

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CSC-028-2010

UGANDA **PROSECUTOR**

VERSUS

A1: NO. 34236 GODFREY D/C SIZA	} ACCUSED
A2: NO. 6139 SPC MURIISA JUSTUS		
A3: MUSIKA GODFREY		
A4: NO. 6140 SPC MUHUMUZA DAN		

BEFORE: HON. MR JUSTICE BASHALJA K. ANDREW

JUDGMENT

NO. 34236 D/C SIZA GODFREY, NO. 6139 SPC MURIISA JUSTUS, MUSIKA GODFREY, NO. 6140 SPC MUHUMUZA DAN (hereinafter referred to A1, A2, A3 and A4 respectively) are indicted with Murder contrary to Sections 188 & 189 of the Penal Code Act.

It is stated in the particulars of the offence that the four accused persons on the 10/01/2007 at Mbarara Central Police Station Cells in the Mbarara District murdered Bekunda Senti (*hereinafter called "the Victim"*). The accused persons pleaded not guilty.

Facts as per "Summary of the Case" are that the deceased was arrested by A1 in the company of the other three accused on 7/01/2007. All the accused are attached to the Violent Crime Crack Unit (VCCU) South-Western Region. The reason for the arrest was because of the information they received that the deceased was a robber, and was in possession of a gun. A4 is said to have been in touch with the

wife of the deceased to pay some money so that the deceased is not tortured when arrested. The deceased was detained at Mbarara Police Station, and on 9/01/2007 at about 6:40 pm, A1 D/C Siza signed for the deceased, and took him out of the cells supposedly for purposes of conducting further investigations. A1 was in the company of A2, A3 and A4. It transpired that the purpose was, actually, to lure one of the deceased's associates into arrest, but instead the deceased warned off a one Wycliffe; the said associate.

When the deceased was picked from the Police Cells, he was in a very healthy condition. The deceased was returned about 11:00 pm while unable to walk and was supported by A1. The deceased was bleeding and crying out in agony for the rest of the night. This was confirmed by the Cell's Guard and the In-charge Counter at the time. The deceased continued crying out in agony for the rest of the night saying he had been tortured and assaulted by the VCCU operatives who had earlier taken him. The deceased passed away about 5:00 am, in the morning of 10/01/2007 after crying to his cell-mates to assist him change positions due to the immense pain. A postmortem was conducted and the following were the findings of the pathologist as causes of death:

- (a) Adult respiratory distress syndrome.
- (b) Hemorrhagic shock.
- (c) Neurogenic shock.
- (d) Multiple organ failure.

These were as a result of assault with blunt objects and burns from electric shocks. The accused persons were medically examined on Police Forms 24, and each was found to be an adult of sound mind. They were accordingly indicted.

Let me restate the cardinal principles of a criminal trial upon which courts base to make their findings. Firstly, the Legal burden of proof on every issue in the offence charged rests with the prosecution and not the accused person. Secondly, the standard of proof is always beyond reasonable doubt. In event of any doubt at the

conclusion of the trial, then such doubt should be resolved in favour of the accused who must be acquitted. These principles have been applied in several leading cases, which are binding on this court. *See Woolmington Vs DPP, (1935) AC 462; Ojepan Ignatius Vs. Uganda, S.C. Cr. Appeal No. 250/1995, Abdu Ngobi Vs. Uganda, SC Cr. Appeal No. 10/1991, Wamongo & others vs. Uganda, [1976] HCB 74, Uganda Vs. Benedict Karerengabo MB 30/71; Deziderio Kayongo Vs. Uganda MB 29/71.*

In a charge of *Murder contrary to Sections 188 & 189 Penal Code Act*, the essential ingredients which the prosecution must prove to the required stand are as follows:

1. that a person is dead;
2. that death was caused unlawfully;
3. that death was caused with malice aforethought; and
4. that the accused participated in the commission of the murder.

These elements have been considered and applied in leading authorities which this court will follow. *See Joseph Rujumba Vs. Uganda [1992-1993] HCB 36 (SC); Uganda Vs. Okello (supra) Uganda Vs. Nkurungira Thomas alias Tonku & Another, H.C. Cr. Session Case No. 42 of 2010 per Rugadya J. (unreported).*

In the instant case, the defence did not contest the first three ingredients. The prosecution relied on medical evidence contained in the post-mortem report (Exhibit "P2") which shows that the victim one Bekunda Senti died, and the dead body was examined by Dr. Sendi Bwogi of Mbarara Regional Referral Hospital. PW1 Nakalisa Lukia, wife to the deceased also testified that in the morning on 9/01/2007 she came to Mbarara Police Station bringing food to her husband who was arrested two days earlier. She found him dead and the body was in the hospital mortuary at Mbarara. She participated in the burial. PW2, CPL Kaguruke Hassan, the in-charge at the counter at the Police Station, also stated that the deceased was found dead in police cells in the morning of 9/01/2007. PW3

Bangirana Ismond a cell-mate with deceased testified that he was in cells on charges of criminal trespass, and that the deceased died in the cells at about 500 - 6:00 am on 9/01/2007. Several other witnesses confirmed the fact of the deceased's death. These include, PW6 Dr. Monday Araali of Mbarara University Teaching Hospital who testified upon "Exhibit P2"(postmortem report), ASP Alice Gasasira a police Officer who was on duty that fateful night, D/C Turyahikayo Elifazi and PC Magoda Patrick the Cells Guard that night. The fact of the deceased's death has been proved beyond reasonable doubt by prosecution.

Regarding the ingredient that death was unlawfully caused, the law presumes every homicide to be unlawful unless it is excusable under the law. It is excusable when carried out in execution of a lawful sentence or occurs in circumstances of self defence. The burden to show that death was excusable shifts on the person pleading the excuse, but it is a rebuttable the presumption. ***See Gusambizi Wesonga & Others Vs. R. [1948] 15 EACA 63; Uganda Vs. Okello (supra); Uganda Vs. Kulabako Night Jenifer H.C. Cr. Session Case No. 61/1991 (unreported).***

The death in the instant case there is no evidence that the death was either accidental or excusable. In absence of evidence to the contrary it is deemed to have been caused unlawfully. Medical evidence shows multiple causes of death - all of which are inconsistent with the lawful excuse for the death of deceased. This ingredient has been proved to the required standard.

Regarding the element of malice aforethought, this has to be inferred from the circumstances surrounding the death of the deceased. Rarely is it proved by direct evidence; because it is a state of mind of a person. ***Section 191 PCA*** defines the circumstances from which malice aforethought can properly be inferred. Interpreting the said section of the law, courts have laid down guidelines which should be taken into consideration when an inference of malice aforethought has to

be made. In the *case of Nanyonjo Harriet Vs. Uganda Cr. Appeal No. 24 of 2007*, the Supreme Court of Uganda had this to say:

“In cases of homicide, intention and knowledge of committing the offence is rarely proved by direct evidence. More often than not the court finds it necessary to deduce knowledge from circumstances surrounding the killing including the mode of killing, the weapon used and the part of the body assaulted and injured.”

Clearly, the Supreme Court was giving a succinct interpretation of **Section 191 PCA**. See also *Steven Musango & Another Vs. Uganda CA Cr. Appeal No. 52 of 2001; Uganda Vs. Nkulungira Thomas alias Tonku (supra) which cited with approval. Tubere Vs. R (1945) 12 EACA 63 and Uganda Vs. Turwomwe [1978] ACB 182.*

It is also stated, as a matter of caution, in some of the leading authorities that malice aforethought being a state of mind, is not a matter of opinion but a fact to be proved. *See Bukenya & others VS. Uganda [1972] EA 549; Francis Ocoke Vs. Uganda [1992-1993] HCB 43; Joseph Rujumba Vs. Uganda (supra); Nandudu Grace & Another Vs. Uganda S.C. Cr. Appeal No. 4 of 2009.*

The medical evidence as contained in “Exhibit P2” (postmortem report) (PF48 B) shows that the deceased died of multiple causes of death, which clearly demonstrate the *mens rea* of the assailants. PW6 Dr. Monday Araali who testified explaining the findings on the postmortem report (PF 48) stated that the body of deceased had the following:

1. multiple dark patches on legs especially right leg;
2. burns leading to peeling off of the skin on buttocks and chest wall;
3. co-angulation (clotting) due to burning. colouring of tissues as a result of heat in blood vessels swelling of blood vessels swelling of brain tissue, lungs dilation of heart, which became flabby and thickened; and

4. internal bleeding Internal organs, kidney, liver and pancreas were congested due to rapture.

PW6 explained the multiple causes of death as:

1. Hemorrhagic shock;
2. Neurogenic shock;
3. Multiple organ failure; and
4. Disturbance in the respiratory system.

All these originated from the assault sustained by the deceased, with blunt objects and burns from electric shocks.

PW3 Osmond Musasizi a cell-mate to the deceased stated that the deceased cried in agony all night long that he had been assaulted by VCCU operatives, until he died around 5:00 am. P.C Magoda Patrick (PW 1), who was a Cells Guard that fateful night, testified to seeing bruises on the body of the deceased when he was brought back from Kamukuzi by the accused – the VCCU personnel.

To my mind, whoever inflicted the wounds/injuries on the deceased knew or had reason to believe that death would occur as a result. The injuries as described are so severe, and they resulted into multiple causes of death; such that any one of them would automatically result into the death of the deceased. Each could independently cause death, and a combination of them all was just an act of “over-killing” the victim. The assailant needed not to inflict injuries that could kill the victim four times over, because even one of them would be sufficient to cause death according to the findings on PF 48 B. (Exhibit P2). Therefore, the nature of the injuries sustained as described by the witnesses, clearly demonstrates existence of the *mens rea* of the assailants. The prosecution has duly established the element of malice aforethought to the required standard.

The defence vehemently denied and contested the participation of the accused persons in the murder of the deceased. Each denied and gave evidence in their own defence. Prosecution, for its part, relied on the testimony of PW1 Nakarisa Lukia, widow to the deceased. She testified that she saw people who arrested her husband from home at Kabwohe on 7/01/2007. They were three men and a driver. They pretended that they wanted to buy the deceased's car. They entered the garage of the deceased in presence of PW1, and she was able to see them. They arrested her husband and she followed them to Mbarara Police Station. She saw one of them called Muhumuza (A4). He even asked her for money to give to the others so that they would not torture her husband. When she came back on the third day, she found her husband dead. She identified the four accused as the people who arrested her husband on 7/01/2007 from an identification parade. They are Muhumuza (A4) Musiika Godfrey (A3) and Siza Godfrey (A1)

PW2 CPL Kagaruke Hassan also testified that on 9/01/2007 he was the in-charge Counter Supervising junior Police officers at Mbarara Central Police Station, when A1 (D/C Siza) came about 6:00 Pm and took out a suspect (deceased) after signing for him in a Lock-up Register Book. He took the suspect to a waiting saloon car outside the Police station. A1 said he was taking the suspect for interrogation, and brought back the suspect after three hours. The suspect was brought back limping but was not limping when A1 was taking him away. PW2 further stated that he also saw blood spots on the suspect's toes.

PW2 then reported the matter to AIP. Musasizi after the Cells Guard, one Magoda (PW10) reported that the suspect was sick in the cells. The suspect was lying down complaining of pain as a result of interrogation by VCCU. The deceased told PW2 that he was interrogated by D/C Siza (A1). PW2 stated that the said suspect died early in the morning in Police cells.

PW5 IP. Musasizi testified that on 9/01/2007 he was the Orderly Officer and was with other staff at the counter. The officers included CPL. Kagaruke (PW2), D.C

Shumbusha (PW9), P.C Kidega, and the Cells Guard one PC Magoda (PW10). Then at 6:30 pm the deceased was picked by VCCU led by A1 for investigations. The taking of the suspect was registered in the Station Diary (SD). At 5:30 am the next day PW5 got a report that the suspect who was taken by VCCU had died in Police cells.

PW9, CPL Shumbusha Patrick, stated that on 9/01/2007 he was on duty at Police Counter, Mbarara Police Station. At about 6:00 pm, A1 went to the police cells and came with one suspect called Bekunda. An entry was made in the SD that the suspect was taken by A1 of VCCU. PW9 saw the suspect who was very healthy when he was being taken walking normally. Then A1 put him in a white car with tinted glasses and drove off. At around 9:00 pm A1 and the other three accused brought back the suspect to the cells. The following morning the suspect was found dead in the cells.

PW10, P.C Magoda George, stated on 9/01/2007, A1 came to the Police station at about 6:40 pm and asked him for a suspect called Bekunda Senti (deceased). A1 came with the three other accused who remained at the counter. They had come in a white saloon car. A1 told PW10 that the suspect was needed for interrogation. A1 signed for the suspect in the SD at the counter and assured PW10 that the suspect would be brought back in only ten minutes. PW10 recorded this in the Lock-up Register Book (Exhibit P5).

PW10 further testified that the suspect was taken when he was in a very good and healthy condition. He was brought back; not within ten minutes as promised by A1, but later about 11:00 pm when he was very weak, and was even supported by D.C Siza (A1). As soon as the suspect was handed over to the Cells Guard, he started crying in pain and said he had been beaten by VCCU. PW10 reported the matter to his supervisor CPL. Kagaruke (PW2) and PC. Tumukunde. They came and saw bruises on the back of the suspect. CPL. Kagurukye said the suspect should rest in cells as they informed the duty-officer IP. Musasizi (PW5).

The suspect continued crying in cells. IP. Musasizi came to the cells at around 02:00 am and said they will organize to take the suspect to hospital. The suspect was not taken and continued crying until his voice grew faint, and he eventually kept silent at about 5:30 am. PW10 called the suspect's name, but he was not responding. PW10 then informed IP. Musasizi, CPL Kagaruke, DC. Shumbusha and PC. Tumukunde, and all went to the cells and found that the suspect had died. When A1 was asked about the suspect, he said he took him for interrogations. A1 was detained and so were the other accused who were with him the previous evening with the suspect.

AI testifying in his defence as DW1, stated that he took the suspect from the police cells for interrogation together with A2, A3 and A4. They proceeded to Kamukuzi and on the way, A4 Muhumuza asked to be let off because his children were alone at home. A1 who was the leader of the team allowed him to go.

The suspect was supposed to call his counter-part suspect called Wycliffe on phone; but the co-suspect's phone was not available. From Kamukuzi A1 then brought back the suspect to the Police cells, and handed him back to the Cells Guard at about 8:00 pm; when the suspect was very normal. The next morning, A1 was informed that the suspect had died in the Police cells. A1 denied ever torturing the suspect.

A2 testifying as DW2, also denied having any hand in the death of the deceased. He testified that he was called by A1 from his home on 9/01/2007 at around 6:15 pm. A1 told him that there was a suspect from the cells who was going to assist them in locating a wanted co-suspect. A2 accompanied A1 to Kamukuzi Administration Police Offices. A1 asked the deceased to call the phone of the co-suspect called Wycliffe, but the phone was found switched off. They came back and A2 was left at his home at a place called Biafra as the others proceeded to the Police station with the suspect. A2 also stated that the suspect was taken and brought back in a good healthy condition.

A3, Musiika Godfrey testifying as DW3, stated that he is a taxi driver, and that his role was to drive A1 and the other accused. That on 9/01/2007 in the evening, he drove A1, who had hired him to Mbarara Central Police Station, where A1 picked the suspect. They proceeded to Kamukuzi, but on the way they picked A2 from his home at Biafra-Mbarara. When they reached Kamukuzi, A1 and A2 and the suspect got out of the car. A3 excused himself and went to a nearby bar and had a drink. Shortly after A1 called him back, and A1, A2 and the suspect got back into the car and A3 drove them back to the Police station. A2 was left at his home in a place called Biafra.

A3 stated that he does not work for Police, and that he was not involved in questioning the suspect. A3 further stated that the suspect was in very good healthy condition when they took him and when they brought him back to the Police station.

A4, Muhumuza Dan testifying as DW4, stated that on the date in question, after they had brought the suspect from Kabwohe to the Police cells, he asked A1 to be let off to go and attend to his children who were alone at home. As the rest proceeded to Kamukuzi, A4 was left to go home. He denied having anything to do with the death of the deceased.

After carefully evaluating the above evidence of prosecution and the defence together, three major facts emerge prominently. They are that:

1. A1 DC. Siza signed for the deceased from the Police cells on 9/01/2007 at about 6:30 pm.; and also DC Siza signed in the Lock-up Register Book (Exhibit P5) which shows the deceased as “No. 82”; having been taken out by VCCU.
2. The deceased was taken in a very healthy condition. All evidence, including that of the accused persons, is that the deceased was in perfect good health condition. He was taken to Kamukuzi Administration Police Offices for

interrogation by the accused A1 in the company of the other accused persons using a saloon white car described as having dark tinted glasses.

3. The deceased was brought back to the Police station around 11:00pm when he was not in good health condition. He had blood on his toes and was limping supported by A1 to reach the cells from the car. PW2 CPL. Kaguruke clearly saw the blood on toes, and the deceased limping. That was not how the deceased had been taken when A1 signed for him from the cells.
4. PW9 D.C Shumbusha similarly stated that the deceased was in a very bad health state when he was brought back to the cells. PW10 P.C Magoda the Cells Guard also said he received the deceased back in the cells when he was in a very bad shape. He informed his superiors who did nothing about it, until the deceased passed away crying in terrible agony.

If the deceased was taken, supposedly for interrogation, to Kamukuzi in a healthy state and he was returned in a terribly bad healthy state, the question becomes who occasioned the injuries? Certainly, it must be the accused persons. A1 DC. Siza is responsible for the injuries sustained by the deceased. He took the deceased in a good healthy condition and brought him back in a very bad condition. He is accountable for whatever happened to the deceased. Merely denying does not absolve A1 from his duty to explain and account for what happened to the deceased when he left the Police station.

As a Police officer in whose charge the deceased was entrusted as a suspect, A1 was accountable for whatever happened to the prisoner. From the evidence of PW6 Dr. Monday, the victim died of multiple causes as a result of being assaulted with blunt objects and burns from electric shocks. It is my view that the suspect was evidently tortured by the accused. In absence of how these terrible and fatal injuries could have been sustained while his custody and care, A1 bears the blame for whatever happened.

Requiring explanation of the accused of how the deceased got these injuries while under their care does not mean shifting the evidential burden to them. It simply

means that they are accountable for what happened to person entrusted into their care.

A2 Murisa Justus, is equally culpable for the death of the deceased. He was picked from his home in Biafra by A1 and together they proceeded with deceased to Kamukuzi administration Police Offices. A2 never distanced himself from the scene at Kamukuzi, and he also claimed that the prisoner was in perfect condition when they brought him back to the Police cells after interrogation. He participated in the torture since he too could not explain how a healthy person all of a sudden deteriorated and soon after died of fatal torture wounds described in the postmortem report.

A3 Musika Godfrey's role was that of the driver. He drove the accused from Mbarara Central Police Station to Kamukuzi. At Kamukuzi A3 claims to have left the A1 and A2 with deceased and went for a drink. He states he was called back soon after by A1 to take them back to the Police station. He attempted to deny that the deceased was in a very bad health condition after the torture. He even claimed that the deceased walked out of the car very well and did not look like a person who had been tortured; and that he had no difficulty in walking. One wonders why an innocent driver would concern himself with the difficulty in the walking of the prisoner, why he cared to observe the suspect so much for torture or its absence, unless he was covering up for the co-accused. It could only mean that A3 knew of what happened to the suspect and as such became an "*accessory after the fact*" under **Section 393 (1) PCA**, for which he would be found guilty.

Regarding A4 Muhumuza Dan, I have found that there is no evidence which links him, either directly or remotely, to the torture of the deceased. He asked for permission, from A1 D.C Siza who was his immediate supervisor, to go and be with his children rather than go to Kamukuzi with the rest of the accused. He was left to go, hence was not part of the torture group at Kamukuzi Administration Police Offices. His testimony is not isolated, but is corroborated in this material

respect by *Exhibit "P4"* which is his charge – and - caution statement. Also, the other accused persons' statements exonerate him as not having been at the scene of crime. Accordingly, I have not found compelling evidence which links A4 to the offence charged.

As advised by the Assessors, I find A4 Muhumuza Dan is not guilty of the offence charged, and he is accordingly acquitted. The Assessors also advised me in their unanimous opinion to find A1 DC. Siza and A2 Murisa Justus guilty as charged. I agreed with the Assessors' findings. Accordingly, I find A1 D.C Siza guilty of ***Murder contrary to Section 188 and 189 PCA***, and accordingly convict him. Similarly, I find A2 Muriisa Justus guilty of ***murder contrary to Section 188 & 189*** and convict him.

The Assessors advised me to acquit A3 Musiika Godfrey. However, I respectfully differ with them. In as much as there is no evidence which links A3 directly to the murder, his role and actions of trying to cover up for the other convicts makes him an accessory after the fact. Accordingly I find A3 Musiika Godfrey guilty of being ***accessory after the fact to murder*** contrary to ***Sections 206 PCA*** and convict him.

BASHAIJA K. ANDREW

J U D G E

20/03/2012

Mr. Ojok Michael(Principal State Attorney):

We have no previous convictions. The convicts are treated as first offender. A3 has been on remand since January 2007, and has spent 5 years on remand. I pray that this be taken into account. A1 and A2 have been on remand for 1 ½ years. They committed a very serious offence. The offence of murder was committed in aggravating circumstances. Both were Police officers who are charged to offer protection to citizens. They did not follow this; instead they tortured the deceased

under inhuman condition till he died. We pray for serious view. We pray for a sentence that will echo abhorrence to this kind of impunity.

Mr. AgabaBenon (Counsel for Convicts) Allocutus:

A1 is 34 years. He has been on bail after 1 ½ years on remand. He is married with six kids. He is HIV positive. Once one is like this, his life expectancy goes low. He is remorseful and repentant. We pray court be pleased to be lenient to him.

A2 (Convict) is 35 years old now with 4 children and has seven other dependants. He got bail after 3 year on remand. He is asthmatic and suffers from High Blood Preasur. He is remorseful and prays for leniency.

A3 (convict) has been on remand for five years and 3 months. He has three children and other orphans. He is remorseful, and prays for leniency.

A1 (Convict)(Allocutus): I have no objection but I pray for a lesser sentence.

A2 (Convict)(Allocutus): I pray for a small lenient sentence.

A3(Convict)(Allocutus): I pray for mercy and lesser sentence.

BASHAIJA K. ANDREW

J U D G E

20/03/2012

SENTENCE AND REASONS

Although the convicts are regarded as first offenders, they participated in the commission of a very grave offence of murdering a citizen under their care. As law enforcement officers, the convicts were expected to protect the life of the citizen. Instead they took it away in a brutal and barbaric manner. This court sounds a serious warning to all personnel in security organs that killing citizens merely

because of the power they wield over them cannot be tolerated in a democratic and free society. Human rights, which is a cornerstone of justice of citizens must be observed strictly at every level of operation of security organs.

They are supposed to provide security to these citizens, and not to subject them to torture, such as was inflicted on late Bekunda Senti. Equally, using excessive force to extract information from citizens by Police or other security operatives cannot be tolerated. It is illegal and inhuman and will be dealt with sternly. Security operatives should respect the sanctity of life of fellow citizens. After all, such institutions, as VCCU, exist subject to civilian authority, and anyone who goes overboard has him or herself to blame. They must operate within the confines of the law. Let it be known that even if there is an order issued from superiors which is unlawful and the subordinate complies and enforces it to the detriment of a citizen's life, that officer has himself or herself to blame. Equally if a Police officer executes a lawful order in an unlawful manner, he or she bears the consequences of his or her action personally. Accordingly, A1 is sentenced to **TWENTY-FIVE** years imprisonment.

A2 is sentenced to **TWENTY-FIVE** years imprisonment.

A3 having spent on remand five years and three months, is sentenced to **NINE (9)** months imprisonment.

BASHAIJA K. ANDREW
J U D G E
20/03/2012

Court: Right of appeal explained.

BASHAIJA K. ANDREW
J U D G E
20/03/2012