THE REPUBLIC OF UGANDA

IN THE HIGH COURT UGANDA AT JINJA

CRIMINAL SESSION NO.0029 OF 2023

UGANDA::PROSECUTION

VERSUS

A1 GUUDO BOSCO::

A2 MUSASIZI ESEZA :: } **ACCUSED**

BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

RULING ON A PRIMA FACIE CASE

Guudo Bosco (A1) and Musasizi Eseza (A2) herein referred to as the accused persons were indicted with the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act (PCA). It is alleged that the accused persons on the 18th day of August 2022 at Buwolero Nankulyaka Village in Jinja District, with malice aforethought, unlawfully caused the death of Kitimbo Jordan.

At plea taking, both accused persons pleaded not guilty to the indictment.

Representation

The prosecution was represented by Shallote Kamusiime, a Senior State Attorney in the Office of the Director of Public Prosecutions. The accused persons were represented by Counsel Daniel Mudhumbusi on State brief and Counsel Robert Esarait on private brief.

After the closure of the prosecution's case, the prosecution did not make any submissions on a primafacie case/ no case to answer. However, Counsel for the accused persons indicated that he would file written submissions on a no case to answer which were filed in this Honourable Court on 22/9/2023.

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Submissions by accused persons on no case to answer

Counsel for the accused persons stated that the accused persons before this Court were charged with the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap 120. That it is the position of the law that for a no case to answer to be upheld, the prosecution case would have been discredited during cross examination or, it can arise, where the necessary ingredients of the offence have not been proved by the prosecution. Thus the prosecution at this stage should have established a primafacie case against the accused person. See **Fred Sabahashi vs Uganda, Criminal Appeal No.23 of 1993 (SC).**

To prove the ingredients of murder Counsel relied on the case of ***Uganda versus Ssebuwufu Mohammed and 7 Others Criminal Case No.0493 of 2015***.

Counsel submitted that in this case before Court, the defence does not dispute the fact of death.

However, he indicated that the prosecution has failed to adduce evidence to prove that Jordan Kitimbo's death was unlawful and was caused with malice aforethought by the accused persons.

Counsel submitted that all evidence submitted by PW3, the mother of the deceased child, Jordan Kitimbo and PW2, the LC1 Chairman of Buwolelo village all indicated that Jordan Kitimbo's death was lawful and excusable having been caused by a sickness commonly known as '*Olwenyanja*' and that such affliction manifested through widespread body wounds arising from blisters akin to the type caused by hot water and not even timely medical endeavors undertaken by the accused could reverse the same.

On the element of malice aforethought, Counsel submitted that Court should take interest in the conduct of the accused, especially before the fact of Jordan Kitimbo's death. Counsel argued that PW3's evidence is corroborated by PW2's evidence who testified to have known the accused for 8 years and that he had heard that there was a sick child at A1's home. It was his further evidence that when he visited the accused persons' home, he found A2 who told him that the child was lying down in the sitting room and had been brought to the home by his biological mother when he was already sick. Upon being cross examined, PW2 informed Court that he was aware that the deceased child had been receiving treatment even at home before being taken to hospital. That it was also the evidence of PW4, the deceased's maternal grandfather, that A1 had called him on 17/08/2022 to inform him that the

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deceased was sick and as a follow up, A1 on the 18/08/2022 called PW4 informing him that he was taking the child, Jordan Kitimbo to Buwenge hospital, but that later, Kitimbo died.

Counsel argued that although it is an absurdity that Jordan Kitimbo, ordinarily supposed to have enjoyed the fullness of life and its related unlimited benefits, died at such a tender age, a critical summation of the evidence of PW2 and PW3 clearly indicates that Jordan Kitimbo died in the hands and care of the accused who possibly did what is positively imaginable in the circumstances to save his life.

Additionally, if at all there was any participation by the accused related to the death in issue, it is arguable that it is participation any parent in their circumstances would have undertaken to save their ailing child's life. Counsel emphasized that the accused persons participated by attempting to save the deceased's life. Counsel submitted that the prosecution's evidence pertaining to the ingredients of malice aforethought and participation of the accused in the commission of the offence was demonstrably insufficient to warrant the accused to be put to their defence and prayed that this Honourable Court agrees with this position.

On the element of common intention to execute an unlawful purpose, Counsel quoted Section 20 of the Penal Code Act which is to the effect that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence. Counsel relied on the case of **Simbwa versus Uganda Criminal Appeal No. 023 of 2012** to support this position.

Counsel argued that neither the evidence of PW2, PW3 nor PW6 (Dr. Juliet Nabirye, the Medical Doctor who conducted the postmortem of the deceased) projects the notion of common intention of the accused persons into the Court's mind. Subsequently, the actions of the accused persons are actions this Court cannot comfortably frame to be actions tainted with a common intention to murder Jordan Kitimbo. In conclusion, Counsel submitted that the evidence adduced by the prosecution had failed to illustrate a meeting of minds between the accused to unlawfully terminate Jordan Kitimbo's life.

Counsel further argued that the success of any criminal trial has its roots in the depth of the cogency of adduced witness evidence so much that such evidence should not render itself to any doubt, however microscopic. He invited this Honorable Court to

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look at the evidence of Nabirye Juliet (PW6), the Medical Doctor with a microscopic lens. Counsel submitted that the evidence of PW6 had glaring gaps. That whereas, PW6 testified to have filled in Police Form 48B, the Form as it stands its own right does not indicate that it is Jordan Kitimbo's body that was examined by PW6 but that of the Area Councillor. PW6 testified not to have signed Form 48B, the gravity of the matter notwithstanding. He emphasized that contrary to known practice, PW6 further testified that she had received Form 48B from the Police with some of its contents part-filled, yet Police Form 48B should only be only filled by the examining Medical Officer. Additionally, PW6 presented evidence of the deceased's photos to support her findings yet curiously, it was her evidence that she neither took the photos nor knew the person who photographed the deceased's body.

Counsel submitted that with the foregoing evidence, a conclusion is involuntarily provoked that actually no physical examination of Jordan Kitimbo's body was undertaken by PW6. That it is suffice to say that whatever post mortem report PW6 purports to have written was squarely based on the photos taken by the Police and given to her so as to sustain grand falsity before this Court.

It was further PW6's evidence that whereas she could have conducted an internal body examination of the deceased, the theatre facilities at Buwenge Hospital were insufficient to enable the conduct of such examination. That due to the insufficiency of the theatre facilities at Buwenge Hospital, PW6 was unable to conduct a comprehensive post mortem and as a result formulated the speculative conclusion that the probable cause of the deceased's death was burns occasioned by hot water.

Upon cross-examination, PW6 testified that her conclusion meant "the most likely cause of death" was burns occasioned by hot water. Plainly speaking what this phraseology *"the most likely cause of death"* means is that there could have been other possible causes of Jordan Kitimbo's death; in other words, it is a conclusion that does not lock out other possibilities of the cause of death such as normal sickness or diseases suffered by children.

Counsel further submitted that whereas it is common practice and within the knowledge of ordinary minds of society that post -mortems are ordinarily undertaken by Pathologists, to be specific, Forensic Pathologists, it was the evidence of PW6 that she is a qualified Medical Doctor and not a Pathologist. Counsel prayed to this Court to treat the evidence of PW6 as being unworthy of a response from the accused since her evidence was glaringly wanting and her competence questionable.

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In conclusion, Defence Counsel submitted that in light of the arguments made, it was clear that the prosecution had fallen short of adducing evidence cogent enough to put the accused persons on their defence; it is evidence hoisted on feeble stilts. Counsel prayed that the matter be dismissed on a no-case to answer and that Court should subsequently release the accused persons.

Court's analysis

Burden and Standard of proof

The burden of proof in criminal matters rests squarely on the prosecution and does not shift to the accused unless it is exempted by statute. The standard of proof is high; the prosecution must prove all the essential ingredients of the offence beyond reasonable doubt.

For the case of murder, the prosecution must prove each of the following essential ingredients;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

The prosecution led the evidence of six witnesses; Mulopa Simon (PW2), Kwikiriza Viola (PW3), Kalenzi Wilberforce (PW4), Detective Inspector of Police Moses Muwobi (PW5), Dr. Nabirye Juliet (PW6) and D/AIP Mucunguzi Prosper James (PW7) respectively.

The Law

At the close of the prosecution's case, **Section 73 of the Trial on Indictments Act (TIA) Cap 23** as amended, requires this Court to determine whether or not the evidence adduced by the prosecution has established a prima facie case against the accused person. It is only when a prima facie case has been made out against the accused that he/she should be put to his or her defence.

Section 73(1) of the TIA provides that; - "*When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing Court has been given in evidence, the Court, if it considers that there is no sufficient evidence that the accused or any one of several accused committed the offence, shall, after hearing the advocates for the prosecution and for the defence, record a finding of not guilty*".

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Prima facie case.

By law it is expected of the prosecution that, at the close of their case, they have made out a *prima facie* case, one on the face of it, which is convincing enough to require that the accused person to be put on his defence. Justice Stephen Mubiru in the case of **Uganda Vs Obur Ronald & 3ors Criminal Appeal No. 0007 of 2019 (HC)** stated that: -

"A prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence ***(See Rananlal T. Bhatt v R. [1957] EA 332).*** *The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.*

According to **A Guide to Criminal Procedure in Uganda" B.J. Odoki 3rd Edition at page 120,** it is stated that in order for the Court to dismiss the charge at the close of the prosecution case, Court must be satisfied that: -

a. There has been no evidence to prove an essential element of the alleged offence, or
b. The evidence adduced by the prosecution has been so discredited as a result of cross examination or, is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

The Evidence

Court analyzed the evidence adduced by the prosecution in proving whether the charge of Murder brought against the accused persons had been proved so as to be put to their defence. Court analyzed the ingredients of the offence as follows;

(1) That there was death

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It is trite law that death may be proved by production of a post -mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. ***(See Uganda versus Anyao Milton Criminal Session No. 5 of 2017)***

The prosecution adduced a post -mortem report dated 18th August, 2013 prepared by PW6, Dr. Juliet Nabirye, a Medical Officer at Buwenge General Hospital which was admitted as evidence and was marked as PEX3. Dr. Nabirye indicated to have examined the body of a two-year-old child. This evidence was corroborated by the testimony of PW7, D/AIP Mucunguzi Prosper James, a Senior Crimes Officer who was the Scene of Crime Officer in this case and had visited the accused persons' house with other Police Officers at Nakulyaku Buwolelo, Jinja Northern Division, Buwenge. He informed Court that he found a body of a young boy of about 4-5 years at the accused persons' home, covered with a white bedsheet. That he later took the body of the deceased child to Buwenge Health Center IV for post-mortem examination to be conducted.
Defence Counsel did not contest this ingredient and I therefore find that the Prosecution has proved this ingredient.

2) The death was caused by some unlawful act.

It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law **(See *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*).**

To prove that Jordan Kitimbo's death was unlawful, the prosecution relied on the evidence of PW6 who in both PEX3 (the postmortem report) and in her testimony in Court stated that the deceased body had old scars on the abdomen and on both legs and the back. That on further examination of the deceased's child's body, she observed extensive bruising and peelings of the skin on the left side of the scalp and the frontal bone and peeling of the skin to the inner left mid-thigh and blisters on the left lateral (outer knee) joint.

That she did not look at the internal injuries as the mortuary at Buwenge Health Centre IV was not equipped with a theatre to facilitate an internal examination of the deceased. PW6 further testified that the probable cause of death was burns by hot water in view of the peeling of the skin, the shiny skin of the body coupled with the discharge of whitish fluids where the skin was peeling off.

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However, this evidence was contested by the Defence as submitted above. I agree with the submissions of Counsel for the accused persons that the evidence of PW6 should be taken into consideration with caution given the fact that PW6 testified that there were other diseases which could have caused the said peeling off of the skin of the deceased child. PW6, as a Medical Doctor did not conduct the requisite tests to rule out those other possibilities but instead made a finding on general body observations.

Regarding PEX3 (the postmortem report) which was exhibited by PW6, she indicated NIL on the part of the report that required her to state whether she had observed internal injuries on the body of the deceased. Nil in simple terms means *nothing*. It should be noted that in her oral testimony, PW6 told Court that she was not able to open up the body of the deceased in order to conduct an internal examination due to the inadequate facilities of the mortuary at Buwenge Health Centre IV. I therefore find that the testimony of PW6 in this respect is difficult to believe and is tainted with falsehoods for having found that the deceased did not suffer from any internal injuries. Further the postmortem report PF48B was partially filled by another person when clearly it should only be filled by the Medical Officer who conducts the procedure. Under Sections 60 and 61 of the Evidence Act, it is provided that the contents of documents may either be proved by primary or secondary evidence. Primary evidence means the document itself produced for inspection by Court. **In Ug Vs Obur Ronald and 3 Ors (Cr. Appeal 7 of 2019),** it was held that*" a document is false if it purports to have been made in the form in which it is made by a person who did not infact make it in that form... "* Therefore, in the instant case, the postmortem report fails the test of qualifying as an authentic document that should be relied on by this Court.

In the instant case PW2, PW3 and PW4 all indicated that the deceased was a sick child. That even PW3 the mother to the deceased which evidence of sickness is corroborated with that of PW4 and PW2 indicated that she took the child to A1, the father of the deceased child and that the child suffered from a disease locally known as "Olweyanja". PW3 indicated that the child would get reddish wounds around the anus which would spread to other parts of the body and could only be treated with local herbal medicine. She also testified that the child had been sick for over 1 ½ months before she took him to A1 for treatment.

From the evidence adduced by the prosecution, it is evident that there is doubt cast on the identity of the actual body of the deceased person that was indicated on the post-mortem report as having been examined by PW6. There is no evidence on the post-mortem report, as presented to this Court that it was the body of Jordan Kitimbo that was examined. Rather the report indicates that the body that was examined was

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that of the Area Councillor. That notwithstanding, PW6 did not open up the body to ascertain the absence of internal injuries which would rule out any other causes of death. In the circumstances, I find that the prosecution failed to adduce sufficient evidence to prove the ingredient of unlawful death against the accused persons.

(2) That the unlawful act was actuated by malice aforethought.

The prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is defined under Section **191 of the *Penal Code Act*** as either an intention to cause the death of any person whether such person is the person killed or nor or knowledge that the act or omission causing death will probably cause the death of some person. The question for Court in this matter is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death.

In the case of ***R v. Tubere s/o Ochen (1945) 12 EACA 63***, Court set out the circumstances which the trial Court should consider in deciding whether there was malice aforethought in the killing of a person which are;

(a)The type of weapon used;

(b) The nature of injury or injuries inflicted;

(c) The part of the body affected and;

(d)The conduct of the attacker before and after the attack.

Malice aforethought being a mental element is difficult to prove by direct evidence. In the instant case PW2, PW3, PW4 all indicated that the deceased was a sick child. That even PW3 the mother to the deceased which evidence of sickness is corroborated with that of PW4 and PW2 indicated that she took the child to A1, the father of the deceased child since he was suffering from a disease locally known as "Olweyanja" and that the child had been sick for over 1½ months while in her care.

PW2 in his testimony stated that he had been informed by a one, Patrick Alibitya that the deceased child was mistreated that he went to the home of the accused persons to confirm this maltreatment. That on visiting the accused persons home, he confirmed that that the child was sick and he observed blisters on his body which were oozing fluid. That he advised A2 to take the child to hospital.

PW2 also testified that he had a child who had ever suffered from a similar disease that deceased child exhibited at the time he visited the home of the accused persons.PW2 further testified that according to him, the deceased child died of a

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sickness and that A1 tried to take him to hospital. This evidence is also corroborated by the evidence of PW 2 and PW4 who testified that the deceased child had been sick and by the time he was taken to the accused persons' home, he was already suffering from an ailment.

PW 7, the Scene of Crime Officer (SOCO) testified and in his report marked as PEX5, indicated that he held a meeting with the local authorities, the local community and the neighbours and he was informed that the accused persons were mistreating the deceased child. This evidence by PW7 was disputed by PW2 the LC1 Chairperson. PW7's evidence as to mistreatment is treated as hearsay as no neighbors of the accused persons he referred to were called by the prosecution to testify to prove this allegation. Therefore, the testimony of PW7 in respect of the mistreatment of the deceased by the accused persons is treated as hearsay as held in the case of **Uganda v Kisembo (Criminal Session 203 of 2014) [2019] UGHCCRD 7 (8 February 2019)**

I therefore find that no sufficient evidence has been adduced by the prosecution to prove the ingredient of malice aforethought against the accused persons.

(3) That it was the accused who caused the unlawful death.

There should be credible direct or circumstantial evidence placing the accused person at the scene of the crime as an active participant in the commission of the offence. **Section 19 (1) (b) and (c) of the Penal Code Act** specifies persons who are deemed to have taken part in committing an offence and to be guilty of the offence and who may as a consequence be charged with actually committing it. This includes every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence.

Prosecution relied on the testimonies of PW3 the mother of the deceased and PW4 the maternal grandfather who both testified that A1 called them about the sickness of the accused but he failed to disclose to them where the deceased child was at the time and thus they could not access the child.

PW7 (SOCO) in his testimony also stated that when he visited the crime scene, he found the body of the deceased at the home of the accused persons and on taking photographs of the deceased, he observed it had wounds which could have been caused by hot water. That the body also had old scars.

I believe that prosecution evidence against the accused intended to establish the participation of the accused persons in the commission of the offence is entirely

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circumstantial. In a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference **(see *Shubadin Merali and another v. Uganda [1963] EA 647*; *Simon Musoke v. R [1958] EA 715*; *Teper v. R [1952] AC 480* and *Onyango v. Uganda [1967] EA 328 at page 331*).**

It is my finding that the evidence adduced by the prosecution falls short of linking the accused persons to the commission of the offence of Murder. I therefore hold a submission of no case to answer and accordingly find the accused persons not guilty of Murder and discharge them of this offence under Section 73(1) of the Trial of Indictment Act Cap 23 as amended.

I so order.

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HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA
JUDGE
28th September, 2023.