part this is defined clearly by precedent. There are potentially as many different kinds of

¹⁶⁸ Macmillan, *The sociology of the professions: lawyers, Doctors and others*, London, p.19-37

¹⁶⁹ R., Smith and B. Wyne, *Interpreting Science in the Law expert evidence*, 1989, p. 10-12

forensic experts as there are areas of specialist knowledge or skills or socially restricted forms of acquired experience. While the expert status of the pathologist, blood- group analyst, or ballistics specialist usually poses no problems, there may be debate about the 'expertise' of a person asked for an opinion about the risk of a particular stunt or about obscenity. Much the most significantly controversial area of expertise concerns decisions about states of mind and, hence, the standing of psychiatry. But this paper will not deal further with either forensic psychiatry or with the question of how the courts, or society more generally, construct the boundaries of expertise (for example, in relation to handwriting analysis).¹⁷⁰

4.3The functions of the forensic scientist

A forensic scientist must be skilled in applying the principles and techniques of the physical and natural sciences to the analysis of the many types of evidence that may be recovered during a criminal investigation. A forensic scientist may also provide expert court testimony. An expert witness is called on to evaluate evidence based on specialized training and experience. An expert will then express an opinion as to the significance of the findings. Also, forensic scientists participate in training law enforcement personnel in the proper recognition, collection, and preservation of physical evidence.¹⁷¹ Given the importance of forensic scientists, each country should have at least one or two to better contribute to the advancement of criminal justice, but unfortunately Burundi has none, which, as we often said in our study, contributes or prevents several cases of murder from being solved.

4.4Boundaries of forensic science

Forensic practitioners recognize clear divisions of expertise and corresponding occupational organization.¹⁷² They distinguish forensic science, itself divided between

¹⁷⁰ Ibid., p. 13

¹⁷¹ S. Richard, *Criminalistics, An Introduction to Forensic Science*, Eight Edition, Ph.D., 2004, p. 12

¹⁷² K. Simpson and B. Knight, *Forensic Medicine* 9th edition, London: Edward Arnold, 1985, p. 8

biology, chemistry, firearms, arson detection, and so forth, including what in the US is called criminalistics; forensic medicine and pathology, the first dealing with the living, the second the dead, both belonging to the (much larger domain of legal medicine; forensic psychiatry; and a cluster of special skills), of which the most important is document work (in regular use in fraud cases), which they usually describe as a scientific practice. The explanation for these divisions is in many cases a historical one and they do not simply reflect a natural division of knowledge. Thus, forensic biology, a sub-specialism of forensic science, includes the identification of artificial fibres as a natural development of its earlier analysis of organic materials, including wool and cotton.

4.4.1 The significance of the separation between forensic science and forensic medicine or pathology

The medical qualification for the latter involves distinct training and occupational identification, and it usually attracts substantial rewards in terms of money and especially status. It therefore gives forensic medicine a social identity separates from forensic science, whatever the actual occupation, knowledge or skills of the practitioners. Forensic scientists tend to acquire their skills 'on the job', in the forensic laboratory. Two other social-historical facts enhance this distinction: medicine was the first area of expert opinion to be widely used in the criminal courts, giving it a longstanding position of authority, which forensic science cannot lay claim to; and forensic doctors and scientists tend to differ in class back- ground and social status.

A further difference between forensic science and medicine lies with the pattern of employment: the great majority of English and Welsh forensic scientists are employed by the Home Office (forming the Forensic Science Service) in regional centres, with an administratively separate Metropolitan Police Laboratory in London, linked by career to the scientific civil service. This means that the work of the forensic scientists is mostly on behalf of the police and prosecution. By contrast, forensic doctors (separate from the police surgeons) have an institutional base in hospitals or universities and work for

clients for a fee, whether the clients be coroners, police, the Crown Prosecution Service, or defence solicitors.

4.5The authority of the Autopsy (Post-Mortem)

An autopsy (also known as a post-mortem examination or necropsy) is the examination of the body of a deceased person and is intended to determine the causes and circumstances of death when it is violent, suspicious or unexplained.¹⁷³

It is conducted to investigate the causes and circumstances of a suspicious death as part of an investigation. The goal is to seek the involvement of a third party in the process that led to the death. It is practiced in a forensic institute, at the request of the magistrate in charge of the investigation. It is a forensic doctor who takes care of it. Note that because the evolutions of the techniques - in genetics, in imagery, have largely made the installation of a diagnosis, the number of suspicious deaths decreases and thus the number of medical-scientific autopsy also.¹⁷⁴

4.5.1 Who performs Autopsy?

He is called a pathologist, the specially trained doctor who does autopsies. At the request of a coroner, the autopsy is performed by the pathologist, he is also responsible for the laboratory. The coroner goes to the scene of death and checks the evidence and the time of death, he is a government official who confirms and certifies the death of an individual in a jurisdiction.¹⁷⁵

A pathologist is a medically qualified government officer whose duty is to investigate deaths and injuries that occur in unusual or suspicious circumstances. He may be the

¹⁷³ [Http://www.police-scientifique.com](http://www.police-scientifique.com) accessed on 20th, October, 2017

¹⁷⁴ Ibid.

¹⁷⁵ H. Benham, *A practical guide to clinical forensic evidence*, London, 1978, p. 16-18

coroner or a doctor.¹⁷⁶ He is a doctor who examines the bodies of people who have died suspiciously or violently to determine how and why they died. Although the specific requirements for training and authorization for a person in this position vary by jurisdiction, many places require pathologist to have experience in pathology, an understanding of the law.

An autopsy in Burundi is impossible because there is no forensic pathologist and there are no laboratories equipped for an autopsy.

The small number of forensic pathologists and the few forensic laboratories that are mostly located within Kampala do not provide a conducive environment for an effective application of forensic science in the conducting of criminal investigation in Uganda.

4.6 Period and nature of a pathology test

A straightforward PM (post mortem) performed by an experienced pathologist may take as little as thirteen minutes, and this pathologist may perform two thousand in one year. Such practice is a source of some controversy among pathologists themselves; most would probably think that forty-five minutes was a reasonable norm. Much of the work may be done by mortuary assistants.¹⁷⁷ An autopsy on a body when a serious crime is suspected may obviously take much longer, perhaps several hours, especially as a variety of police personnel (particularly photographers) may also be present. But even in important cases, there is very evident routinization in the autopsy.¹⁷⁸ The aim of the forensic pathologist is initially entirely descriptive, to provide a natural history of appearance, beginning externally (and this is often most important) and only then proceeding through a systematic examination and removal of clothes, skin and hair

¹⁷⁶ The Academy (Journal), Medicine, science and the law: official journal of the British academy of forensic science, 1961

¹⁷⁷ M. Clark, *Ministering to the departed: post mortem technicians and the development of mortuary work as a skilled occupation*, article, 1900-1980, p. 4

¹⁷⁸ B. Knight, *The post- mortem technician's Handbook*, 1984, p. 10-11

samples, organs, and body fluids. The pathologist dictates to a tape recorder or assistant so that he/she dissects and describes simultaneously. Routinization is encouraged by the work overload, by the fee system through which coroners retain pathologists, and by the possible development of a legal case.

This last point requires amplification. If the pathologist's report is to become legal evidence, then that report must provide a comprehensive description of the relevant facts. 'Comprehensiveness', literally speaking, is in principle impossible; hence the need to conform to a routine which legal convention will accept as 'comprehensive'. Related to this, especially where a crime may prove to be involved, is a concern that other evidence about the death may suggest new questions to put to the body, questions which, ideally, should be answerable by the original comprehensive description. Further, the law imposes a strict requirement of demonstrable continuity in material evidence: there must be proof that evidence before a court actually is evidence from the body in question; this, again, can be ensured by routine (labelling specimens, signing for items). Thus, efficiency is a basic professional value in the management of the PM.

4.6.1 Form of a pathology report

A pathologist writes his report in an extremely empiricist language; his descriptive skill; involving both observation and communication; is his basic service. This suggests three questions, and the answers to them appear to be central to the authority which the pathologist possesses in legal settings. First, how does the pathologist know what to describe; second, in describing, how does the pathologist distinguish what he labels as fact from what he labels as interpretation of fact; and third, how does the pathologist communicate, putting his expert knowledge and experience into terms which lay people, themselves varying considerably in background and experience, from judges to assessors, will find persuasive? These are not 'problems' as such for the pathologist, himself; they are what he does in this kind of professional occupation. Here as elsewhere, what appear problems to an outsider are merely practice to the specialist?

What may appear rather open-ended interpretative questions to an outside observer, exist for forensic specialists as well-defined technical questions.

As I have suggested, the answer to the first question what to describe? is given as the intrinsic part of a routine. The answer lies in employing observation and experience to report the facts of state of clothing, attaching substances, external wounds and bruises, general condition of the body, symptoms of disease, damage, and so forth. Pathologists often refer to their activity as an 'art', even suggesting (such suggestions carry all sorts of covert messages, especially to colleagues in other areas of medicine) that 'pathology hasn't changed since Morgagni's time' (about 1760).¹⁷⁹ The claim to be an 'art' includes a self-justification for this aspect of pathology not consisting of a series of scientific tests, though tests will be done after the PM and included in the report.

The conduct of the basic PM contrasts with an ideal of objective scientific diagnosis; it is an activity where description is a function of experience and training, not measurement by instruments. The 'art' or 'science' tag is a general resource in medicine for expressing the relations between the personal skills of the diagnostician and the increasingly dominant scientific tests in validating clinical or pathological judgment.¹⁸⁰ This 'art'/'science' relation also reflects a division between social groups since, as with clinical diagnosis, it is not usually the physician working with the body who actually conducts the tests, though the pathologists report will include both his own observations and the results of tests done for him.' In addition, the reference to 'art' may reflect the fact that pathologists are also all too well aware that, in almost every legal context, 'lawyers would very much like doctors to be more factually precise than they are.'¹⁸¹

At least some forensic pathologists are proud of the 'art' status of their practice, and it is very important to their sense of group self-identity. But they also see that this 'art'

¹⁷⁹ [Hpp://www. Criminaljusticeprograms.com](http://www.Criminaljusticeprograms.com) (accessed on 12th, august, 2017), Forensic pathologist, interview

¹⁸⁰ J. Sadler, *Ideologies of Art and science in medicine*, Article, 1978

¹⁸¹ Ibid.

status is at the root of certain problems. In particular, there are topics on which they are regularly required to report in factual terms, yet about which they cannot be precise. The clearest example is perhaps time of death. This 'simple' piece of information is frequently important to the police and to the court's deliberations, and the police and the courts regularly wish that pathologists could be more precise. The pathologist will state a time of death only within a bracket of possibility. The technical problem is that the key information, the rate of body cooling, is affected by extraneous factors (such as the weather) which themselves may have varied in unknown ways. This situation fosters a great deal of research to develop instrumentation, latterly computer aided, for compiling a more precise reading, based on a range of internal bodily measurements, and the technical situation is constantly under review. Meanwhile, pathologists are very explicit about stating time of death, often in terms of quite broad margins.

This circumspection became particularly apparent following the Confait case, first coming to trial in 1972. Maxwell Confait was murdered in a house, which was subsequently set on fire, and police questioning obtained confessions leading to the trial and conviction of three youths. The case raised four major concerns:

the possible confession of another suspect, the discrepancy between alibi evidence and the likely time of death according to pathological evidence, the boys' mental handicap, and the possibility of errors in the police interrogation leading to false confessions. In 1975 the Court of Appeal quashed the convictions, on the grounds that the evidence on which the convictions had been obtained was unsafe. Subsequently, a 'private' legal Inquiry ordered by Parliament, which reheard all the issues, concluded that the right people had been charged. But later again, it became clear that the confessions were indeed false, raising serious questions about police methods, for a court appearance. Forensic pathologists and other forensic experts therefore normally describe the observed facts, again following a systematic routine, in the main body of the report, and then state opinion in a clearly differentiated section at the end. Further, if the report contains technical material (for example, statistical data from the analysis of

body fluids), the expert may separate this into an appendix so that it does not obscure statements of fact in lay terms. Learning to write these reports so that they provide legal people with what they want is a basic aspect of training; doctors have to learn how to write a report for non-medical purposes.

To the question, are there problems in distinguishing fact and opinion, most forensic pathologists and scientists (but, significantly, not psychiatrists) answer with an unqualified noun. They make the separation all the time. Facts are unproblematic: the number and distribution of bruises, the degree of occlusion of an artery, the blood group. The strong implication is that all competent observers would state the same facts; by definition, such observations are not open to negotiation and if there were to be disagreement it could be resolved only by deciding on the competence of the observations made. Pathologists report that experts do not disagree about facts; they are 'professional', and hence there is mutual trust and respect precisely because they have the competence to make factual reports with which their peers would concur. Their authority both as individuals and as a group depends on their ability to construct factual consensus. This ability is what the legal administration and the courts ideally want, so much so that legal people sometimes argue that the law would benefit by duplicating, so far as it was able, expert scientific fact-finding procedures. In practice, as we will see in the following section, many experts, and some legal people, contrast this factual achievement with the fact-distorting potential of the adversary process.

By contrast with statements of fact parties accept that there may be legitimate disagreement on statements of opinion?' After all, opinion by definition involves a judgment about what a fact or facts mean for a particular reconstruction of events. Most characteristically, the expert's opinion will concern the likelihood of a particular causal narrative corresponding to what did occur. For example, the pathologist will be expected to give an opinion on whether a particular knife could have caused a particular wound or whether the results of analyzing a vaginal swab are compatible with rape by a particular individual. Pathologists argue that if experts discuss their opinions with each other freely, that is, under conditions, which they themselves control, then they will

nearly always reach agreement. In other words, they believe that they possess the ability to distil opinion into fact, in the sense that all competent observers would read the same conclusion. They accept, however, that the results of such distillation may exist as statements of likelihood, which rationally permit different emphases. It follows, in their view that it is the legal setting, which imposes a sharp separation between fact and opinion and the opening up of shared likelihood statements into unshared statements of opinion.

This belief among forensic pathologists, that there is potential consensus of opinion even if doubts are visible in court, enhances their group self-confidence and hence ability to project a sense of authority. They treat 'opinion' as an area where factors beyond their control may generate legitimate disagreement. By contrast, factual disagreement is illegitimate. Nevertheless, this distinction between fact and opinion may sometimes break down. When this happens, however, there is tendency to ascribe this to circumstances where observation is peculiarly difficult and hence where even the most experienced practitioner may be wrong.

4.7 Common form of homicide

Very common circumstances illustrate the pathologists approach. Stabbing is the most common form of homicide and most of pathologists are familiar with knife wound. They regard the description of the external appearance in wounds as relatively straightforward, though even here the differential contraction of skin or subcutaneous tissue may pose problem in observing the shape of the wound. However, observing the direction and depth of a wound is more difficult in internal organs. When the attack occurred, the victim would have been in a particular posture, moving defensively or aggressively, and with the crumpling of the body and the subsequent movement the internal organs would have shifted position. The pathologist has therefore to reconstruct the original direction and depth of the wound. The direction and force of a wound might well be crucial to the police or in a court case, for example, in distinguishing who was the attacker in a brawl, and there is therefore pressure for firm factual

evidence. Depending on the case seems that the pathologist's statement about the direction stab wounds may appear either as fact or as opinion. In addition, the defence may well be able to find a pathologist at least willing to question a firm statement of fact on behalf of the prosecution. Yet pathologists do not use such events to query the fact! Opinion distinction; instead, they characterize describing the direction of internal wounds as a problem area for observation and therefore they both anticipate and accommodate disagreement.

4.7.1 A statement, which has a probabilistic content

Another type of statement which appears difficult to categorize according to a fact/opinion distinction is one which has a probabilistic content. This is an important matter since much expert knowledge exists in probabilistic form, which, superficially at least, contrasts with a legal ideal of black-and-white factual statements. There is the additional difficulty that juries often find it difficult to understand the reasoning by which experts arrive at firm statements of probability. We want here, though, to point only to the element of convention and choice in deciding whether to treat a particular probabilistic statement as fact or as opinion.¹⁸² Probabilistic statements are of many different kinds and they certainly may have a legally factual character, for example, the statement that one person in ten thousand has a particular combination of blood group characteristics and that there is therefore a certain probability that a particular individual may be the source of the blood trace in question.

Probability statements of this character, which the expert may be able to formulate in rigorous quantitative terms, merge in practice into looser statements of likelihood. With the latter form of statement, which is very common in expert evidence, the expert gives the court the benefit of opinion as to the likely truth of a statement, without that opinion being a conclusion from a probability calculation. The court and particularly the jury nevertheless may well confuse likelihood and probability, treating a firm conclusion of probability as expressing only a likelihood. This is because the court wants to know

¹⁸² *Trial by mathematics: precision and ritual in the legal process*, Harvard Law review 84:1329-93, 1971

definitely whether a particular event did or did not occur, and both probability and likelihood statements appear as insufficient answers to this question. If the factual question is whether this particular individual is the blood source, any statement which does not answer yes or no may in consequence be treated as only opinion. Experts can even complain that, having presented a probability argument, which to them is a conclusion, they are then asked to come to a conclusion. Alternatively, expert may be 'certain', while still admitting a theoretical possibility and the court may then treat this possibility as indicating uncertainty.

4.8 Communication of evidence by Expert witness

When asked what makes a good expert witness, most people involved with forensic evidence, whether as lawyers or scientists, mention first of all communication skills. Most would also agree, though not necessarily counsel in all cases, that the expert should indeed be an expert. But technical expertise in itself is certainly not sufficient for legal purposes which, whether in a written report or in oral testimony, require clarity and simplicity of expression, firmness with modesty, and an ability obviously most important with a jury to couch technical statements in lay terms. The 'good' expert witness is 'without any doubt, somebody who can communicate in simple terms. Forensic experts who appear regularly as witness take pride in these qualities; indeed, as a group they are partly self-selected and partly selected by lawyers for their possession of these qualities. A 'good' expert witness thus accepts that a lay rather than a scientific understanding controls the outcome of a coroner's or criminal verdict. Accepting this may involve experts in foregoing what they call 'the niceties' of a qualified scientific statement.

There are occasions though, when this desire to communicate effectively can lead to a change of meaning or at least a loss of control over the meaning of expert knowledge. Writing a report is one thing, but 'monitoring the product once it gets out in court is a

much harder matter'.¹⁸³ It is probably this loss of control, which, more than anything is, disturbs scientists who enter into the adversary process.

Communicating pathological evidence has other 'non-scientific' dimensions. The evidence can be deeply shocking to a jury in cases of assault, rape, or murder, and this emotive quality can have far more influence than any presentation of knowledge. It is interesting that judges now no longer permit juries to be shown colour photographs of injuries, though colour photography and video is a standard part of a pathologist's practice in a case possibly involving a serious crime. Forensic pathologists therefore resort to other ways of explaining the nature of injuries, for instance by recourse to diagrammatic figures marked in different colours. The courts have had to decide to accept that such aids to explanation constitute a proper form of evidence the point illustrates well the distinctive preoccupation of forensic expertise with communication and one further sense in which it is an 'art' as well as a 'science'.

4.9 The Authority of Expertise and the Adversarial System

Many people both inside and outside the scientific community assume that the practice of science is equivalent to being rational. It is assumed, that is, that if one wishes to know what the case is, then one must pursue a scientific procedure. On a naïve understanding of jurisprudence but an understanding in tune with deeply felt intuitions about justice, it is common to expect the courts to give priority to finding out what was the case in relation to a particular event. There is therefore an expectation that the legal system, as a fact-finding institution, should follow scientific procedures, but of course the criminal law badly this appoints such expectations.¹⁸⁴

¹⁸³ A. Subttil, *Legal medicine in Europe*, New Haven, CT, 1995, p. 14-15

¹⁸⁴ Ibid.

4.9.1 The understanding of the adversarial system by Doctors.

Many doctors and scientists regard the adversarial system with distaste. It appears to be a system which enables barristers to win cases rather than uncover the truth; a system which may even distort truth to do so. Those with a scientifically trained mind tend to see a set of contrasts between open, informal, convergent, and truth-seeking scientific communities, and closed, formal, divergent, and case-winning court practices. Without accepting the truth of this contrast, it is obvious that there are important differences between those settings in which the construction of agreed knowledge proceeds by explicit/formal rules and those where it proceeds by implicit/informal rules. What therefore sets forensic practitioners apart from other scientists or doctors is their understanding and acceptance of the formalized fact-finding rules of the courts and, by implication, the rules of the adversarial system. Some experts positively relish adversarial tactics; others, however, regard it as a difficult occupational duty to appear in court. 'I feel in a sense we are servants of the legal system and it's up to us if we're going to practice in that field to develop the necessary knowledge and expertise to perform our functions in that environment This makes forensic experts into very distinctive occupational groups since, unlike their 'purely' medical or scientific colleagues, they agree to surrender ultimate control over the way scientific evidence becomes built into constructions of factual reality.¹⁸⁵ A case can be made that other scientists do not have this control either, but this is another matter.

Scientific and medical forensic experts alike reiterate that they have a commitment to 'the truth'. 'I look upon it as the job of the forensic scientist to try and get the truth before the court.'¹⁸⁶ They keep this value strongly in mind when they enter the legal arena, distancing themselves from the outcome of cases. Experts tend to view this commitment as a personal quality. Thus, they believe, the expert's personal qualities enable a scientifically; trained individual; to operate with integrity in an adversarial

¹⁸⁵ Ibid. p. 20

¹⁸⁶ Ibid. p. 16-17

setting which does not share the same value of commitment to 'the truth'. On this view, personal qualities make it possible for experts to mediate between scientific and legal norms. Interestingly, forensic experts often use a 'games' language in this context, a language which has more than metaphorical meanings

The language of games provides a way of reconciling an adversarial strategy with individual integrity, or the institutionalized commitment to winning a case with the personal skills of describing scientific truth.

Experts find it a sensitive issue to be scientists working for one side of a case which may be fought by openly adversarial tactics. Besides the language of games, they have a range of strategies to cope with this: intellectual identification with a scientific discipline; group solidarity among experts which overrides being pitched in opposition by the courts; working at different times for the prosecution and the defence; conceiving of expert evidence as a service to the court — not a service to one side ('You try and isolate everybody else from your mind and you think of the question and its effect on the jury and you try and answer as honestly as you can to the jury, I mean primarily to the jury') and writing reports in a firm style that indicates to legal people the limitations of evidence and retains control over the possible meaning of expert knowledge. Experts express these strategies in individualist terms, that is, in terms of the personality, experience and competence of the expert in a particular case. Above all, they take professional pride in not allowing their evidence to be misrepresented or to be pushed beyond what they, as scientists, regard as reasonable; to be 'professional' is to achieve such a degree of control.

Many experts are open to the suggestion that working regularly for one side (as occurs with Home Office forensic scientists and pathologists) may foster 'prosecution mindedness' or 'defence mindedness': 'There is no doubt no matter how hard you try, if you are constantly appearing on the prosecuting side your mind is set to the prosecution tune, so to speak. From the sociological point of view this reflects the way the evaluative component of a person's action follows from that person's existence in a particular social structure, and the phenomenon is perfectly general. By contrast,

forensic experts formulate the phenomenon in individualist terms, as one of personal 'bias'. Correspondingly, they believe that developing individual professional qualities, rather than changing social disorganization, is the way to overcome the difficulty: what is needed is 'the determination to be absolutely impartial and to be seen to be impartial'. From the point of view of some barristers, experts may as a result become too experienced in giving evidence and are therefore in danger of pre-empting the effective working of the adversarial system. 'I detect in experts sometimes, if they're too familiar with giving evidence, that they know what questions they're going to be asked and they tailor their evidence; and they take great delight in avoiding giving the barrister of the other side the answer that he or she wants.' But it is probably only a small group of eminent and long-practising experts who are sometimes regarded in this way. For these experts, this ability to understand and anticipate the direction of cross-examination is part of what is admired as 'courtmanship'.¹⁸⁷

4.10 Relevant cases which have aroused major controversy in recent years

In order to move from the general to the specific effects of the adversarial system, we will discuss some relevant cases which have aroused major controversy in recent years. These cases have had significant repercussions. *The first is the Scottish trial of Mr. Preece (1972) and referred hearing of appeal (1981), which called into question the standards of a Home Office forensic scientist and, by implication, the quality of the Forensic Science Service and its in-built relationship with the police and prosecution. The second concerns IRA bombing cases, coming to trial in 1975 and 1976 and then to appeal in 1987 and 1988. The third is the trial of Dr Leonard Arthur (1981), which brought to a head concern about the relationship between legal tactics and scientific evidence. In all these cases there was a clash between prosecution and defence counsel's instrumental use of expert evidence in pursuing an adversarial strategy, and what scientists themselves understood to be a properly reasoned evaluation of that evidence.*

¹⁸⁷ Ibid.

4.10.1 The case of Mr. Preece

Mr. Preece was a long-distance lorry driver convicted for sexually assaulting a woman and then murdering her. Police identification of the suspect and the subsequent prosecution case depended on expert identification of fibres in the lorry's cab and on the compatibility of Preece's secretor group and fluids taken from the victim. An experienced Home Office scientist, Dr Alan Clift, obtained this forensic evidence (an assistant did the actual analysis) and gave evidence in court. The case was unusual in that the forensic material appeared to carry great weight in the decision to convict; nevertheless, neither the judge nor the defence counsel raised possible limitations to the evidence, which later the case was referred back to the High Court. On the allegations that Dr C. had withheld evidence he should have given about the victim's blood group, had failed to disclose that stains he had tested were not isolated seminal stains but mixed seminal and vaginal stains, and had reached unwarrantable conclusions thereon. The High Court, having heard afresh the evidence of Dr C. along with the evidence of six eminent forensic scientists on the limited serological aspects of the case, found it established. Dr C.'s evidence fell short of the standards of accuracy and objectivity required of an expert witness. [Accordingly] the appeal must be allowed and the conviction quashed.¹⁸⁸

The High Court made its decision in the light of its very strong criticism of Clift, and reports in the media followed this pattern. However, as will be seen, it is a gross oversimplification to reduce the event to one of individual error.

Sometime before the referred hearing, the Home Office suspended Clift and put into effect a large-scale reorganization of line management within the Forensic Science Service. It instituted new quality control procedures, including a form of blind testing that might expose inadequacies in many other scientific laboratories, and it began to reassess its policy in relation to the defence. The full story of these changes is not publicly available, though it has a long prelude within the Service. But the public

¹⁸⁸ Preece v H.M. Advocate (note and commentary) Criminal Law Review nv:783-5, p. 783

castigation of Clift turned an upheaval into a trauma, drawing media attention to possible weaknesses which the home Office believed it was already correcting. This exposure continued when, in 1984, the English Appeal Court heard eight cases in which Clift's expert evidence might have contributed to securing a conviction. Some of the convictions in these cases have, as a result, been judged unsound.¹⁸⁹ While it is very hard to assess what impact these decisions will have, forensic experts feel that there may be a new skepticism towards scientific evidence, that they can perhaps expect to be treated with less respect in court, and, more importantly, that the courts may devalue science as factual authority.¹⁹⁰ Became crucial, Preece maintained his innocence and after years in prison obtained a rehearing; on this occasion the appeal judges heard extensive expert evidence, the crucial part of which was that the victim's secretor group was actually the same as that of the accused:

In retrospect, the central failing of Preece's trial lay with certain statements that were not made. There was also an unresolved ambiguity as to whose responsibility it should have been to make these statements. The ambiguity on this particular occasion reflected the general lack of clarity about whether either legal officers or expert eyewitnesses have the duty to put all the evidence before the court. The answer is clearly not as far as the barristers are concerned, but the matter is not nearly so clear-cut for experts. The court is more likely to expect the expert than the barrister to describe 'the whole truth'. At the referred hearing of Preece, the judges held that the expert at the original trial had not made statements in evidence that he should have made. What they did not say was that neither defence counsel nor the judge at the original trial had raised questions about what the expert witness was not stating:

What is so strange is that at the Preece trial no one; not the Crown counsel who must have known from the original report the victim's blood group, nor the defence counsel advised by his expert forensic pathologist, nor the judge; asked a single question as to the victim's group. Had they done so the matter would have been instantly clarified. In

¹⁸⁹ The criminal Appeal Office, no's 970/R/84,1793-6/R/84

¹⁹⁰ C. Z. Nunn, G. W. Tressell, and al., *Public confidence in science*, article, vol. 186, 1974

the light of this it is difficult to see why the [Appeal] Court should have been so extremely critical of Dr. Clift's evidence and why they should have said that he 'deprived the defence and the Court of the means whereby his confident opinion could have been called in question.¹⁹¹

In his original English-style report, Clift had described the victim's blood group; but when this report was redrafted to suit Scottish procedure, this information was omitted, and, as stated, it was not given as part of the-evidence at the trial. The appeal hearing determined that Clift should have ensured that the court had this evidence because not to do so would be to allow his evidence to be more definite than was justified and, in this case, to alter the whole character of the proof.

The appeal judges also appeared to be stating that the expert witness has a duty 'not only to give his evidence to the best of his ability but also supply a critique of that evidence drawing attention to its weaknesses as well as its strengths'. It is not at all clear that all barristers would accept this. Further, in other circumstances, this might put such demands on expert witnesses that they would be unable to-make firm and clear-statements. Other forensic experts believe Clift made an error of judgment in not ensuring that the court had the full evidence. But the general point remains that barristers argue a case in court and do not necessarily ensure that every possible pertinent fact is assessed, and Clift merely deferred to this. There is therefore a very real problem, generated by the adversarial system, concerning responsibility for evidence as to the limitations and comprehensiveness of expert evidence. The system does not ensure a critical evaluation of scientific knowledge. 'The question and answer technique is very unsuited to a scientific debate because the formulation of each question to a great extent conditions of the answer. The question as put may be deliberately incomplete and very often is; it may be inadvertently incomplete.

Though the courts agree that the expert is responsible for the accuracy of evidence, the limitations of that accuracy may escape a court's attention.

¹⁹¹A. R. Brownlie, *Medicine science and the law*, journal article, 1963, p. 41

This case also shows that there may be an important difference between a factual discourse based on oral questions in court and one based on written reflection on the results from a laboratory. The court necessarily simplifies: it is indeed its ability to do this while retaining all the key elements of a case that makes it an efficient decision-making institution. But the court is ill equipped with rules to decide how it should simplify scientific information, especially when such information is heavily qualified by limitations of applicability. In many areas of everyday scientific activity, scientists view simplification as necessarily involving distortion. The forensic experts, however, are people who are willing and able to simplify; but clearly they must somehow monitor the process of simplification, and in transferring Laboratory results to a report and in translating a report into oral evidence they need to act as a quality controller of their own product. This involves the expert in negotiating with solicitors, barristers and law officers over what is relevant information and what is a legitimate simplification.¹⁹² More generally, the last twenty-five years have seen an increasing number of meetings in which lawyers and experts seek to acquaint each other with their practices and points of view.¹⁹³

4.10.2 IRA bombings

During 1987, forensic issues acquired great prominence owing to the emotional and political tensions surrounding the cases of those convicted for IRA bombings in England. As with the Preece case, the relevant expertise was scientific rather than medical; but the issues are too pertinent to leave aside. It also appears likely that all these cases will contribute to a new public suspicion of forensic authority and to legal skepticism of the reliability of scientists (whether medically qualified or not). These cases show just how fragile apparently straightforward scientific work can be in a skeptical environment, and just how impossible it is to separate the content of scientific knowledge from the process of social evaluation through which that content becomes authoritative.

¹⁹² <http://www.crimeandsciencradio.com>, accessed on 2nd, September, 2017

¹⁹³ British Academy of Forensics sciences

In January and August 1987 respectively, the Home Secretary referred to the Court of Appeal, first, the cases of the six men convicted in 1975 for bombing two Birmingham pubs in what has been called 'the biggest murder in British history', and second, the cases of seven people 'the Maguire seven' convicted in 1976 for handling explosives.¹⁹⁴ By early 1988, only the former appeal had been heard (in November and December 1987), and it was turned down.

In understanding the role of forensic evidence, one must remember both the brutality of the relevant bombings and the ferocity of the public response. In the Birmingham case, prosecution forensic evidence was secondary to the confessions of the accused. The defendants retracted their confessions at the original trial, and in the appeal, arguing that they were given under duress amounting to criminal assault by the police. In these emotional circumstances, the courts and the media have looked to 'unemotional' science to chart a neutral and objective path for justice. It is therefore very important that science has not proved adequate to the task. The immediate response has been to blame individual scientific incompetence. A less judge mental and individualistic attitude might focus instead on the circumstances in which a piece of science acquires authority, whether competently performed or not.

The six men convicted of the Birmingham bombings were arrested shortly after the offence, five of them while travelling by train to catch the Northern Ireland ferry. The police extracted confessions following positive results of a test for nitroglycerine on swabs taken from the hands of two of them. Dr Frank Skuse, a Home Office forensic scientist, performed the tests using Greiss's reagent; he was unable to confirm his results using the means such as gas chromatography. The defence failed to undermine his conclusions at the trial, particularly because its own expert, Dr Hugh Black, proved to be a poor performer in court and did not himself have experience with relevant equipment. At the appeal, there was further argument about what concentration of reaction agent Skuse had used a crucial matter since scientists disagreed over the

¹⁹⁴ C. Mullin, *Error of Judgement: The Truth about the Birmingham Bombings*, 1990, p. 100-105

specificity and sensitivity of the Greiss test to detect nitroglycerine as opposed, for example, to nitrocellulose. Opinion has swung against Skuse since 1974 on this technical matter and at the appeal, it became clear that the Greiss test is no longer used. Indeed, Skuse was retired on grounds of 'limited efficiency', in circumstances which have not been made clear, shortly after a 1985 Granada Television programme which raised considerable public doubt as to the reliability of his specific detection of nitroglycerine in this case. The appeal again raised public skepticism.

Granada's 'World in Action' programme pictured the Greiss test proving positive for swabs taken after handling playing cards, exactly what 'the Birmingham bombers' had been doing on the train before their arrest. Significantly, it was non-Home Office scientists who criticized the test on television: Dr Brian Caddy, Head of the only British university forensic science department at Strathclyde, and Mr. David Baldock, an ex-Home Office scientist who had set up his own laboratory for defence work. Whatever Home Office scientists said privately about the limitations of the test, it required a diversity of institutional settings to make criticism public. The Home Office agreed that the Greiss test was indicative not confirmatory for nitroglycerine when provoked by the making of the television programme. This admission contrasted with Skuse's 1975 view that he was 'ninety-nine per cent' certain that he had detected- nitroglycerine. The authority of this piece of scientific knowledge had thus differed profoundly in different settings. At the time of writing, the case of 'the Maguire seven' has not come to appeal, and we do not know how the 'new evidence' that is the grounds for appeal will appear. It must feature the forensic evidence which had quite exceptional importance in the original trial. The police arrested the Maguire family and others in their house on suspicion of handling explosives (or even more direct involvement) for the Guildford and Woolwich bombings in 1974. Explosives experts at the Royal Armament Research and Development Establishment at Woolwich Arsenal examined swabs and clothing and reported that a thin layer chromatography (TLC) test for nitroglycerine proved positive. This was crucial to the prosecution case, since the police found no other direct evidence linking the accused to explosives and the accused had had little opportunity to conceal

substances before their arrest. At the trial, defence counsel therefore concentrated on criticizing the TLC test: it could distinguish but not positively identify substances; there was disagreement whether the correct solution had been used; there was room for doubt about the interpretation of the test (example, whether spots left by the movement of a solvent up an absorbent plate could be said to be in the same place); and the original tests had destroyed the evidence so that no repeat or check was possible.

The defence called as an expert witness Dr John Yallop, a retired scientific officer from Woolwich, who invented the TLC test but no longer considered it satisfactory as a basis on which positively to identify nitroglycerine. The prosecution, however, called as an expert witness the scientific officer then in charge at Woolwich, Dr Douglas Higgs, who directly disagreed with Yallop. The debate became quite technical and it certainly got confusing. At the end of the day, it appears that the judge's summing-up, which minimized the area of scientific doubt, and the firm authority of Higgs, encouraged the jury to convict.¹⁹⁵ The way the prosecution and judge constructed authoritative statements out of contentious science must strike the sociologist of scientific knowledge as a spectacular example of the public 'closure' of factual truth. Subsequently, however, as with the Birmingham case, very considerable doubt has developed as to whether the process of constructing authority. Did justice either to the openness of scientific findings or to the accused.

What we can see in these cases is the manner in which the police, the prosecution and judges minimize alternative interpretations of scientific tests in the interest of constructing clear cut factual statements. Once such factual statements exist, they appear to have an authority independent of any social interest. In 1975 and 1976 the immediate pressure to achieve convictions following IRA activity was extreme. Those serving the police or the Courts were therefore likely to give factual knowledge, including the scientific kind, authoritative expression. In the longer term and beyond

¹⁹⁵ D. Nelkin, *The political Impact of technical expertise*, research article, 1975, p. 55

the court, when doubt and ambivalence became possible, this authority began to appear unwarranted. In dealing with this, it was easiest to formulate specific criticisms about the competence of particular scientists or about the unreliability of particular tests. A more sociological view finds little surprising in such 'incompetence' or 'unreliability', since scientific knowledge in general appears to be a fragile social achievement. More striking is the power of the court at the trial and of the Home Office subsequently, to sustain the authority of a highly simplified view of scientific opinion.

The minimization of doubt had its advantages for short term purposes; but, in the longer-term as the current appeals and the public castigation of forensic science now suggest the costs may be intolerable. There is some recognition of this among lawyers, especially defence lawyers, who have become concerned about the relationship between legal justice and expert evidence.¹⁹⁶

4.10.3 The adversarial system and expert disagreement

Moving on from the Preece and bombing cases, and the limitations of expert evidence, we should consider the adversarial system and expert disagreement. The adversarial system tends to polarize, rather than reconcile, expert differences. For example, when experts do disagree in a legal setting it is frequently because they come from different backgrounds and hence place varying degrees of reliance on different methodologies and types of evidence. Barristers may use such variation to open up conflict in court. Thus the adversarial system appears distinctly ill-suited to comparing and assessing the value of different kinds of evidence. By adopting an unsubtle 'either/or' view of factual reality, the courts become insensitive to different ways of conceiving of that reality.

Striking evidence that the Courts are ill-equipped to compare or evaluate expertise comes from the crude and direct way barristers/ Advocates parade qualifications and status as expertise. Baldly stated, the first and basic of credibility is, who is he?' Partly, this means 'What qualifications does he have?' but cruder still, it means quite literally

¹⁹⁶ A public defender by London

'Who is he?' There seems to be a general assumption that, faced by difficult or contradictory expert evidence, juries will simply accept the greater authority, assessing authority as presented in court rather than in terms which might satisfy scientific or medical communities. There is therefore some concern about how 'inexpert' or even 'rogue' defence experts (who can collect large fees) may affect decisions. More generally, it is an aspect of an individualistic social ideology to treat expertise as an individual attribute and then to assess the quality of this expertise by reference to the individual's social position. The courts here take to an extreme a general feature of our society.

Disagreement was a prominent feature of the trial of Dr Arthur. It was the direct and intended result of the subordination of scientific argument to a legal strategy. The irony is, however, that the medical profession tacitly supported this subordination in order to obtain the acquittal of a much-respected colleague 'a good chap' and to preserve the freedom of clinical judgement. A profession, many of whose members reject involvement with the law because of its adversarial structure, on this occasion swung its expertise and financial resources behind winning a case regardless of what it would normally regard as scientific truth.' The profession closed ranks behind Arthur's defence, preventing the prosecution from mounting a fully informed expert case.¹⁹⁷

The trial arose from the anti-abortion group 'LIFE' calling the police's attention to a claim, from a member of staff at the hospital where Arthur worked as a consultant paediatrician, that a baby with congenital defects (Down's syndrome) had died because of overdosing with an analgesic drug (dihydroCodeine) and subsequent contraction of bronchopneumonia. The defence was later to argue that the parents informed the doctor that they did not want the baby and that the doctor therefore initiated a regime in restricting suffering but not involving positive therapy. The doctor's decision was represented as a 'clinical judgment', grounded in technical and not ethical

¹⁹⁷ *The influence of litigation on medical practice*, London: Academic press, 1977

considerations, and it involved reference to various pathological disorders. The Colton case to support a charge of murder was that they chose a drug and had it administered in quantities which an intention to kill. Obviously, this was a trial of the doctor chose a drug and had it administered in quantities which showed an intention to kill. Obviously, this was a trial of the greatest significance to medical ethics, calling into question the transformation of ethical choice into technical judgment; giving public exposure to issues concerning the trust between doctor and parents; questioning the authority of the doctor in relation to his staff; and most controversially debating medical practice in general in relation to babies with congenital defects. The trial itself was not concerned with what are really policy issues, but these issues were certainly part of its professional and public significance.

The relevant area Home Office list pathologist, Professor Alan Usher, performed the initial autopsy on the baby. As was his practice in such cases, he consulted with an eminent pediatric colleague who, he understood, confirmed his conclusions as to cause of death. When the Director of Public Prosecutions decided to prosecute, however, the legal officers found every specialist pediatric facility in Britain closed to inquiries, and that no pediatrician was prepared to appear as a prosecution expert witness. It was therefore left to Usher, in his occupational capacity as the Home Office pathologist involved, to appear as the leading expert witness; The prosecution also called as an expert witness a specialist in analysing organic compounds in the blood. This specialist was not a doctor and worked for the Home Office forensic research laboratory at Aldermaston. Usher had not prescribed for children in twenty years, and his evidence was therefore based on the leading pharmacological texts rather than direct experience. The scientist had no experience with prescribing.

The defence strategy was to show that it could not be proved 'beyond all reasonable doubt' that the baby's death from bronchopneumonia resulted from the administration of the analgesic. Arthur's counsel deployed a range of tactics in what became a brilliantly successful defence, following a common strategy, since the defence does not have to prove a case but only show that the prosecution cannot construct a proof,

counsel did not attack scientific statements directly but questioned the authority of the prosecution experts to make those statements. He undermined the credibility of the prosecution witnesses as experts on child medicine and, in the case of the scientist, destroyed his credibility on any medical matters at all, sidestepping the scientist's very real expertise in measuring drug levels in the blood. Further, the prosecution could not produce any pediatric specialist to support its case, whereas the defence had the whole specialism at its side. Most damagingly, the defence called as its chief expert witnesses the world expert and colleague whom Usher had originally consulted about the autopsy, and this expert now stated that further investigations which the prosecution had 'failed' to carry out had led him to change his mind. Counsel sprang these new investigations and the revised specialist opinion on the court, making the prosecution experts appear unprepared and inexperienced. The judge ruled that the charge of murder could not be sustained, thus leaving the prosecution to argue the charge of attempted murder.

The defence scientific case is rather interesting. Assessing the causes of the baby's death depended on determining the relative debilitating significance of four elements: congenital defect, the analgesic, withdrawal of food, and pneumonia. The prosecution evidence was that the analgesic was administered in quantities which would be known to contribute to death in a young baby, and that this knowledge, not the other factors present, was crucial. It argued that the autopsy revealed no congenital defect sufficient to be a significant element in producing death, and that pneumonia appeared only after the analgesic regime had begun. The defence, however, with money no object, carried out quite exceptionally elaborate autopsy procedures; in particular, it prepared a continuous set of tissue sections right through the brain (whereas Usher prepared the customary few sections). Counsel then selected from this series slides, which showed hard deposits in the brain tissue, arguing that this was evidence of much more congenital brain damage than the prosecution had taken into account. The judge agreed to the defence projecting such a slide onto the wall of the courtroom, creating a visual image of massive defect in the brain.

The defence succeeded in providing the court and the jury with the reasoning they appeared to be looking for: it could not be proved 'beyond all reasonable doubt' that death had resulted from the doctor's actions. From the view point of Scientific argument, however, two observations are relevant. First, the evidence about the effect of high doses of the analgesic was not directly questioned. Second, it was the evidence for the degree of congenital brain damage that was problematic: great experience is needed to interpret any tissue section; some knowledge is needed to recognize the normal presence of some deposits and minor 'defects' in healthy babies' brains; and less experience is needed to appreciate that the scale of projection distorts judgment of significance. As Brian Wayne's overview in this volume has suggested, it is always possible to produce evidence to undermine any scientific argument, given enough resources and ingenuity. 'The facts' are always open to question; it is only the rules and conventions of the court which draw the line around what questioning is legitimate.

In the criminal courts, this 'undermining' is asymmetrical; as a barrister remarks, 'the uncertainties of science will always work in the defence's favour'.¹⁹⁸ 'Beyond all reasonable doubt', strictly speaking, is an impossible requirement in science or medicine. As a barrister observes, 'I think for the most part the [defence] expert will widen the thing out and let the jury feel there is doubt, because science is doubtful', and this may be enough to secure an acquittal." A doctor can always be persuaded to say that something is 'possible'. It is noteworthy that it is common for the defence to employ an expert to sit in court, not to give evidence, but to feed questions to counsel and to dissuade the prosecution expert from unwarranted dismissal of 'possibilities'. (But, since this defence expert is advisory and not called as a witness, his or her own expertise cannot be questioned.)

This case has had one specific long-term consequence for expert evidence, in relation to the procedure called 'disclosure'. In England and Wales, the prosecution prior to the trial must serve on the defence any evidence, which will form part of its expert case; the defence then has the opportunity, in natural justice, to seek its own expert opinion

¹⁹⁸ *The influence of litigation on medical practice*, London: Academic press, 1977

and perhaps to formulate a rebuttal.¹⁹⁹ But the converse did not hold; as some defence lawyers and solicitors argue, it is a legitimate tactic (that is, a tactic which may further justice) to spring expert evidence on prosecution witnesses. Yet the defence does not have the right to spring any evidence; it is required, for example, to notify the prosecution of an alibi defence so that it can be investigated. In Scotland, the pretrial procedure known as 'precognition' makes the defence unable to spring expert evidence on the prosecution. Precognition is the name for the Procurator Fiscal's duty to examine witnesses,²⁰⁰ and he has the power to call any expert witnesses; the informal statements thus assembled are then passed to the Crown counsel.²⁰⁰ Experts like this procedure because they can explain evidence informally and without pressure to a party who is not directly part of an adversarial trial.

Over the years, this lack of a reciprocal requirement for disclosure in England and Wales became the focus for expert medical and scientific criticism of the adversarial system. From the expert's viewpoint, expert practice is designed to enhance the capacity of legal decision making to ground itself on facts. Many experts accordingly conceive of their responsibility as being in the last resort to the court, not to one or other side of a case: 'I regard myself as there to help the court rather than help the side that calls me, and I've made that abundantly clear on numerous occasions and given answers for the side that called me that made the case worse.'²⁰¹ The lack of a disclosure requirement appears in direct conflict with the expert's perception of his or her role. While even experts critical of the adversarial system generally think it a waste of time to argue for its replacement, the lack of a disclosure requirement provided the opportunity for a specific criticism with some hope that there might be a change. Thus, disclosure became a focus for disquiet with the adversarial system as a whole; practitioners were able to express a general evaluation in terms of a specific technical or procedural matter.

¹⁹⁹ Ibid.

²⁰⁰ J. Glaister, *Glaisters Medical Jurisprudence and toxicology*, 13th edition, 1938, p. 84-87

²⁰¹ Ibid.

Usher's experience at Arthur's trial, where what he thought was evidence confirmed by a specialist colleague, was criticized in public by that same colleague when it came to the trial, brought the question of disclosure to a head. If Usher had been informed of the defence position beforehand, he would have been able to reconsider his own evidence; as it was, the court made him appear inaccurate and unprepared. Further, defence counsel forbade the specialist to speak to Usher and thus maximized damage to the prosecution case in court. The barrister thus exerted his power to treat scientific evidence as subservient to legal ends, not as objective knowledge in its own right. In this specific case, lawyers not only prevented experts from arriving at the best-informed objective evidence but also publicly humiliated a long-serving pathologist whom many colleagues, privately, believe was correct about the scientific evidence.

The result was a concerted lobby by the British Association in Forensic –Medicine gaining weighty legal support, to require the defence to disclose its expert case, leading to the insertion of a clause in the 1984 Police and Criminal Evidence Act. The success of this lobby is perhaps some indication that the courts do wish to attune decision making to what they understand to be the objective and non-adversarial revelations of science. There are also signs that the judiciary favours moves in this direction, because judges see their own role as one of objective neutrality in cases, paralleling the self-ideal of scientific experts.

Defence lawyers and solicitors who oppose the new legislation do so, they argue, because the result will be the protection of experts from criticism, rather than the exposure of the grounds of an expert case.²⁰² They fear that experts will forearm themselves, in their own interest, through pre-trial discussion. Forensic pathologists favour disclosure because it enhances the 'neutral' standing of expert knowledge. They also believe that experts meeting together are nearly always able to agree or, if they cannot agree on the precise interpretation of an observation that they can agree on the demarcation of a closely defined area of legitimate difference of opinion. This belief is confirmed by their experience, mostly obtained by working among a small group with a

²⁰² The United Kingdom's Winn Report

high degree of personal acquaintance and mutual respect.²⁰³ Their effort to enhance the neutral status of expert evidence is therefore not simply a response to the tactics of the adversarial system but also shows a concern with the ability of this small occupational group to regulate its own practices.

In reality, this self-regulation has gone on a great deal on an informal basis, without the formal disclosure requirement. A non-adversarial system actually operates in the court's shadow defence pathologist's phone up the Home Office pathologist to find out what's up; Home Office forensic scientists get together with defence serologists to discuss divergent findings.²⁰⁴ There is nothing covert about this; this is, after all, what a scientific community should be like. But this is precisely the point at issue, since these informal practices substitute scientific norms for legal ones. And thus, the fear among defence lawyers is that the disclosure requirement will formalize this substitution, fundamentally affecting the traditional rights of the defendant, with scientific agreement pre-empting a determination of justice.

It is sometimes said that all these issues might be avoided if the court were to appoint its own experts, assigning science to a position where it could affect neutral arbitration. But while many legal people (again, perhaps especially in the judiciary), as well as scientists, accept this in principle, it attracts little favour in practice. Lawyers and forensic experts alike see clearly that natural justice places a question mark (because of the possibility of error and bias) over the appointment of such experts and over their judgments in particular cases. 'You cannot say that one appointed expert is good enough, because he could easily make mistakes, and he could become biased; he could also rapidly come to think of himself as a god-like figure who never made mistakes.'²⁰⁵ The obvious response is to ask each forensic specialism to nominate its most

²⁰³ Ibid.

²⁰⁴ Dr. B. R. Sharma, *Forensic Science in Criminal Investigation and Trials*, 4th ed., Universal Law Publishing Co. Pvt Ltd, Delhi India, 2003, p. 77-79

²⁰⁵ Mark Hawthorne *Fingerprints: Analysis and Understanding*, 2nd ed., 2008, Universal Law Publishing Co. Private Ltd, Delhi India, 110-113

'professional' experts. However, there seems to be no agreement that an appointee from the top of the relevant forensic specialism would in fact inspire universal confidence.²⁰⁶

An argument with some similar features has occurred within the Home Office, and among its forensic scientists and pathologists, about the availability of personnel and laboratory facilities to the defence as well as to the police and prosecution. At various times, critics have suggested that the Forensic Science Service and the pathologists are so closely integrated with the police that their evidence is necessarily prosecution oriented. However, the Home Office does now permit its forensic staff, if colleagues in the same laboratory are not already engaged on the case, to do work for the defence. In fact, this rarely happens because it involves a scientist working away from base. The laboratories are also open to defence work, but again this facility is not much used. The central reason is that forensic scientists insist that their work is scientific and that any results must therefore be made available to both defence and prosecution. The defence, resisting having its information (or limitations) disclosed, therefore does not use the facilities.

The adversarial system thus has very deep effects on the way scientific evidence becomes part of a decision in a criminal court. For most experts, most of the time, these effects are neither good nor bad but rather the parameters of their occupation. Expert evidence has often only a minor part in a case; all parties in the court also normally receive it as unproblematic. Nevertheless, the potential for difficulty is always there, in that there is no necessary overlap between the ends of scientists and the ends of the courts.

Few practitioners believe that all potential difficulties would disappear if there were an inquisitorial as opposed to an adversarial system in English law.²⁰⁷ Inquisitorial' systems of course exist in many European countries on both sides of the political divide. Yet

²⁰⁶ The split between the British Academy of Forensic Sciences and the Forensic Science Society

²⁰⁷ International journal on *Law and Medicine*1:219-27,1980

there is almost no comparative research evidence, though there is some indication that also occur in inquisitorial settings.²⁰⁸

4.11 Conclusion

Forensic expertise consists of special skills in providing scientific information in a form in which it can assist legal decision making. Most practice is routine and uncontroversial, and this permits the construction of knowledge about individual cases on a day-to-day basis. Where difficulties arise, forensic experts do not formulate 'general problems' but rather seek to negotiate a specific solution, one which is pragmatically appropriate to the case in hand. The hard-pressed forensic services can therefore move on from one case to the next while providing what the courts require.

In stressing that controversy over forensic evidence is the exception, forensic experts imply that most scientific facts translate very easily into legal facts. Legal and scientific institutions share a strong empiricist ethos, valuing knowledge in the form of precise observational statements. This same ethos assumes that an accurate observational statement is transferable from one social setting to another or from the social purpose to another, and thus that the use of scientific facts as legal facts should be unproblematic. As a few much-discussed cases show clearly, this is not so. Science and law formulate factual knowledge for different-social purposes; the purpose of science is knowledge of nature that of the criminal law is justice. It would require a jurisprudence of a very special kind (such as one equating justice and utility, which most people would not accept), to lead to an expectation that the purposes of science and of law should always coincide. Thus, we argue, there will always be cases in which the courts take decisions in a way, which, from the scientist's viewpoint, distorts scientific knowledge. Since the law has priority over science, historically and politically, this may place the scientist in a most uncomfortable position.

²⁰⁸ Ibid.

Forensic experts, however, are occupationally adept at 'serving' the courts. This explains why, despite different purposes, legal decision-making can straightforwardly incorporate forensic science most of the time. This leaves forensic scientists and pathologists with the social and psychological difficulty of balancing a sense of self-identity as scientist or doctor and an occupational identity as servant of the legal administration. Sometimes this balance is upset, through a scientist or pathologist not upholding the standards of science (an element in Preece's trial), or through a court pursuing its ends without sufficient regard for separate scientific values (an element in Arthur's trial).

We should not regard cases where there is controversy concerning forensic evidence in terms of 'failure'. From a technocratic viewpoint, which assumes that even legal decision making should depend on expert assessment of all the circumstances of a case, it must be 'failure' where the law and science are at odds. From a different political viewpoint, it is quite proper sometimes to deny scientific knowledge a decisive place. The political difference here becomes explicit when a court (as in obscenity cases) has to decide whether it is right for the purposes of the court to hear expert evidence. The court may wish to decide whether there really is expert knowledge in a particular area, or, even if there is, whether the issue for the jury is one, which requires its own lay understanding rather than expert knowledge. The persistence of the court's right to decide what constitutes relevant expertise is an important sense in which lay as opposed to expert viewpoints retain authority. Mapping how in fact the courts do draw boundaries around expertise would provide valuable sociological information about the relations between technical expertise and public opinion. For example, the courts have withdrawn the authority of psychology experts in obscenity cases.²⁰⁹

Forensic practice thus provides a technical service for a social institution whose ends it cannot control and which lie inexorably within the political sphere. The legal institutions have a highly developed appreciation of symbolic acts as a source of social meaning.

²⁰⁹ Weidenfeld & Nicholson, *An account of censorship laws and their enforcement in England and Wales*, London, 1979, p. 99-100

The courts, for example, leave the final decision to a jury representing 'the people' in serious criminal cases. It is interesting to ask whether this might constitute a model for policy on the social relations of science. Obviously, one should not romanticize the criminal law, with its evident faults, since it is not above inhumanity or wielding power to defend a particular political interest. But criminal law administration does show how it is possible for scientists to accept that there are socially defined ends formulated with different categories of understanding than scientific knowledge, and that, correspondingly, there are circumstances in which it is rational to value the symbolic beyond the empirical, drawing as need be upon science as a service rather than as a final arbiter.

(A) Some Cases in Burundi where forensic Evidence has not been used to make conclusions on Murder cases

This was an extract from the final report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council Resolution S-24/1. The report covered violations and abuses of human rights from 15 April 2015 to 30 June 2016. The experts found that gross human rights violations had taken place, committed primarily by State agents and those linked to them. These gross violations were systematic and patterned and impunity was pervasive. While the crisis continued and even though the level of overt violence declined, the overall level of oppression and control over the society had increased, manifested by arbitrary deprivations of life.

1. Reports of mass graves

Allegations of mass burials of those executed during these incidents had been widely reported.²¹⁰ Initial satellite imagery suggests that bodies had been buried in mass

²¹⁰ <https://www.amnesty.org/en/press-releases/2016/01/burundi-satellite-evidence-supports-witness-accounts-of-mass-graves/>, accessed on 5th, September, 2017

graves during that period, including in Bujumbura (in Kanyosha and Mpanda) and Bubanza. UNIIB received testimony corroborating the existence of mass graves. Reported intimidation by members of the Imbonerakure and SNR of persons in possession of information on this topic gave further credibility to the testimony. The proper forensic examination of alleged mass graves called for specialized expertise. In the meantime, the sites concerned had to be left undisturbed. UNIIB offered to arrange for the alleged sites to be properly recorded, so that it could be investigated in full at a later stage, but the Government did not respond to the offer.

2. Targeted assassinations

A former senior officer of the National Defence Force confirmed to UNIIB the existence of several lists of people, including civilians and military, to be eliminated by the security forces.

Armed elements in opposition to the Government were also been involved in several murders, notably targeted assassinations. UNIIB documented a case where a member of the Imbonerakure was burnt alive. Grenade attacks have also allegedly been carried out by these armed elements, causing casualties among the population. From May 2015 to February 2016, OHCHR Burundi documented several cases of grenades thrown by unknown individuals in public places, mainly in Bujumbura.

Apparent examples of tit-for-tat targeted assassinations within the Army particularly threatening to the integration of the armed forces, included the killings of several senior Army officers belonging either to the pre-Arusha Agreement Burundian Armed Forces (ex-FAB) or to the former rebel group “Armed Political Parties and Movements” (ex-PMPA) and the apparent retaliatory killings of alleged supporters of the regime within the forces. Among the most emblematic examples are the killings of General Adolphe Nshimirimana on 2 August 2015; General Karakuza on 25 April 2016; and Colonel Darius Ikurakure on 22 March 2016. The latter was shot dead in the compound of the headquarters of the Army Joint Staff.

Human rights activists, as well as their relatives, had been primary targets. For instance, on 3 August 2015 *Pierre Claver Mbonimpa*, a leading human rights activist and representative of the Association for the protection of human rights and of detainees (APRODH), was shot in the cheek and arm during an apparent assassination attempt. On 6 August 2015, his son, Welly Fleury Nzitonda, was arrested. He was later killed in the Mutakura neighbourhood of Bujumbura. On 9 October 2015, Mr. Mbonimpa's son-in-law, Pascal Nshimirimana, was killed by firearm and grenades as he was returning home in Ngangara.

(B) Cases in Uganda where forensic Evidence has been used to make conclusions on Murder cases

Case law in the field of fingerprints has no well-established foundation in Ugandan. It is clear that such evidence as fingerprint or foot impressions is regarded to be circumstantial in nature. The most popular case in this field is that of the murder of an American national one *Cecilia Marie, Goetz* in 1998 by Richard Arinaitwe (unreported). In this case finger print impressions played a very important role in reaching a logical legal conclusion in the matter.

In the case of *Akbar Hussein Godi*, Nineteen-year-old Rehema Ceasar was shot dead on the evening of December 4, 2008 at Lukojjo village in Mukono District. She had apparently gone out for dinner with a person whose identity she had not disclosed. Nobody saw the person who shot and killed her. Nobody apparently saw the person she had gone out with for dinner. Her husband, Akbar Hussein Godi, then a 25-year-old Member of Parliament for Arua Municipality and a lawyer by profession, was charged and convicted of her murder. The prosecution presented and court used what is known as circumstantial evidence in addition to forensic evidence to convict Godi.

Uganda vs Dr Aggrey kiyingi and 2 others criminal session case no. 0030 of 2006

D/Sgt Karugaba and D/IP Katungi were the two officers who were at the center of the investigations. They went to the scene and recovered some exhibits, some of which were submitted for forensic examinations.

Their evidence was that the death of the deceased had been planned by Dr Kiyingi coordinated by Berwanaho (A2) and executed by the late Atwine who was a brother of Berwanaho (A2). The gun which was used was brought by Bob Mugisha (A3).

That gun was recovered near the scene. Its butt had been cut off and its serial number removed. The gun and ammunitions recovered at the scene were taken to Nairobi by D/SP Aisu (PW15), for forensic examinations. Mr. Johnston Musoki Mwongela (PW9), firearms expert from CID headquarters Nairobi, with great skills, managed to restore the serial number, which the assailants had erased. He also confirmed that the cartridges which were recovered from the scene had been fired from the said gun.

The accused were accordingly acquitted and set free basing on the evidence of forensics.

CHAPTER FIVE

CONCLUSION

5.0 Summary

Despite the increased attention given to forensic evidence around the world, in Burundi and Uganda, there are very few published data or books on forensic science. The identification of types of evidence collected regularly and the extent to which this evidence is submitted and reviewed in forensic laboratories are few. From this study; the researcher came up with the following presentations:

5.1 Findings

5.1.1 Burundi

A. An overwhelming majority of the evidence allowing the demonstration of the truth are proofs by word reported: testimonies, confessions, denunciations. The strictly material evidence is most often absent from the files: no fingerprint, no autopsy, no DNA sampling on the victim, no ballistics report, sometimes only the murder weapon is seized:

Two consequences result from this fact:

First, the risk of instrumentalization of the means of proof and influence of the actors judicial;

Second, the difficult burden placed on witnesses: whether they are prosecution or defense witnesses, their story may suffice to convict an individual or, on the contrary, to exculpate him. The pressure on the witnesses is strong and an ambiguous relationship develops between the witnesses and the accused, the victims, the community and the institutions. The absence of alternative evidence to the testimony also nourishes the desire for revenge on the part of the condemned: without conclusive testimony, no condemnation. The responsibility for the conviction can thus be embodied in the person of the prosecution witness.

B. There are no legal texts that clearly regulate the evidence that must be admitted by the courts, the only legal text available to the country for the admissibility of the evidence is the Criminal Procedure

C. There is not a special body charged with conducting criminal investigations such as the CID of Uganda, which means that a police unit that is around the place where the murder was committed, it is the one who will be responsible for conducting the investigation.

D. The Burundian national police are not well trained and does not have adequate materials to deal with the growing crime from day to day.

E. The country does not use any forensic science method in its criminal investigations and has no Forensic Science experts. Furthermore, it doesn't have any criminalistics laboratory.

F. In the country's universities, there are no courses given on forensic science sciences.

5.1.2 Uganda

A. The lack of scientific research to confirm the validity and reliability of forensic sciences disciplines and to establish quantifiable measures of uncertainty in the conclusions of forensic analyzes still a big challenge;

B. The absence of new methods of forensic science that can be applied in different cases of murder and which can help to resolve them;

C. The inability of forensic experts to use standard terminology to report and testify to the results of forensic investigations;

D. The lack of rigorous and mandatory certification requirements for practitioners;

E. On the issue of the number of fingerprint experts in Uganda police, they decried the great need of such experts, as were only two in the department. Why they were as few as that, was attributed to a number of factors, which include among others transfers of trained personnel to other departments let alone lack of funds to train others.

F. On the issue of evidence, the law of evidence demands that he who asserts must bring up proper proof to support his or her case before court. That however, casts the burden of proof to whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he or she asserts to prove that those facts do exist.²¹¹ It is further provided that it is that person who would fail if no evidence were given on either side it is upon whom that the burden of proof lies.²¹²

G. In Burundi as in Uganda, Police officers lack proper training and materials that would allow them to properly collect and protect the evidence gathered from the crime scene; serious shortage of adequate training and continuing education for practitioners.

In Conclusion, the forensic evidence plays a major role in murder investigation and prosecution. When a person is charged with a crime, the prosecution and the defense call upon different witnesses to testify to the guilt or innocence of the accused person. One of the most important actors in all this testimony is often not a person: it is forensic evidence.²¹³

The major role of the police is crime control and prevention. Crime control is done by ensuring that all cases of crime are thoroughly investigated and concluded judicially or within the police organization. Successful police investigations depend on good training,

²¹¹ Section 101 of the Evidence Act Cap 6

²¹² Section 102 of the evidence Act Cap 6

²¹³ C. Matthew Bangerter, *The Importance of Forensic Evidence in court*, 2016. From <http://www.Bangerterlaw.com>, accessed on 27th, October, 2017

personal talent of the investigator and on the good material used to collect evidence on crime scene.

In the research's opinions, the truth lies somewhere among these points; criminal investigations involve a close relationship between innovative thinking and diligence of the investigator in the field and the investigator in the laboratory (the police scientist). Investigators and police scientists would work together as a team, supplementing one another's theory and findings. They should both work patiently and thoroughly to reconstruct a crime from their investigative discoveries.

The joining of science with traditional criminal investigation offers new horizons of efficiency in criminal investigation, new perspectives in investigation by pass a total or a major reliance on informers and custodial interrogation and instead increasingly utilize a skilled scanning of the crime of scene physical evidence and a search for as many witnesses as possible. Mute evidence tells its own story in court, either by its own demonstrativeness or through the testimony of an expert witness involved in its scientific testing.²¹⁴ Such evidence may serve in lieu of, or as a collaboration of informers, custodial interrogation and testimonial evidence of witness found and interviewed by police in an extension of their responsibility to seek out the truth of all circumstances of the crime, an increasing certainty in solving crimes is possible and will contribute to the major of crime the certainty that a criminal will be discovered, arrested, prosecuted and convicted.

The current study shows that forensic evidence can influence case-processing decisions, however it is not uniform for all crimes and all types of evidence; the effects of the evidence vary depending on the criminal offense, the variety of forensic evidence, the level of criminal decision, and other characteristics of the case. This study attempted to fill this gap in knowledge by examining the impact of forensic evidence on murder's investigation and criminal prosecution.

²¹⁴ Pinizzotto, Anthony, *forensic psychology: criminal personality profiling*, 1984, p. 76-78

As stated above in findings, however, a lot of gaps have been identified in murder's investigation and prosecution for Burundi and Uganda, because if we try to analyze the situation, we can see that Burundi and Uganda have a big step in the way in which criminal investigations are conducted, especially since with our century, crimes are done more with means that are difficult to discern. Who demand that even investigators need to be more trained and equipped to deal with criminals. moreover, the court needs evidence based on science not to judge in relation to what a person said or to eyewitnesses alone, hence the importance of forensic evidence.

5.2 Recommendations

Following the above conclusion, the researcher has forwarded the following major recommendations to different bodies, to improve the use of forensic evidence in murder investigation and prosecution.

5.2.1 Burundi

A. The adoption of a legal text that regulates properly the admissibility of the evidence: as in Uganda, which has the Evidence Act, Burundian legislature should adopt a legal text that only regulates the admissibility of the evidence. Given the great importance of the evidence, a legal text that regulates only the legality and the admissibility of the evidence should be adopted.

B. The use of Forensic evidence in criminal investigation and prosecution for different crimes: Burundian justice should no longer rely on testimonies only to judge a criminal case (especially murder), in the world today, science plays an important role in justice to hunt down criminals. Although the testimony of various people may be subjective depending on the side for which they testify, the forensic evidence is different. the science is objective and that's why the forensic evidence is very important in the courts is that. The forensic evidence does not lie because it is a science, the opposite of the testimony. This is why it's recommendable in court to have an expert's

forensic testimony; a judge or jury is more likely to find favor on the side that presents compelling forensic evidence to prove the guilt or innocence of a party.

C. The creation of a Criminal Investigation Department of Burundi: the findings of the study revealed that Burundi does not have any body responsible for conducting criminal investigations. to conduct a criminal investigation is not anyone, who can do it, and it is not just any organ of the government that can do it because criminal investigations are more complicated today than they have never been in the past. The influx of huge amounts of information, the evolution of technology had challenged criminal investigation systems and, indeed, investigators. Any violation of the law entails the participation of a criminal investigation, that is why the creation of a special body to conduct criminal investigations would be very beneficial for the country and for society. The criminal investigation has main functions as, to discover, collect and safeguard evidence.

D. Forensic expert: the study reveals that Burundi hasn't any forensic expert. A forensic expert is very important especially his testimony to the court, as it is stated above. The expert testimony of a forensic expert witness is intended to provide an analysis of certain pieces of evidence and information that would support the argument of the party who introduced the forensic expert witness. the testimony of a forensic expert comes to support or contradict the eyewitness or even add what he/she did not say or did not see.

E. Forensic sciences should be approached in academic areas: as the study has shown, in Burundi no university, whether public or private, none of them have courses on forensics sciences, and it is at this point that the researcher recommends to the Burundian government that should include topics on forensic sciences because, as I stated above the evolution of forensic science in the criminal justice system requires criminal justice educators to develop the study of forensic science.

5.2.2 Uganda

A. States should require that all forensic science laboratory analysts receive proper training and certification: it is true that Uganda has some forensic laboratories, but these laboratories are almost un-equipped, there are not enough materials, and even those who work there have not received adequate training. So the Ugandan state should review the state of these laboratories, equip them with necessary materials.

B. The issue of the number of fingerprint experts in Uganda police: in this area, there is much need to ensure that more of the experts in this area are trained to ensure effective performance of duties in the interest of criminal justice in the country.

C. The increase of forensics scientists: The findings revealed that in Uganda there is a problem of the fewest of forensic scientists, and even the latter have not received sufficient training. the state should take care of these people who have the capacity and the education necessary to be forensics scientists, send them abroad, so that they can be well formed for fear that one day the country will be found that he has no forensic scientist capable of carrying out an investigation.

D. Forensic sciences should be approached in academic areas: Uganda has a few universities which teach subjects on forensic sciences, but these subjects are not well given because students are only entitled to theories only. do not receive opportunities to go on field to practice what they have studied. which leads the researcher to recommend to the Ugandan State to improve the conditions under which these materials are given.

E. Training and adequate equipment: as the study mentioned above, Burundi and Uganda have this common problem, their agents receive little training and doesn't have enough equipment. So, the researcher recommended to those states that the police officers and the investigators can be well trained and that if necessary that they can

send some of them abroad in order to obtain a better formation. And that, moreover, a good equipment is available to them.

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