

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO. 0441 OF 2018
(ARISING FROM LUW- 00-CR-A-0084 OF 2017)

UGANDA ----- PROSECUTOR

VERSUS

1. BYAKATONDA AUGUSTINE

2. BUGINGO JAMES ----- ACCUSED

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

The two Accused persons to wit Byakatonda Augustine and Bugingo James were indicted for murder contrary to Section 188 and 189 of the Penal Code Act.

The Prosecution case is that the two Accused persons on the 11.02.17, at Ssenyomo Village in Luweero District, murdered Kaleeba James.

The Accused denied the offence and gave various defenses ranging from alibi to general denials, as will be seen later in this judgment.

The established position of the law is that the burden of proof is upon the Prosecution to prove the guilt of the Accused person(s) beyond all reasonable doubt.

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

The Prosecution is enjoined to prove all the ingredients of the offence to the required standard. Even when there is more than one Accused person as in the present case, the participation of each and every one of them has to be proved.

When the Accused raises a Defence, it still remains upon the Prosecution to prove that despite the Defence, the offence was committed and it was committed by the Accused person. - See the case of **Woolmington vs. Director of Public Prosecutions (1935) AC 462**, **Lubogo vs. Uganda [1967] EA 440** and **Miller vs. Minister of Pensions [1947] 2 ALL ER 373**.

Refer also to Section 101 of the Evidence Act which provides that “**He who alleges must prove**”.

An accused person is deemed innocent until proven guilty or he/she pleads guilty.

Courts have resolved that, the standard of proof required is not proof to absolute certainty. Nonetheless, the Prosecution evidence should be of such standard as leaves no logical explanation to be derived from the facts, except that the Accused committed the offence. – Refer to **Woolmington vs. Director of Public Prosecutions (Supra)** and **Miller vs. Minister of Pensions (Supra)**.

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

In an offence of murder like in the present case, the following ingredients of the offence have to be proved if a conviction is to be returned.

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

In the present case, the Prosecution relied upon the evidence of 7 witnesses.

10 At the beginning of hearing the case, the following documents were admitted in evidence as Prosecution Exhibits on agreement of both Counsel, under S.66 of the Trial on Indictment Act.

- Police Form 48C- The postmortem report of the deceased- Exhibit P₁
- 15 - 2 Police Form 24 on which the Accused were medically examined- Exhibit P₂ and P₃ respectively.

The fact of Death:

The Prosecution evidence shows that the deceased is dead. The postmortem report
20 is dated 11.02.17. The body was examined by someone who signed for the District Medical Officer, Luweero. It was identified by one Kaitesi Violet as that of the deceased Kaleeba James.

The body was found lying in a recumbent position in clay soil. No weapons were
25 found nearby. He appeared well nourished. No autopsy was performed as the body was never opened.

However, it had external marks of violence, that is, wounds on the back, bruises on the legs and buttocks. Cause of death was stated as traumatic shock as a result of
30 multiple bruises and a wound.

The deceased was found to be a middle aged man, well nourished.

It was observed that a bottle of poison was found lying near the body.

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The report was signed and stamped for the District Medical Officer Luweero Health Center IV.

The Defence did not dispute the fact of death.

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This court accordingly finds as a fact that Kaleeba James is dead. He passed away on 11.02.17.

The ingredients of death was proved to the required standard.

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The next ingredient to determine is **whether the death of Kaleeba James was unlawfully caused.**

As submitted by Counsel for the Accused and agreed by Counsel for the State,

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“The law presumes every homicide to be unlawful unless it was accidental or excusable or was sanctioned by the law”.

The circumstances that make a death excusable include Defence of the person or properties”. – See Uganda vs. Okello [1992-93] HCB 68 and Gusambizi

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Wesonga vs. R (1948) 15 EA CA 65.

The injuries that were said to have been inflicted upon the deceased have already been described. - Exhibit P₁ and the cause of death stated.

Counsel for the Accused admitted that the evidence proves that the death was as a result of an unlawful act. This ingredient was also not disputed.

And without any circumstances to justify the infliction of the injuries that are said to have resulted in the death of the deceased, this court finds that the death was as a result of an unlawful act.

The ingredient was proved to the required standard.

To determine **whether the killing was with malice aforethought**, court takes into consideration the provisions of S.191 of the Penal Code Act. The Section defines malice aforethought as *“Intentional killing of a human being or knowledge that an act or omission will result into death of a human being”*. – Refer to the case of **Bukenya and Others vs. Uganda [1972] IEA 549 (CAK)**.

To determine **whether or not the Prosecution has proved malice aforethought**, court takes into account the circumstances surrounding each particular case.

The circumstances include the nature and number of injuries inflicted, the part of the body injured, the type of weapon used and the conduct of the assailants before, during and immediately and after the injuries were inflicted. – See the case of **Mbugua vs. Republic [2002] IEA 150 (CAK)**, **Ogwang vs. Uganda [1999] 2EA 254 (SCU)**, **Dafasi Magayi and Others vs. Uganda [1965] IEA 667 (CAK)** and **R vs. Tubere (1965) 12 EA CA 63**.

The evidence of the Medical Officer – Exhibit P₁ shows that the deceased sustained multiple bruises on the legs and buttocks and on the back. However, no weapon was recovered, although the deceased appears where had been repeatedly assaulted.

Among the body parts injured as already stated was the back legs and buttocks.

It was the argument of Counsel for the Accused that the wounds found on the deceased were not on a vulnerable part of the body and therefore malice
5 aforethought cannot be imputed.

Further that with the bottle of poison found near the body of the deceased, coupled with the evidence of PW2 that when the deceased was found unconscious they tried to give him milk, which could not go down, it is highly probable that the
10 deceased took poison which resulted into his death.

Therefore, that, the Prosecution failed to prove this ingredient to the required standard.

15 On the other hand, Counsel for the State asserted that, the evidence of PW2, the mother of the deceased shows that the body had bruises on the lower abdomen, which is a vulnerable part of the body as it contains vital parts of the human body, “the kidneys”.

20 And that, the bottle of poison was meant to disguise the cause of death of the deceased. Court was urged to find that, with those facts, malice aforethought had been proved.

The evidence of PW2, the mother of the deceased that the body had injuries on the
25 stomach, a vulnerable part of the body that contains vital organs, is belied by the evidence of the Medical Officer. The report Exhibit P1, does not mention injuries on the stomach, it talks of a wound on the back and bruises on the legs and buttocks.

Although cause of death is attributed to traumatic shock as a result of the multiple bruises and the wound, doubt is raised when it is established that there was a bottle of poison found near the body.

- 5 And that the people who discovered the deceased from where he was lying tried to give him milk.

Unfortunately, no autopsy was done to establish if had been ingested by the deceased, thereby raising doubt as to the actual cause of death and **whether**
10 **deceased could have taken the poison himself.**

Court is inclined to agree with Counsel for the Accused that the malice aforethought had not been proved to the required standard. This is because any doubt in the evidence that goes to the root of the Prosecution case is resolved in
15 favor of the Defence.

Finally, it is left to decide **whether it is the Accused persons who killed the deceased person.**

- 20 The Prosecution evidence in this regard was that on 11.02.17, the deceased disappeared when he had gone to herd cattle. He had left home in the morning and the family awaited for his return in vain. The cattle returned without him.

Upon PW2 checking with the relatives where they thought he could have gone, the
25 deceased was not there.

When PW3, the daughter of the deceased went to collect firewood, she saw the two Accused persons in the bush and that upon seeing her, they ran away.

She went to check where the Accused had been and she saw the body of the deceased lying down. She tried to wake him up but he did not respond.

PW3 went back home and informed her grandmother PW2, who went to check and found the deceased dead. There was a bottle of cattle spray (pesticide) next to the body.

That PW1 raised an alarm that was answered by the neighbors. Since it was suspected that the deceased had drunk cattle spray, he was given some milk but it would not go down. Upon realizing that he was dead, the body was taken home together with the bottle of cattle spray.

However, when the body was undressed, it was found to have bruises on the back, the neck and near the kidneys (next to the private parts). There was also blood in the clothing.

The matter was reported to Police, who came to the home with a Doctor who examined the body. The postmortem report admitted in evidence as Exhibit P₁.

Preparations were made for burial and the body was taken and buried in Masindi.

The Accused were arrested.

It was suspected that they had murdered the deceased because of the dispute they had over grazing land, which the deceased had forbidden them to use.

A meeting was called by the Sub County Officials, and the people who attended the meeting were asked to note down on pieces of paper who they suspected to have killed the deceased.

While PW3 confirmed that she saw the Accused at a distance in a bush and they ran away, she testified that she raised an alarm and the residents answered it. But that PW2, the grandmother was at home and the people took the body home to her.

- 5 Contrary to the evidence of PW2, she says there was no problem between the two families arising out of grazing on the same land.

The two witnesses said the deceased disappeared on a Tuesday and the body was found on a Saturday.

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PW4, on the other hand stated that on a Friday, on a date he cannot recall, at about 6:55pm, he met the two Accused persons on a path carrying the deceased. That A1 had two sticks with a bottle which the witness says he did not know what it contained. A2 was the one carrying the deceased who was crying (groaning).

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That when he asked the two Accused what the problem was, they told him that the deceased was drunk and his matters were long and he could not manage them.

Since it was late, PW4 continued on his way. The next day, he learnt of the death
20 of the deceased but never attended the vigil or the burial. But that, when the village meeting was called, he told the meeting what he had seen and that he recorded a statement with Police.

PW6, a Police Officer in charge was by then stationed at Kikyusa Police Station.
25 He testified that a case of suspected murder by poisoning was reported. He visited the scene in company of another Police officer. He found the body in a grass thatched house, placed on a mattress. It was dressed in a white Kanzu and had already been cleaned. But that he noticed fresh injuries on the back and legs.

He was taken to the scene where the body had been found, which is about 100 meters away from the home.

5 That he noticed that the grass was down, which he contends was a sign of a struggle. He took photographs of the scene and also called Dr. Ksinam from Luweero Health Center IV, who examined the body in his presence.

The relatives requested to be allowed to take the body to Masindi for burial.

10 Upon learning that the Accused had been seen in the bush where the body had been found and that they ran away, they were arrested on 19.10.17 and taken to Luweero Police Station. That they could not be traced before that date.

15 The witness drew a sketch plan of the scene which indicates that the Accused lived about 800 meters away. – Exhibit P₄.

Photos were also taken of the scene – Exhibits P_{5A} – P_{5B}.

No weapons were recovered from the scene.

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The family of the deceased made statements at Police on 16.10.17 after they returned from Masindi for burial.

25 PW7, a Police Officer attached to Luwero Police Station, received the file in respect of the Accused on 23.10.17. By then, the Accused were in custody at Luwero Police Station. When he interviewed them, they denied causing the death of the deceased. They told him that on the day the body was discovered, they had gone to graze cattle, but when they learnt of the death, they went to the deceased's home. He recorded their statements and sent them for medical examination. –
30 Exhibits P_{2A} and P_{2B}.

The same witness also recorded statements from some people in Senyomo Village, who told him that the Accused could not be found in the village after the death of Kaleeba. The statements were not exhibited. He is also the one who recorded the statements of PW5.

In contradiction of the evidence of PW2 and PW3, he stated that he was told that the deceased had been found unconscious but not yet dead. That he died after being removed from the bush. He visited the scene e in October, 2017.

At the close of the Prosecution case, Counsel for the Accused made a submission of the case to answer, pointing out inconsistencies in the Prosecution evidence, interalia. The submission was overruled by court and the Accused were put on their Defence.

They both gave sworn statements and called two witnesses.

A1 testified that on the date in question, he took the cows to graze. Upon returning home in the evening and learning of the death of the deceased, he went to the deceased's home and attended the overnight vigil. He also attended burial in Masindi.

That he and A2 were arrested on 18.10.17, from their homes without being told why, and were taken to Kikyuusa Police. There, they were informed that the order for their arrest came from Luweero. It was at Luweero that they were told that it was alleged that they had murdered Kaleeba.

A2 totally denied knowing anything about the death of the deceased, or having been seen in the bush where the body was found. He denied knowing PW5 or that

he ever saw them carrying the deceased on the evening prior to his death or that there was any problem between them and the family of the late Kaleeba.

A2 also vehemently denied having anything to do with the death of the deceased.

5 He testified that on 11.02.17, he went to the garden to work, after which, he went to the Trading Center. That is where he learnt of the death of the deceased.

He too went to the deceased's home and spent the night there. It was alleged that a bottle of cattle spray had been found next to the body of the deceased.

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The next day, they went with other people to Masindi for burial. Upon returning home, they continued with their normal duties until they were arrested on 18.10.17.

He disputed the evidence of PW3 and PW5.

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The two witnesses called by the Accused included DW3, the LC 1 Chairman of the area.

He confirmed that the two Accused attended the burial of the deceased and
20 returned to their homes thereafter. While acknowledging that a village meeting was held for the residents to give information as to who could have killed the deceased, and that people were given papers to write on; to date, the results of the exercise have never been disclosed.

25 He denied knowing PW5 and asserted that the Accused never ran away from the village and were there until they were arrested.

DW4, a Brick maker, learnt of the death of the deceased at about midday from a bodaboda rider who had been called to take the deceased to hospital.

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He went to the deceased's home and was present when the Police and the doctor came to examine the body. He attended the night vigil and burial in Masindi with the Accused. And he also confirmed that the Accused remained in the village until they were arrested in October, 2010.

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It is apparent from the evidence available that there was no eye witness to the alleged murder of the deceased. The evidence linking the Accused to the commission of the offence is circumstantial.

10 In determining the issue of participation therefore, this court reminds itself of the requirement to examine the evidence closely, before basing a conviction on it, to determine that there are no factors destroying the inference of the Accused's guilt. – Refer to **Thiaka vs. Republic [2006] 2 EA 326 (CAK)** and **Charo vs. Republic [2007] IEA (CAK)**.

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The court also bears in mind the established general rule that *“an accused person does not bear the burden to prove his innocence. And that by putting forward a Defence like alibi or any other, an accused does not thereby assume the burden of proving the defence except in a few exceptional cases provided for by law. It is up to the prosecution to disprove the defence of the accused persons by adducing evidence that shows that, despite the defence, the offence was committed and it was committed by the accused persons”*. See the case of **Kato vs. Uganda [2002] IEA 101**, **Wamalwa and Another vs. Republic [1999] 2 EA 358 (CAK)** and **Sekitoleko vs. Uganda [1967] EA 531**.

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The submissions of both Counsel will also be taken into consideration. The submissions raised such issues as circumstantial evidence, Defence of alibi, contradictions in the Prosecution evidence, conduct of the Accused before and
30 after the death of the deceased.

The circumstantial evidence in this case relates to whether PW4, stated saying that she saw the two Accused in a bush and they ran away. And then PW5 who stated that the evening before the deceased was found dead, he found the two Accused carrying him.

Counsel for the Accused argued that, looking at the facts, there is no direct evidence pointing to the participation of the Accused in the murder.

In their Defence, the Accused explained their whereabouts on the fateful day, which evidence was confirmed by their witnesses.

And when all circumstances of the case are taken into consideration, there is no independent evidence leading to the conclusion that they committed the offence or participated in the commission of the crime.

Counsel for the State contended that the evidence of PW3 and PW5 was not disputed in cross examination. And it was only during cross examination that the issue of not knowing PW5 was raised.

Therefore that, the Defence was only meant to misguide the court.

And that while the Prosecution did not lead any direct evidence to the participation of the Accused persons, their conduct on 10.02.17 and in the morning of 11.02.17, is circumstantial evidence which is strong to prove that they caused the death of the deceased person.

The case of **Aharikundira Yustine vs. Uganda Cr. Appeal No. 104/2009 CA** where the court relied on the case of **Kazibwe Kassim vs. Uganda. SCCA 01/2003** was cited in support of Counsel's arguments.

She the asserted that, the events of 10.02.17 and 11.02.17 where the Accused are said to have been seen with the deceased and then where the body was recovered from is incapable of another explanation apart from their guilt.

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That while it is true they went to the vigil and for burial, Police had received the information, that the Accused had been seen at the place where the body was recovered from. But for reasons only known to them, the Police did not act immediately. That, that was taken advantage of by the Accused to make
10 appearance at the vigil and the burial, to show that they were concerned.

Court was then urged to disregard their conduct and not take it as innocent, but rather find that the Prosecution had proved the case against the Accused to the required standard, find Accused guilty and convict them as charged.

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It is apparent from the evidence on record that, there were no eye witnesses to the offence. The Prosecution solely relied on the circumstantial evidence to contend that it was both Accused persons who killed the deceased.

20 In determining the participation of the Accused in the alleged crime, court accordingly bears in mind the established principle of law that ***“to find a conviction exclusively upon circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt”***. See Chard vs. Republic [2006] IEA
25 43 (CAK).

Be that as it may, this court is also mindful of the established principle of decided cases that ***“circumstantial evidence is often the best evidence. If evidence of surrounding circumstances which by intensified examination is capable of
30 proving a proposition with the accuracy of mathematics, it is no derogation of***

evidence to say that it is circumstantial evidence.” - Refer to **Thiaka vs. Republic [2006] 2 EA 362.**

Nonetheless, Court is mindful of the principle that *“an accused person who raises a probable defence does not thereby assume the burden of proving it. It is up to the prosecution to prove that despite the defence, the offence was committed and it was committed by the accused person(s).*

This is because a conviction depends upon the strength of the Prosecution case and not on the weakness of the Defence”.

After careful consideration of the evidence of both the Prosecution and the Defence in this case, this court finds that there are various contradictions and inconsistencies that go to the root of the Prosecution case.

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PW2, the mother of the deceased testified that there was a land wrangle between the family of the deceased and the Accused person. And that could be the probable motive for the Accused to have killed the deceased. While motive would not be an important factor in commission of the offence, PW3 the daughter of the deceased denied there having been any land wrangle between the families.

20

The alleged conduct of the Accused before the death of the deceased is also brought into question.

Why would PW5, who alleges to have seen the Accused person the evening before, carrying the deceased in what he considered suspicious circumstances, only bring up the matter at the village meeting called to determine who had killed the deceased?

25

The meeting was held on long after the burial of the deceased? And it is on record that the results of the said meeting were never made public.

5 PW3 the daughter of the deceased also claims that she saw the two Accused persons in the bush where the body of her father was found and when they saw her they run away. If this information was revealed to Police immediately thereafter, why would it take such a long time to arrest the Accused?

10 It is not disputed that the Accused attended vigil and also travelled to Masindi for burial, after which they returned to their homes.

Why would a village meeting be called to determine who the culprits were?

15 If there was concrete evidence connecting Accused to the crime, why would it take eight months to arrest them, when they returned to their homes after burial.

That the Accused were arrested from their homes was confirmed by the two witnesses they called in their Defence, who included the LC1 Chairperson of the village. The evidence of the two witnesses was not discredited.

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Looking at all the surrounding circumstances, is there a possibility that the deceased could have committed suicide? A bottle⁰⁰ of cattle spray was found next to the body. It is mentioned by the Medical Officer who examined the body of the deceased and made a postmortem report Exhibit P₁.

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While the report attributed the cause of death to trauma as a result of the alleged beating, why wasn't an autopsy performed to determine whether the deceased had ingested the poison?

It is the Prosecution evidence that the people who answered the alarm after the body was discovered tried to give him milk but it would not go down.

The two Accused persons raised alibis that were not disproved by the Prosecution.

5 They stated that on the date the body of the deceased was discovered, they were out in the field grazing cattle and working in the garden respectively.

When they learnt of the death of the deceased, they went to his home and attended vigil and the next day travelled to Masindi together with other people to attend
10 burial. After which, they returned to their homes, from where they were arrested eight months later.

This cannot be said to be conduct of guilty person.

15 After the evaluation of the evidence of both the Prosecution and the Defence, this court finds that no credible independent evidence was adduced by the Prosecution to link the Accused to the murder of the deceased.

The inconsistencies in the Prosecution case which were not explained by the
20 Prosecution are resolved in favor of the Accused.

For all those reasons set out in this judgment and in disagreement with the Assessor's opinion, this court finds that the Prosecution failed to prove to the required standard the participation of the Accused persons in the commission of
25 the offence.

They are accordingly hereby not found guilty and are acquitted of the charge and are hereby set free forthwith unless otherwise held on other legal charges.

FLAVIA SENOGA ANGLIN

JUDGE

30.11.2020