THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-00282 OF 2022

UGANDA==========PROSECUTION

VERSUS

1. **KALYEGIRA EMMANUEL**
2. **NATUKUNDA PATIENCE**

==========ACCUSED

BEFORE: HON. JUSTICE DAVID S.L. MAKUMBI

JUDGMENT

BACKGROUND:

The indictment in this case is that of Murder c/s 188 and 189 of the Penal Code Act.

The Prosecution case is that on the 17th day of October 2021 at Kahungabunyonyi Zone in Fort Portal Tourism City the two accused persons unlawfully killed Kabahango Vincent.

It is specifically alleged that the deceased left his home on 16th October 2021 at about 8.30AM for a meeting and had not returned home. At about 5PM the Accused and the deceased met to watch a football match at Bukwali and had left together at about 6.30PM to proceed to Zoom Pork joint to eat pork. The deceased and the Accused had then left at about 9PM for Kalya Courts Hotel.

At around 3AM the following day the deceased and the Accused arrived at Gardens Care Medical Centre with the deceased bleeding seriously from an injury to the left side of his

neck. The nurse on duty had then referred them to Fort Portal Regional Referral Hospital as the injury was too grave. The deceased's vehicle UAS 579S was found in a trench near the clinic.

A1 had then proceeded in bloodstained clothes to the deceased's home to inform his wife about what had happened. When the deceased's wife arrived at the hospital she found he had already passed away and had various injuries to his neck, face and one of his fingers.

Both Accused persons were then arrested and charged and upon medical examination A1 was found with lacerations on his right upper eyelid, right hand and right ankle joint.

THE BURDEN AND STANDARD OF PROOF

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.

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,

> *"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 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 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, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt."

Section 188 of the Penal Code Act provides that,

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission commits murder."

The ingredients apparent in the offence of murder are therefore,

1) Death of a human being;
2) Death was caused unlawfully;
3) Death was caused with malice aforethought; and
4) The Accused person is responsible for the death.

ANALYSIS OF THE EVIDENCE:

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 dead body. (see **Kimweri v Republic [1968] EA 452**)

Prosecution tendered in a post-mortem report dated 17th March 2021 as PE 2 which disclosed the cause of death of the deceased as traumatic congestion leading to haemorrhagic shock.

PW1, the wife of the deceased, told the court that the deceased was buried in Fort Portal on 19th October 2021. PW1 told the court that she was able to identify the body of the deceased which bore a stab wound on the neck and other cut injuries to the forehead and one of the fingers.

The Defence did not contest the death of the deceased.

There is therefore no reasonable doubt that the deceased died.

With regard to the circumstances of the deceased's death, 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 **Gusambizi s/o Wesonge v R [1948] 15 EACA 65**).

According to the postmortem report PE 2, the deceased's body had external injuries. The body also had dried blood stains, a swollen neck, cut wound on the middle finger, a stab wound on the left aspect of the neck, and a cut above the left eye.

The cause of death was described as traumatic congestion leading to haemorrhagic shock.

The nature of injuries especially the stab wound to the neck clearly established the fact that the deceased had died in unlawful circumstances. This was also not contested by the Defence.

There is therefore no reasonable doubt that the deceased was unlawfully killed.

As concerns malice aforethought, in the case of **Mumbere v Uganda – Supreme Court Criminal Appeal No 15 of 2014**, the Supreme Court held that,

> *"The elements of malice aforethought are well set out under Section 191 of the Penal Code Act as follows:*
>
> *'**Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—***
>
> ***(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or***
>
> ***(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.'***
>
> *We also wish to note that this Court in **Nandudu Grace & Another v. Uganda, Criminal Appeal No.4 of 2009** reiterated the ratio in the earlier decision of this Court in **Francis Coke v. Uganda [1992-93] HCB 43** that the existence of malice aforethought is not a question of opinion but one of fact to be determined from the available evidence.*

We also hasten to add that in determining whether the prosecution has proved malice aforethought, the Court has to examine the circumstances surrounding each case. These circumstances include: (i) the nature of the wounds inflicted; (ii) the part of the body injured; (iii) the type of weapon used; (iv) the conduct of the accused person immediately before and after the injuries causing death were inflicted; and, (v) the manner in which the weapon was used-whether repeatedly or not."

PW7, Dr. Katalemwa Jonathan, the Regional Police Surgeon, told the court that the body of the deceased had dried blood stains, cut wounds on the finger and above the left eye. The injury above the eye measured 1 centimetre by 0.5 centimetre. The body also had a stab wound on the left aspect of the neck measuring 3 centimetres in diameter and 10 centimetres deep. The neck was also swollen. Internally there were thick clots of blood in the upper neck muscles on the left side and thick clots of blood in the middle sternum. There was also blood in the chest cavity.

Considering the nature of injury being a stab wound to the neck, there is no doubt that whoever inflicted the injury upon the deceased either did so intentionally or with complete indifference that the injury would likely cause the death of the deceased.

The Defence did not contest the presence of malice aforethought in the deceased's death. There is therefore also no reasonable doubt that whoever killed the deceased did so with malice aforethought.

With the above in mind, there is now only the question of whether the accused participated in the murder.

The Prosecution evidence in this regard was entirely circumstantial as there was no direct witness testimony about both Accused persons' participation in the murder. The

Prosecution based its submissions in this regard largely on the last seen doctrine citing the case of **Jagenda John v Uganda – Court of Appeal Criminal Appeal No. 1 of 2011.**

Based upon all the evidence that was brought before this court, there is no doubt that the Accused persons were with the deceased at the time he met his untimely end. The Accused persons themselves do not dispute this in their testimony. However, what is clearly in dispute is the role of the Accused persons, in any, in causing the death of the deceased.

The Prosecution submitted that while the Accused persons claimed that robbers attacked them, the nature of the injury to the deceased was such that someone inside the car and not outside the car could only have inflicted it. The Prosecution further submitted that the injuries suffered by A2 to his face were inconsistent with the testimony of A1 who testified that he was inside the vehicle at all times.

The Prosecution also submitted that DW2 (A2) had failed to describe the attack in detail, which was suggestive that the assailants were non-existent.

For its part, the Defence contended that all the evidence was consistent with friends who went out to eat and drink. Furthermore, the Defence highlighted the fact that the Accused persons had cooperated with the police throughout the investigation and had tried to seek medical attention for the accused. The Defence further pointed out that A1 was very distressed by the loss of his good friend and that his efforts to inform the deceased's wife about his death were consistent with innocence.

In considering the above, I take into account the legal position concerning circumstantial evidence in criminal trials and the last seen doctrine applicable in cases where an accused person is said to be the last to have seen the deceased alive.

In matters of circumstantial evidence the Supreme Court has held in the case of **Byaruhanga Fodori v Uganda – Criminal Appeal No. 18 of 2002** that,

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find 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 court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See:* ***S. Musoke V R [1958] EA 715 and Teper V R [1952] AC 480).***"

Furthermore, in the case of **Bogere Charles v Uganda – Criminal Appeal No. 10 of 1998**, the Supreme Court in reference to **Taylor on Evidence 11th Edition P.74**, held with regard to circumstantial evidence that,

> *"The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."*

As concerns the last seen doctrine, the Court of Appeal in ***Businge Paul and Another Vs. Uganda Criminal Appeal No. 048 of 2019 q***uoting the Nigerian case of ***Moses Jua Vs. The State (2007) LPELR-CA/IL/42/2006,*** held thus:

> *"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."*

Bearing in mind the aforementioned guiding authorities, the evidence in this case is such that the Accused persons were with deceased at the time he died and in line with the **Busingye** authority cited above, both accused persons put forward an explanation as to how the deceased met his death. It is the contention of the Prosecution that the explanation is not to be believed as it was clear that somebody inside the car inflicted the injuries on the deceased.

However, the evidence did not conclusively establish the assertion that someone inside the car inflicted the injuries upon the deceased. PW7 Katalemwa Jonathan, the Medical Examiner who conducted the post mortem examination stated categorically that he was not able to tell where the deceased's assailant was positioned when the fatal injury was inflicted.

It is also important to note that both A1 and A2 testified that the deceased was attacked on two sides through both front door windows which they said had been open during the attack. This therefore means that as much as the attackers would have been outside the car they still had partial access to the interior of the vehicle so even if the proposition that someone inside the car killed the deceased, it could still have been achieved by somebody reaching into the car through the windows. This therefore left doubt as to whether the Accused persons would have been the only likely suspects.

Furthermore, according to PW4 Natukwasa Immaculate DNA analysis was conducted on the following exhibits:

1) Exhibit 8AA – Green Jersey recovered from Kalyegira Emmanuel
2) Exhibit 8AD – White bedsheet with blue stripes for deceased Kabahango Vincent
3) Exhibit 8AH – Bloodstains from driver side of Motor Vehicle UAZ 579S
4) Exhibit 8AI – Light blue facial mask recovered from driver seat of Motor Vehicle UAZ 579S

5) Exhibit 8AL – Blood swabbed from exterior surface of driver side door of Motor Vehicle UAZ 579S
6) Exhibit 8AM – Blood swabbed from right middle finger of deceased
7) Exhibit 8A0 – Light Blue Chino shorts from deceased Kabahango Vincent

Based on the above, PW4 drew two conclusions. The first conclusion was that there was extremely strong genetic evidence that the deceased Kabahango Vincent was the donor of the male DNA profile recovered from blood stains on the above-mentioned items.

PW4s second conclusion was that the generated genetic evidence did not support the proposition that any of the suspects (A1 and A2) were the donors of male DNA profile recovered from bloodstains on the aforementioned exhibits. PW4s findings were extensively catalogued in her DNA Analysis Report No. FB 142/2022 dated 28th April 2022 and received into evidence as Prosecution Exhibit 8B.

Going by the DNA evidence above, the deceased's blood had been found on A1's jersey (Exhibit 8AA). However by his own testimony and that of A2 it was clear that A1 had physically supported the deceased when he was at the clinic and on the way to Fort Portal Hospital. This was corroborated by DW3 the boda rider who transported A1 and the deceased to Fort Portal Hospital and DW4 the nurse who provided first aid to the deceased. A1 therefore had a plausible reason for having the deceased's blood on his clothes.

If indeed there had been a fight between the deceased and A1 or even A2 there ought to have been some DNA evidence transfer from the accused persons onto the deceased but the DNA evidence does not bear this out.

It is pertinent to note that the photographic evidence collected by the police in this matter revealed that the bloodstains were mainly in the driver seat area where the

deceased had been seated (See Prosecution Exhibits 4C, 4E, 4F, 4G, 4H and 4J). It is hard to conclude that a stabbing attack done inside the car would have resulted only in blood largely around the driver seat area and yet the only apparent bloodstain beyond the driver's seat was on the headrest of the front passenger seat (See Prosecution Exhibit 4J). This to me presents a very high likelihood that the assailant who did the fatal stabbing may have indeed been outside the vehicle as A1 and A2 claimed. This is consistent with the blood spatter evident on the inside of the driver's door (Prosecution Exhibit 4E) and the bloodstains on the outside of the same car door (Prosecution Exhibit 4C). I therefore tend to believe A1 and A2's account of the attack in this respect.

The Prosecution also contended that the assailants could not have injured A1 as he had been inside the car the whole time. However, I bear in mind that A1 testified that his injuries were the result of being hit with a car door as he tried to exit and assist the deceased. According to Police Form 24 admitted in evidence as Prosecution Exhibit 1A, A1 was examined and found with healed lacerations to his right upper eyelid, right anterior palm and right ankle joint. The nature of injuries to A1 appeared to me to be consistent with someone who had been indeed struggling to exit the vehicle on the right hand side against someone actively preventing him from doing so. The Prosecution's assertion that A1 never exited the vehicle is therefore correct but it does not prove that A1s injuries were the result of fighting the deceased. If he had been fighting with the deceased then he would not have sustained injuries exclusively to the right eye, right hand and right ankle.

The other evidence in this matter that I must take into account is the conduct of the deceased, A1 and A2 soon after the attack. According to both A1 and A2 they fled the scene together with the deceased at the wheel of the vehicle. This is consistent with the forensic evidence collected from the vehicle. What the evidence therefore says is that immediately after the deceased was attacked he managed to drive away from the scene

all the way up to where his vehicle was found in a trench. To me this begs the question that if it was indeed A1 and A2 that had attacked him then would he have stayed in the vehicle with the same people that had fatally stabbed him. Human instinct towards would dictate that out of self-preservation he would have tried to flee from the vehicle itself and not remain with the very same people that were trying to kill him.

Furthermore, according to DW4 the nurse who administered first aid to the deceased, he had arrived at the clinic still able to talk and had told her he had been injured and that he needed help. DW4s testimony did not bring out any indication that the deceased was in fear of A1 and A2 or any other indication that the persons with him were responsible for his dire condition. A1 had gone even further than simply taking the deceased to hospital. He had taken the trouble to go to the deceased's residence to inform his wife about what had transpired and had done so wearing bloodstained clothes. To me this did not appear to be the conduct of a guilty person. At this juncture, I must also point out that A1s demeaonour in court was that of someone who was still distressed by the deceased's death to the point that he openly broke down as he testified about pleading with the doctor to save the deceased.

In light of the above, I am indeed of the view that both Accused were the last to be seen with the deceased prior to his fatal stabbing. However, they have both offered explanations which the Prosecution case has not adequately rebutted.

The Prosecution suggested that A2s failure to recount the exact events of the attack suggested that her testimony was not truthful. I disagree with this because the burden of proving that A2 was not truthful always rested upon the Prosecution. The Prosecution needed to demonstrate from its evidence that A2s failure to recount the exact events of that night was because she was not being truthful. Even if she had opted to remain

entirely silent and not testified, she remained innocent until the Prosecution evidence could prove otherwise which in this case has not been done.

Based upon the **Byaruhanga** and **Bogere** precedents cited above, the circumstantial evidence in this matter leaves sufficient reasonable doubt in my mind as to leave me morally uncertain that the Accused persons participated in the murder of Kabahango Vincent.

ACQUITTAL:

In light of the evidence adduced in this matter I agree with the Assessors in this matter find that the Prosecution has not proved beyond reasonable doubt that A1 Emmanuel Kalyegira and A2 Natukunda Patience murdered Kabahango Vincent.

Emmanuel Kalyegira and Natukunda Patience are therefore acquitted of the offence of murder and are free to go unless they have other pending charges.

David S.L. Makumbi
JUDGE
18/06/24