

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-00333 OF 2020

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UGANDA=====PROSECUTION

VERSUS

- 10
1. NAMUMANYA ALLAN
 2. TUHAIRWE BRIAN Alias Dogo
 3. TUKUGIZIBWE JONATHAN Alias TEDIDE=====ACCUSED

BEFORE: HON. MR. JUSTICE DAVID S.L. MAKUMBI

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JUDGMENT

BACKGROUND:

The indictment in **Count 1** of this case is that of **Murder contrary to Sections 188 and 189 of the Penal Code Act.**

20 It is alleged that on the 19th day of October 2021 Namumanya Allan, Tuhairwe Brian alias Dogo and Tukugizibwe Jonathan alias Tedide unlawfully killed Kasangaki Wilson with malice aforethought in Kibale National Park at Sebitole in Kabarole District.

The indictment in **Count 2** of this case is that of **Aggravated Robbery contrary to Sections 285 and 286 of the Penal Code Act.**

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It is alleged by prosecution that on the 19th day of October 2021 Namumanya Allan, Tuhairwe Brian alias Dogo and Tukugizibwe Jonathan alias Tedide robbed Kasangaki Wilson of Motor Bajaj Boxer Registration No. UFH 511L valued at UGX 5,050,000 (Five Million Fifty Thousand Shillings) in Kibale National Park at Sebitole in Kabarole District
30 and that before or immediately after the said robbery caused the death of Kasangaki Wilson.

The Prosecution's case in brief is that on the 19th day of October 2021, the deceased one Kasangaki Wilson went to work as a boda boda rider on his motorcycle Reg. No. UFG 511L. At about 8AM the Accused persons Allan Namumanya A1, Brian Tuhairwe A2 and
35 Jonathan Tukugizibwe A3 approached the deceased to negotiate for his services. The deceased was seen leaving with A2 and A3 while A1 remained behind. The deceased was never seen alive from that point.

Game Rangers in Sebitoli National Park on 27th then found the deceased's body October 2021. The decomposing body was taken for post mortem dressed in a white jacket,
40 black faded jeans, and black gumboots with white stockings. The body also had a penetrating wound at the right side of the neck and cause of death was determined to be sharp force trauma.

On 28th October 2021 A1 was seen around Harugongo and arrested by a boda boda cyclist. He was taken to police where he was subsequently picked out of an
45 identification parade.

On 27th July 2022 A2 and A3 were rounded up in a security operation in Fort Portal City and were also picked out of an identification parade as the persons last seen leaving with the deceased.

All the Accused persons were charged accordingly.

50 In this matter the Accused are charged with the offence of Murder and that of Aggravated Robbery.

EVALUATION OF EVIDENCE:

For an accused person to be found guilty of the offence of **Murder**, the prosecution must prove the following ingredients:

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- 1) That the death of a human being occurred;
 - 2) That the death was caused unlawfully;
 - 3) That the death was caused with malice aforethought; and
 - 4) That the accused participated in the crime.

For an accused person to be found guilty of the offence of **Aggravated Robbery**, the
60 prosecution must prove the following ingredients:

- 1) Theft of valuable property belonging to the victim;
- 2) Use of violence or threat of use of violence during the theft;
- 3) Possession of a deadly weapon during the theft; and
- 4) Participation of the accused in the theft.

65 According to the time-honoured case of **Woolmington v DPP (1935) AC 462**, the Burden of Proof in criminal trials is always on the Prosecution. In that regard the Prosecution always has the duty to prove each of the ingredients of the offence and generally speaking the burden never shifts onto the accused except where there is a statutory provision to the contrary.

70 The Standard of Proof in criminal trials is proof beyond reasonable doubt and is met when all the essential ingredients of the offence are proved beyond reasonable doubt. The locus classicus in this regard is the case of **Miller v Minister of Pensions (1947) 2 All ER 372** wherein Lord Denning stated at Pages 373-374 that,

75 *“The degree of beyond reasonable doubt is well settled. It need not reach
certainty, but it must carry a high degree of probability. Proof beyond
reasonable doubt does not mean proof beyond the shadow of a doubt. The
law would fail to protect the community if it admitted fanciful possibilities
to deflect the course of justice. If evidence is so strong against a man as to
leave only a remote possibility in his favour, which can be dismissed with a
80 sentence: ‘of course it is possible but not in the least probable’, the case is
proved beyond reasonable doubt; but nothing short of that will suffice.”*

The legal standard in the determination of whether or not the burden and standard of
proof has been properly met will be done in accordance with the Supreme Court
decision in **Abdu Ngobi v Uganda – Criminal Appeal No. 10 of 1991** where it was held
85 that,

*“Evidence of the prosecution should be examined and weighed against the
evidence of the defence so that a final decision is not taken until all the
evidence has been considered. The proper approach is to consider the
strength and weaknesses of each side, weigh the evidence as a whole,
90 apply the burden of proof as always resting upon the prosecution, and
decide whether the defence has raised a reasonable doubt.”*

Count 1: Murder

Death may be proved by the production of a post-mortem report or evidence of
witnesses who state that they knew the deceased and attended the burial or saw the
95 dead body (see **Kimweri v Republic [1968] EA 452**).

Concerning this ingredient the Prosecution relied on the evidence of PW5 Dr
Katalemwa Jonathan a Police Surgeon attached to Rwenzori West Region Police

contained in Police form 48B which was admitted in evidence as **PEx 2**. Dr Katalemwa testified that he examined the body of one Kasangaki Wilson which was brought at
100 Buhinga Hospital on 27th October 2021 and that he examined the body of the deceased and documented his findings in PE 2. He testified that upon examination of the deceased's body which was decomposing, he found a penetrating injury on the right side of the neck exposing the neck bone. He established the cause of death as sharp force trauma to the neck.

105 PW6 No. 59392, D/Cpl Sempijja Kenneth, the Fort Portal Central Division Scene of Crime Officer visited the crime scene and took photographs of the deceased and drew a sketch map. The sketch map was admitted in evidence as **PEx 3** indicating the area where the body was found and the photographs of the decomposing body of the deceased were admitted as **PEx 4C, 4D, 4E** and **4F**.

110 PW6 also testified in reference to a receipt found in the deceased's pocket and photographed at the scene. He stated that the receipt was in the names of Kasangaki Wilson with a number plate for a motorcycle he was suspected to be riding.

Prosecution also relied on the testimony of PW9 Akugizibwe Yassin, a boda rider who testified that he went with other riders to the mortuary and identified the deceased
115 based upon items of clothing that they knew he usually wore.

For its part the Defence contended that the death of the deceased had not been proved as the deceased's body was found in a decomposed state. The Defence further contended that no DNA test had been conducted to confirm the identity of the deceased as PW4 Bomera Sylvester had testified that the deceased's parents did not
120 provide DNA. However, this was incorrect as it was PW5, the Police Surgeon who disclosed that while DNA samples had been retrieved from the body, there was no person or relative that claimed the body. PW6 the Scene of Crimes Officer also

confirmed this when he testified that there was no relative against whom to compare the results of the DNA profile taken from the body suspected to be that of Kasangaki
125 Wilson.

Going by the legal precedent in the **Kimweri** case cited above, proof of death is by post mortem examination or evidence of witnesses who knew the deceased and attended burial or saw dead body.

In this particular case, the evidence leaves some reasonable doubt. Prosecution Exhibit
130 4D being a picture of the body recovered and suspected to be that of the deceased clearly depicts a body with just a human skull left. Indeed as the Post Mortem report (PEX 2) also noted the head lacked soft tissues due to presumable predation by wild animals. In other words, wild animals had probably eaten the deceased's face away.

Going by the available evidence a body was recovered this body was not scientifically
135 proven to be the body of Kasangaki Wilson. Furthermore, the testimony of PW9 of having identified the body by items of clothing they knew the deceased to normally wear still leaves sufficient reasonable doubt. In criminal matters, the evidential standard is proof beyond reasonable doubt. The fact that the body was found with clothes that were similar to what the deceased was known to have been wearing cannot be safely
140 relied upon to make a conclusive determination. This is because by PW9s testimony they first saw the body before they could identify the clothing.

In emotionally charged situations such as identification of a suspected murder victim, there is considerable risk of confirmation-bias by witnesses. This is where a witness perceives a situation according to what they already believe is true. It might therefore
145 have been preferable for the police to collect information about what the deceased had been wearing on the day he was last seen alive before letting witnesses come to identify the body. They would therefore have been able to test the identification parameters

against previously collected information. As the situation presently stands there was no independent way to confirm whether what PW9 was stating was actually correct. Even if
150 he believed he was telling the truth, the risk of being honestly mistaken about a similarity in clothing is too high to base a conviction upon in this matter.

It is also pertinent to note that whereas PW6 testified about a receipt he found in the deceased's pocket bearing the deceased's names and the number plate of the motorcycle he was riding, Prosecution Exhibit 4B being a scene of crime photograph
155 depicts two receipts. One receipt is of a cash sale of oil for the sum of UGX 18,000. That same receipt bears the handwritten name "Kasangaki" and a phone number 0782516714. It also has what appears to be a number plate Reg. No. UFH 521V.

However, there is also another receipt evident in the scene of crime photograph PEx 4B. The receipt in question is from Kabarole District Boda Boda Association dated 16th
160 August 2021. The receipt is for payment of a registration fee of UGX 65,000 by a member called Kanakulya Ronald. It has a phone number 0782-129268 with the inscription "C/man" next to the number. This receipt also has what appears to be a number plate on it being UFH 521V. These two receipts relate to two different names with the first one only bearing the surname of the alleged murder victim.

165 The discovery of these two receipts on the body of the deceased combined with the lack of facial features on the body and the absence of DNA evidence leaves sufficient reasonable doubt in my mind as to not be able to conclude that Kasangaki Wilson is the deceased person.

I therefore find that the Prosecution has not proven beyond reasonable doubt that
170 Kasangaki Wilson actually died.

The absence of proof of death ideally resolves whether the accused are guilty of murder in the negative as the absence of any one of the ingredients listed for murder renders a conviction impossible.

175 However, I do feel it is important to point out another aspect that the Prosecution in my view failed to prove and that is participation of the Accused. By the available evidence, it was alleged that the accused persons were last seen with the deceased alive and by that evidence the Prosecution asserted that the Accused persons were responsible for the murder of Kasangaki Wilson. In this regard, even if it were proven that the deceased was in fact Kasangaki Wilson I noted that the testimony of PW1 and PW2, who were fellow
180 boda riders at the stage Kasangaki was last seen, was to the effect that Kasangaki left with A2 and A3 and that A1 was left behind. A1 was only identified as having left along with A2 and A3 with another rider who was later found murdered but it was not that rider's murder that A1 was being tried for.

The Prosecution case regarding the Accused persons largely rested on the last seen
185 doctrine whereby the person or persons last seen with the deceased are under a duty to provide a rebuttable explanation of as to how the deceased died (see **Busingye Paul and Another v Uganda - Court of Appeal Criminal Appeal No. 48 of 2019**). By the witness testimony of PW1 and PW2, it was A2 and A3 last seen departing with Kasangaki. Short of any other evidence, it could not therefore be said that A1 was among those who
190 were reasonably assumed to have been with Kasangaki at the material time he went missing.

The other relevant issue is that the manner in which A2 and A3 were subsequently identified also cast a considerable amount of doubt on the evidence. According to PW3, Bwambale Sezi, the investigating officer, A2 and A3 were arrested as a result of a

195 security operation conducted in July 2022. He had then called upon PW2 Francis Tinkasimire to identify the suspects.

The Defence argued about the manner in which the identification parade took place saying that the procedures relevant to identification parades as laid out in the case of **Uganda v Lanyero Grace - HCT-02-CO-SC-0062-2016** were not followed. The Defence
200 specifically raised issue with the fact PW7 testified that the suspects in the ID parade for A2 and A3 were not similar in appearance to A2 and A3 and were only paraded because they were suspected motorcycle thieves. Defence Counsel further contended that PW2 was able to see the suspects prior to their being paraded.

Concerning the identification of A2 and A3, I reviewed the Identification Parade Report
205 on Police Form 69 as related to the identification of A2 and A3 and tendered in evidence as PEx 6. From that form, the following was immediately apparent to me:

- 1) Concerning the presence of an advocate there is provision in the form to indicate whether the suspect(s) requested that an advocate be present. The answer written in the form is "No". However, PW7 the officer who conducted the parade
210 never testified as to whether he informed the suspects of their right to have an advocate present. This is pertinent because the suspects could not request an advocate if they had not been advised of their rights.
- 2) It was also indicated in the form that the suspects did not object to any other person they were paraded with and also to the arrangement of the parade. Once
215 again it is pertinent to note that PW7 gave no indication that the suspects had been advised of their right to raise objections of this nature.
- 3) As concerns whether the suspects were satisfied that the parade was conducted in a satisfactory manner there was only the word "Yes" written in the form. Despite the fact that the form clearly indicated that the suspects be invited to

220 sign their reply or statement. There was no evidence that the suspects signed to
confirm that the ID parade was satisfactorily done.

The rules governing the conduct of identification parades have been previously established by the courts as follows (see **Sentala v Uganda [1968] EA 365; R v Mwangas/o Manaa [1936] 3 EACA 29; and Simon Musoke v R [1958] EA 715**):

- 225 1) The Accused person is always informed that he may have an advocate or friend present when the parade takes place.
- 2) The Officer in Charge of the case does not carry out the ID parade.
- 3) The witness does not see the accused before the parade.
- 4) The accused is placed among at least 8 persons as far as possible of similar age,
230 height, general appearance and class of life as the accused.
- 5) Accused is allowed to take any position he or she wishes after the identifying witness has left if he or she so desires.
- 6) Witnesses are not allowed to communicate after the parade.
- 7) The parade should exclude anybody who has no business there.
- 235 8) The Officer in Charge should note after witness leaves whether or not the identification was made and the circumstances.
- 9) If the witness desires to see the accused walk, speak, remove or put on a hat, it should be done but care taken to ensure all persons on parade do the same.
- 10) The witness should touch the identified person.
- 240 11) During preparations for or at the parade the accused should be asked if they are satisfied that the parade is being conducted in a fair manner and note the reply.
- 12) Prior to the parade, the witness should be informed that the group of people may or may not contain the suspect. Furthermore, witness should not be told to pick out someone or otherwise influenced in any way.

245 13)The Officer in Charge should act with scrupulous fairness otherwise the value of
the ID parade will depreciate considerably.

In light of the rules outlined above, as I have already noted there was no evidence that
the suspects were advised of their right to have an advocate or even a friend present.
There was also no evidence that they were advised of their right to object to the
250 manner in which the parade was being conducted or to even choose where they prefer
to stand in the parade. In all these instances it is not enough for the Officer in Charge of
the parade to simply enter one-word answers “yes” or “no”. There is ample space
provided in the form in which a diligent officer ought to indicate whether the suspects
have been advised of the right in question. As things stand, PW7 never testified in court
255 as to whether these critical issues were put to the suspects and it is also not evident in
Police Form 69 exhibited as Prosecution Exhibit 6.

It is also particularly damaging that the suspects never endorsed their consent that the
parade was conducted fairly.

Once there is a failure to meet any of the requirements listed above, it is unsafe for this
260 court to draw a conclusion that the suspects were properly identified. The identification
parade is not to be treated lightly. It is a procedural precursor to the guarantee of the
right to a fair trial under Article 28(3) of the Constitution and once there is any
indication that the identification parade has not been done properly, the court cannot
safely base a conviction on the impugned parade. The identification process should
265 therefore always be treated with utmost care and seriousness. It is only by following the
outlined rules that the court can be satisfied that the officer in charge acted with
scrupulous fairness and therefore assign the required weight to the evidence derived
therefrom. Short of this, an accused person cannot be guaranteed a fair trial and the risk
of wrongful conviction rises exponentially.

270 In this case, PW2 testified to having seen A2 and A3 leave with Kasangaki Wilson. He
was the only witness that the Prosecution subsequently produced in terms of the
identification parade. However, given the glaring procedural irregularities of the ID
parade coupled with him being the only witness that the prosecution produced in
concerning the impugned parade, I find myself unable to conclude beyond a reasonable
275 doubt that he reliably identified A2 and A3. In such circumstances, it might have helped
to produce other witnesses from the ID parade that independently identified A2 and A3
but unfortunately this was not done.

According to the available evidence there was a fairly significant amount of time that
passed between when PW1 and PW2 saw A2 and A3 in October 2021 and July 2022.
280 Given that A2 and A3 were not persons previously known to PW1 and PW2, the process
of identifying them after arrest needed to be conducted with utmost care leaving no
room for reasonable doubt that the correct persons were identified. However, as I have
already pointed out above, the identification parade left a lot to be desired.

As concerns A1, the situation is even worse because he was not even seen to leave with
285 Kasangaki. He cannot therefore be considered as someone last seen with Kasangaki.
Nevertheless, he too was put through the process of an identification parade which was
documented in Police Form 69 exhibited as Prosecution Exhibit 7. By that record the
same shortcomings as those in the identification parade for A2 and A3 were apparent.
But even beyond that there was no response indicated from the suspect as to whether
290 he felt the parade was satisfactorily conducted. So even if A1 had been seen leaving
with Kasangaki and Kasangaki had been conclusively identified as deceased, there would
still be reasonable doubt about A1s correct identification.

It is for the reasons laid out above that I do hereby find that the Prosecution has not
proved beyond reasonable doubt that the Accused persons murdered Kasangaki Wilson.

295 The death of Kasangaki Wilson has not been proved and even if it had, the evidence identifying the Accused persons was not sufficient to prove beyond reasonable doubt that they were the persons last seen with Kasangaki and therefore responsible for his murder.

300 **Count 2: Aggravated Robbery**

As concerns this offence, I also find that the Prosecution has failed to prove beyond reasonable doubt that the Accused persons committed the offence. By the prosecution's submissions, Kasangaki Wilson was seen leaving with the A2 and A3 and the Motorcycle was never seen again. However, for the same reasons I have laid out above, it was not
305 proved that Kasangaki was in fact murdered and therefore by necessary implication even the theft of the motorcycle he was using cannot be proved.

It is also pertinent that A2 and A3 were not properly identified as the perpetrators for the reasons also outlined above. There was also no evidence linking A1 to the theft as by the available evidence he had stayed behind when A2 and A3 allegedly left with
310 Kasangaki.

ACQUITTAL:

It is on the basis of the above that I do hereby disagree with the Assessors and find the Accused persons not guilty of the offences of murder of Kasangaki Wilson and Aggravated Robbery.

315 The Assessors indicated inter alia in their opinion that there was death of a human being but it is not enough to establish death of a human being alone. I guided in the summing up notes that death is proved by post mortem report or evidence of witnesses who knew the deceased and attended the burial or saw the dead body. The purpose of this proof is also to confirm that the person who died is the one who the Prosecution alleges
320 died. The available evidence clearly showed that there was no conclusive identification of the deceased beyond the clothes was wearing and some inconclusive receipts found on the body. The post mortem report not only ascertains cause of death but also helps to identify the deceased person. By the account of the Medical Examiner PW5 this was

never done. I could not therefore agree with the Assessors that the Accused persons
325 were guilty of murder.

The failure to conclusively identify Kasangaki Wilson as deceased also meant that the
offence of robbery could not stand as the Prosecution case was that it was Kasangaki
who was robbed of a motorcycle. Since the body remained unidentified, it could not be
said that he was the one that was robbed and murdered. It is to that extent that I could
330 not agree with the Assessors on the guilt of the Accused with regard to Aggravated
Robbery.

The Accused persons are therefore wholly acquitted in this matter and may go free
unless they have other pending charges.

Right of appeal explained.

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David S.L. Makumbi
JUDGE
21/06/24

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