

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE

CRIMINAL SESSION CASE NO. 0048 OF 2019

KAB AA 14/2018

CRB114/2018

10 **UGANDA=====PROSECUTION**
VERSUS
MUJUNI HERBERT=====ACCUSED

BEFORE: HON. JUSTICE SAMUEL EMOKOR

JUDGMENT

This case entails an Indictment for murder contrary to Section 188 and 189 of the Penal Code Act against Mujuni Herbert. The facts giving rise to this Indictment are that Mujuni Herbert and others still at large on the 05/02/2018 at Nyamashamba Cell, in Rukiga district with malice aforethought unlawfully killed Barigye Gerald.

The accused pleaded not guilty.

Representation:

Ms Najjunju Julie (State Attorney) appeared for the Prosecution while Mr Felix Bakanyebonera appeared for the accused on state brief. The

5 assessors were Mr Ndyamutunga Livinstone and Ms Muhawenimana Sylvia.

During the preliminary hearing sanctioned under **Section 66 of the Trial on Indictment Act (TIA)** Medical evidence in PF48 A, PF48 B, PF24, 1 sketch plan and 3 photographs were admitted as uncontested.

10 PF48 A is the request for post-mortem examination in respect of Barigye Gerald and the same was admitted as Exhibit P1. While PF48C was the Post-mortem report made at the request of the OCID Rukiga Police Station and the same was conducted in the presence of Sgt Etuju Sam and the body was identified by a one Tugumisirize Gerald. The
15 location of the body is reported as lying in the garden of the late Bugunga. The description of the clothing on the body was a T-shirt stained with blood including a yellow jacket. The external marks of violence were multiple lacerations on the scalp with the autopsy findings being:

- 20
- Lacerations on the scalp.
 - Hairline fracture on the frontal bone.
 - Subdural and epidural haemorrhage.
 - Multiple fractures and bruises all over the body-16 counted.

The cause of death was listed as closed head injury (blunt force
25 trauma).

5 The weapons seen likely to have been used upon the body, the report indicates were two sticks (pestles) with blood stains.

The post-mortem report in PF48 C was received as Exhibit P2.

The PF24 was in respect to examination of the Accused carried out on the 07/02/2018 and his mental state was found to be normal. The same
10 was received as Exhibit P3.

The burden and standard of proof:

The accused pleaded not guilty and this being a criminal case the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused
15 person and the accused can only be convicted on the strength of the prosecution case and not on the weakness of the defence case.

(See Ssekitoleko vs. Uganda (1961) EA531)

The accused doesn't have any obligation to prove his innocence and the onus is on the prosecution to prove each of the ingredients beyond
20 reasonable doubt before it can secure a conviction. Proof beyond reasonable doubt though doesn't mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at best creates a mere fanciful possibility but

5 not any probability that the accused is innocent. (*See also Miller vs. Minister of Pensions (1947) 2 ALLER 372*)

Ingredients of the offence.

The prosecution must prove each of the following essential ingredients beyond reasonable doubt for the accused to be convicted of murder.

- 10
1. Death of a human being.
 2. The death was caused by some unlawful act.
 3. The unlawful act was actuated by malice aforethought: and lastly
 4. That it is the accused who caused the unlawful death.

15

1) Death of a human being:

Death maybe proved by production of a post-mortem report or evidence of a witness who states that they knew the deceased and attended the burial or saw the dead body.

20 **PW1 Orishaba Jane** and **PW2 Tumusiime Jacenta** both testify that in the morning of the 05/02/2018 at around 7:00 am they viewed a body of a man who was dying with multiple injuries and indeed passed on shortly thereafter who was unknown to them at the time but was

5 identified to them by the accused as being the son of Sanyu from
Rwembumba.

Sgt Etoju (PW3) the Investigating Officer and **D/C Twesigomwe
Piston (PW4)** the Scene of Crime Officer all testified to viewing the
body and their investigations revealing that the same belonged to
10 Barigye Gerald.

This court is also in receipt of the post-mortem report in Exhibit P2 that
details the manner in which the deceased met his death.

I therefore, I find that the prosecution has proved beyond reasonable
doubt the death of Barigye Gerald.

15 **2) That the death was caused by some unlawful act:**

The law presumes that any homicide (killing of a human being by
another) is presumed to have been caused unlawfully unless it was
accidental or it was authorised by law.

(See R vs. Gusambizi S/O Wesonga (1948) EACA 65.)

20 It is the undisputed evidence of all the four Prosecution witnesses PW1,
PW2, PW3, and PW4 that the clothes of the deceased Barigye Gerald
were blood stained and he bore injuries all over his body including his
head. It is the evidence of PW1 and PW2 that the deceased passed on
shortly after they discovered the body.

5 There is absolutely no evidence on record that the death was either excusable or authorised.

I therefore, I find that the prosecution has proved beyond reasonable doubt that the death of Barigye Gerald was unlawful.

3) That the unlawful act was actuated by malice aforethought:

10 ***Under Section 191 of the Penal Code Act (PCA)***, malice aforethought maybe proved by direct evidence or maybe inferred from the evidence indicating knowledge that the conduct of an accused would probably cause the death.

Malice aforethought may also be inferred in regard to the following:

- 15 a) The weapon used i.e. whether it was a lethal weapon or not.
- b) The part of the body that was targeted i.e. whether it is a vulnerable part or not.
- c) The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and
- 20 d) The conduct of the accused before, during and after the incident i.e. whether there was impunity.

See R vs Tubere s/o Ochen (1945) 12 EACA 63

It is the evidence of PW₁, PW₂, PW₃, and PW₄ that the body of the deceased bore injuries including on the head. The post-mortem report

5 in Exhibit P2 details the nature of injuries that the deceased suffered including a hairline fracture of the frontal bone, multiple fractures and bruises were found numbering 16 all over the body and the cause of death being closed head injury.

It is also the evidence of PW3 and PW4 that they recovered two blood
10 stained sticks next to the body of the deceased. The two sticks were tendered to court as Exhibit P7.

I am satisfied that the two sticks in Exhibit 7 when used as a weapon against a human being can be lethal.

I am also satisfied that the part of the body targeted in the attack
15 against the deceased which include the head was indeed a sensitive and vulnerable part of the body.

(See Okello Okidi vs. Uganda Supreme Court Criminal Appeal No. 3 of 1995)

I am also satisfied by the evidence that there was repeated use of the
20 sticks on the body of the deceased that accounted for multiple fractures and bruises numbering up to 16.

I therefore, I find that the prosecution has proved beyond reasonable doubt that the unlawful death of the deceased was actuated by malice aforethought.

5 **4) Participation of the accused:**

It is the evidence of PW1 and PW2 that on the 05/02/2018 at around 7:00 am while they were viewing the body of the deceased that had been discovered by PW1's son at the road side opposite PW1's home in Nyamashamba village they were joined by the accused who asked
10 wondering, "may this boy have fought when he reached Nyamashamba?" and that when they asked the accused if he knew the person the accused replied that it is the son of Sanyu from Rwembumba before turning the body to look at the face. Both PW1 and Pw2 testified that they observed that the accused had blood stains on the collar of his
15 shirt and that when they questioned him as to why he had blood on his shirt, the accused ran away without replying.

PW3 the Investigating Officer in this case testified that in the course of his investigations he received information that the accused, Junior, Maclean and Tafur had been seen drinking in the bar of a one Lovence
20 in the night of the 04/02/2018 and that when he interrogated Lovence she told him that the deceased and 4 others were drinking in her bar until late and that a one Junior picked a quarrel with the deceased over money that resulted into a fight and that the accused Mujuni and others had sticks and she chased them out of her bar and locked up. PW3 also
25 testified that he visited the bar and found a table and bench with blood

5 on them. It is also his evidence that the accused was arrested that morning of the 05/02/2018 from Kebison in Rukungiri on the run and that the shirt worn by the accused was blood stained and the same was recovered sent for analysis.

PW3's evidence is corroborated by that of PW4 the Scene of Crimes
10 Officer who testified that on the 05/02/2018 while recovering exhibits from the scene where the deceased's body was found, they received information that the accused and others had been involved in a fight at a one Lovence's bar and that they moved to the bar and about 2 metres opposite the bar they found dry blood on the ground that he recovered
15 for analysis and 2 more drops at the door way/ entrance to the bar and that once inside they conducted a search of the bar and found attempts were made to clean up the bar but visible blood was on still on the table and on the benches.

It is the also evidence of PW4 that he later recovered from the accused
20 the shirt that he was wearing with suspected blood stains and that all the samples that he collected containing suspicious blood stains were sent to the Directorate of Government Analytical Laboratory for analysis.

The Prosecution also presented **PW5 Jane Nabwoye** a Government
25 Analyst with 12 years' experience who testified that D/ASP Onesmus

5 Kamugisha vide CRB 114/2018 dated 09/02/2018 sent samples for analysis and the same was received on 12/02/2018 as follows:

- i. Exhibit 1 was a blood sample from the scene where the body was found.
- ii. Exhibit 2 blood stains with soil got near the bar.
- 10 iii. Exhibit 3 a shirt with blood stains worn by a suspect Mujuni Herbert.
- iv. Exhibit 4 blood sample of the deceased.
- v. Exhibit 5 blood stain picked from the table found in the house of Friday Lovence.

15 That PW5 was requested to ascertain;

1. Whether the suspected stains on Exhibits 1, 2, 3, and 5 is blood of human origin.
2. Ascertain whether the deceased Barigye Gerald is the donor of the suspected biological material on Exhibits 1, 2, 3, and 5 using
20 Exhibit 4 as the reference samples from the deceased Barigye Gerald.

The findings of PW5 as reported were as follows:

- i. Suspected stains on Exhibit 1, 2, and 3 tested for human blood.

- 5 ii. The deceased Barigye Gerald is the donor of the male DNA profile recovered from the blood stains on Exhibit 3 shirt of Mujuni Herbert and 1 scene blood.

This report was received as Exhibit P9.

10 The Accused in his sworn defence denied the charge against him stating that he knows nothing about Barigye Gerald or how he came to meet his death and neither does he know Orishaba Jane (PW1) nor Musiimenta Jacenta (PW2) or the blood stained shirt that they made reference to. It is his defence that Pw1 and PW2 told lies against him and that he only met Piston (PW4) at Rukiga police station and no shirt
15 belonging to him was ever removed for DNA testing and as such the shirt tested for DNA didn't belong to him.

It is the defence of the Accused that on 01/02/2018 he went to Nyarushanje where he works for a one Vene and remained there until the 06/02/2018 when he was arrested.

20 The evidence presented by the prosecution in this case is circumstantial since there is no direct witness. In this the regard the court in **Simon Musoke vs. Uganda (1958) EA held that:**

“in a case depending exclusively on circumstantial evidence the judge must find before judging upon conviction that the exculpatory facts

5 *where incompatible with the innocence of the accused and incapable
of explanation upon any other reasonable hypothesis than the guilt.”*

This court finds the evidence presented by the prosecution to be cogent and very consistent. PW1 and PW2 both testified that they have known the accused since his birth and that he is from Nyakasa village. Indeed
10 the Accused in his defence confirmed that is a resident of Nyakasa village. Both PW1 and PW2 testified that they saw the accused at about 7:00 am in the morning of the 05/02/2018 and spoke to him. This court takes cognisance of the fact that 7:00 am is already day time and day light is available at such a time. This view is supported by the definition
15 of night in the Penal Code Act as being: *“night” or “night time” means interval between half past six o’clock in the evening and half past six o’clock in the morning”*

I am therefore sufficiently satisfied that at 7:00 am there was sufficient day light for PW1 and PW2 to identify and recognise the accused who
20 they had known since birth and from a neighbouring village of Nyakasa. The Accused also had a conversation with PW1 and PW2 when the Accused asked a rhetorical question, “may this boy have fought when he reached Nyamashamba?”

5 I am therefore sufficiently satisfied that both PW1 and PW2 properly identified the accused in the morning of 05/02/2018 and I rule out any possibilities of error in his identification.

The rhetorical question of the accused whether the deceased was involved in a fight at Nyamashamba is confirmed by the evidence of
10 PW3 and PW4 who in their Investigations visited the bar belonging to a one Lovence in Nyamashamba where they were informed by Lovence that on the 04/02/2018 the Accused and 3 others were drinking inside her bar with the deceased when one of them picked a quarrel with the
15 accused and others were armed with sticks and that she chased them out of her bar and locked up.

The findings of PW3 at Nyamashamba corroborate the evidence of PW1 and PW2 that the Accused asked whether the deceased had fought at Nyamashamba. It is illogical to imagine that a total stranger would
20 pause the question asked by the Accused in the morning of 05/02/2018 unless he had been either witness or participant in the fight on the night of the 04/02/2018 which fight PW3 was able to discover took place.

The presence of blood stained sticks next to the body as confirmed in Exhibit P2 further corroborates the investigative findings of Pw3 that
25 sticks were used in the assault of the deceased. Further corroboration

5 is got from the findings in Exhibit P9 that confirms that the blood found near Lovence's bar actually belonged to a human being.

It is the evidence of both PW1 and PW2 that they observed that the Accused had blood stains on the collar of his shirt and that when they questioned him over the same, the Accused ran away.

10 *In Rex vs. Tubere Son of Ochen (supra) the East African Court of Appeal held that: the conduct of an accused person before or after the offence in question might sometimes give an insight into whether he or she participated in the crime.*

The conduct of the accused person in running until his arrest later in
15 Kebison in Rukungiri District rather than remaining to offer some sort of explanation as to how the blood stains got on to his shirt points irresistibly towards his guilt.

The findings in Exhibit P9 that the blood stained shirt recovered from the Accused by PW4 were found to belong to the deceased Barigye
20 Gerald is irrefutable scientific evidence that the accused did participate in the assault and murder of the deceased or else how did he come to be found in possession of his DNA on his clothes.

The only contradiction that this court has found in the prosecution evidence is the description of the shirt that the Accused was wearing.

5 According to PW1 it was a blue T-shirt, PW2 stated that it had been five years since she saw the shirt and she could not describe it while PW3 described it as being spotted white and black and PW4 described it as being white and black with spots.

The exhibit slip in Exhibit P5 describes the shirt recovered from the
10 Accused as being white and black with spots.

This court has had the benefit of looking at Exhibit P6 a photograph taken of the shirt by PW4 and finds the same to be a blue white checked shirt.

The court in **Alfred Tajar vs. Uganda (1969) EACA** held that minor
15 discrepancies should be ignored if they don't affect the main substance of the prosecution case.

It is Imperative to note that the Prosecution witnesses as pointed out by PW2 are giving their evidence 5 years after the fact. Their memory in regard to colour and description cannot therefore be expected to be
20 razor sharp.

I am satisfied that the colour blue given by Pw1 and white given by both PW3 and PW4 are both dominant colours on Exhibit P6. The black colour made reference to by PW3 and PW4 was an error in judgment

5 on their part. It is imperative to note that the exhibit slip in Exhibit P5 was prepared PW4.

I find the error in description of the shirt to be minor since all the four Prosecution witnesses in PW1, PW2, PW3, and PW4 testified that the blood stains on the shirt worn by the accused was on the collar as
10 corroborated in Exhibit P6. It therefore doesn't go to the root of the Prosecution case.

I am persuaded by the evidence on record that the shirt Exhibit P6 that was the basis of the DNA test in Exhibit P9 belongs to the Accused.

I don't accept the defence of the accused that the shirt is unknown to
15 him. PW1 and PW2 were emphatic that the shirt worn by the accused in the morning of the 05/02/2018 was blood stained on the collar and the same was recovered from the Accused the same day by PW4.

I also do not accept the defence of alibi put up by the Accused that he was in Nyarushanje in Rukungiri District at the time of the murder
20 of the deceased on the 05/02/2018. This defence has been completely discredited by the Prosecution evidence and the Accused has been placed at the scene of crime.

(See Kyalimpa Edward vs. Uganda SCCA No. 10/1995).

5 The Supreme Court in *Mbazira Siragi & Anor vs. Uganda Sc. Cr. Application No. 7/2004* cited with approval the decision in *Teper vs. R (2) (1952) AC 480* in which the court held that:

10 *“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.*

I have carefully considered the circumstantial evidence in this case arising from the blood stains first observed in the morning of the 05/02/2018 on the shirt of the Accused, his conduct when the same was revealed to him, the analysis of the blood sample recovered from the soil near Lovences bar and the blood stained shirt worn by the accused upon arrest.

20 This court has considered the evidence adduced by the prosecution and defence together and found no other co-existing circumstances which would weaken or destroy the inference of the accused’s guilt.

The evidence on record appears to suggest that at least four men including the accused could have been involved in the murder of the deceased. It is therefore not possible for one to be certain whether it is the accused or one of his accomplices that struck the fatal blow

5 since the deceased was repeatedly assaulted all over the body including on the head.

The above fact notwithstanding **Section 20 of the Penal Code Act** provides that:

10 *“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of that purpose, each of them is deemed to have committed the offence”*

15 It therefore follows that the accused is as guilty as the rest of his accomplices in the murder of the deceased.

This court is in full agreement with the assessors and finds that the prosecution has proved its case beyond reasonable doubt and accordingly finds the accused guilty of the offence of murder contrary to Section 188 and 189 of the Penal Code Act and convicts
20 him of the same.

Before me,

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Samuel Emokor

Judge

2nd May 2023

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