

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MPIGI CHIEF MAGISTRATES' COURT  
CRIMINAL CASE NO 0020/2011**

**UGANDA** .....  
**PROSECUTOR**

**V E R S U S**

**A1. KIVUMBI VINCENT**  
**A2. MUGERWA LAWRENCIO**  
**A3. KIGOZI JOSEPH**  
**A4. SSENGENDO LAWRENCIO**  
**A5. GITTA KIZITO**  
**A6. BYAKATONDA DEOGRATIUS** .....  
**ACCUSED**

**BEFORE: HON.LADY JUSTICE ELIZABETH IBANDA NAHAMYA**

**RULING**

The Accused persons, Kivumbi Vincent, Mugerwa Lawrencio, Kigozi Joseph, Sengendo Lawrencio, Gitta Kizito and Byakatonda Deogratius were Indicted with the Offence of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap 120. It is alleged that the Accused persons, Kivumbi Vincent, Mugerwa Lawrencio, Kigozi Joseph, Sengendo Lawrencio, Gitta Kizito and Byakatonda Deogratius on the 27<sup>th</sup> day of March 2011, at Kawumba- Bulunda villages in the Mpigi District murdered **KABUGO YUSUF**. A person convicted of this Offence is liable to suffer death. The Accused persons denied having committed this Offence and as such, a plea of not guilty was entered.

The background of the case is that on the fateful night 26<sup>th</sup> day of March, 2011 at Bulunda village, Buwama Sub-county in Mpigi District, the deceased, Kabugo Yusuf was arrested from his house by a mob that included the six Accused persons. It is alleged that the deceased was tortured by the Accused persons. He was severely beaten, stripped naked and tied with ropes. It is further alleged that one, Kato Deziderio tried to restrain the mob from assaulting the deceased but they resisted. This prompted him to report the incident to Buwama Police Station. The deceased was taken to Buwama Health Centre in a critical condition and unconscious whereupon he died. The Accused persons were arrested and accordingly charged with the Offence of murder of Kabugo Yusuf.

When the Charge was read and explained to the Accused, each one of them pleaded not guilty. A plea of not guilty was entered in respect of each Accused thereby setting in issue all the ingredients of the offence charged. Resultantly, Prosecution had to prove each and every element in the Offence charged in order to secure a conviction against the Accused persons. **See *Ssekitoleko vs. Uganda [1967] EA 531.*** Kivumbi Vincent (A1) was represented by Counsel Lwanga Richard, Kigozi Joseph (A3) and Byakatonda Deogratius (A6) were represented by Counsel Jurugo Isaac, Mugerwa Lawrence (A2) and Gitta Kizito (A5) were represented by Learned Defence Counsel, Gumisiriza Francis and Ssendendo Lawrence (A4) was represented by Counsel Natukunda Juliet whilst the State was represented by Learned State Attorney, Ms. Namala Amina.

In order to consider the culpability of the Accused persons, certain several principles of the law are considered. The Accused persons are presumed innocent until the contrary is proved. **See Article 28 (3) (a) of the Constitution of the Republic of Uganda 1995 as amended.** Therefore, the Prosecution bears the burden to prove not only the fact that the offence was committed but that it was committed by the Accused persons or that the

Accused persons participated in the commission of the alleged Offence. It is therefore relevant to place the Accused persons at the scene of crime.

Regarding the standard of proof, the Prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. **See: Woolmington vs. DPP [1935] AC 462.** However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the Accused, it should be resolved in the favour of the Accused persons. Therefore, the Accused persons must not be convicted because they have put a weak defence but rather that Prosecution case strongly incriminates them and that there is no other reasonable hypothesis than the fact that the Accused persons committed the alleged crime.

The standard of proof is beyond reasonable doubt as discussed in the case of **Miller Vs. Minister of Pensions (1947) 2 All ER 372 at 373;** wherein **Lord Denning** stated as follows;

*“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice”.*

Similarly in **Uganda vs. Dick Ojok (1992-93) HCB 54:** it was held that in all criminal cases, the duty of proving the guilt of the Accused always lies on the Prosecution and that duty does not shift to the Accused except in a few statutory cases and the standard by which the Prosecution must prove the guilt of the Accused is beyond reasonable doubt.

With respect to the nature of evidence required, the Accused persons can only be convicted on the basis of evidence adduced before Court, such

evidence must be credible and not tainted by any lies or hearsay, and otherwise it will be rejected by the Court for being false.

Prosecution must prove all the ingredients of the Offence of Murder in order to sustain a conviction thereof. In the case of ***Uganda Vs. Bosco Okello [1992-93] HCB 68 , Uganda vs. Muzamiru Bakubye & Anor High Court Criminal Session No.399/2010***, where it was held that Prosecution must prove the following ingredients beyond reasonable doubt:-

- i. That the deceased is dead;
- ii. That the death was caused unlawfully;
- iii. That there was malice aforethought; and
- iv. That the Accused person directly or indirectly participated in the commission of the alleged Offence.

The Prosecution called a total of **Three (3) witnesses**. Namely, Mr. Kato Deziderio (PW2), Detective Constable Asiimwe Ason (PW3), and Detective AIP Benon Asingwire (PW4) in an attempt to prove its case. Thereafter, Prosecution closed its case. Upon closure of the Prosecution's case, the Learned Defence Counsel, Mr. Lwanga Richard, for the Defence, representing Kivumbi Vincent (A1) indicated his readiness to make submissions relating to a 'no case to answer'. It was Mr. Lwanga Richard's submission that the essential ingredients of the Offence of Murder had not been established by the Prosecution evidence so as to warrant putting the Accused person, Kivumbi Vincent (A1) to his defence.

Learned Counsel, Jurugo Isaac, also filed written submissions on a 'no case to answer' against Joseph (A3) and Byakatonda Deogratius (A6). Counsel Natukunda Juliet, also filed her written submissions on a 'no case to answer' against Ssendendo Lawrence (A4), her client. The Learned State Attorney, Ms. Namala Amina did not file any submissions.

## **SUBMISSIONS OF PARTIES**

### **Counsel Lwanga Richard for Kivumbi Vincent (A1)**

Mr Lwanga Richard who represented Kivumbi Vincent (A1) submitted that one of the four essential elements of Murder had not been proved by the State against A1. Hence, in his view, there was no need to put the A1 on his defence. He referred to a proliferation of decisions for this Court to consider. They included;

- i) *Woolmington vs. DPP (1935). Ac. 462;*
- ii) *Miller vs. Minister of Pensions (1947). 2. ALL. ER. 372 at 373;*
- iii) *Uganda vs. Dic Ojok (1992 - 93). HCB. 54;*
- iv) *Akol Patrick & Ors vs. Uganda (2006). HCB (Vol. 1) 6 pg.4*
- v) *Uganda Vs. Lydia Draru Alias Atim (HCT-00-CR-SC 0404 of 2010)*
- vi) *Uganda vs. Aggrey Kiyingi & Ors (Crim. Session Case No. 30 of 2006)*
- vii) *Uganda vs. Robert Sekabira & 10 Ors. HCCC No. 0085 of 2010*
- viii) *The State Vs. Marlon Bradshaw for Murder H.C.A No. 291/98*

Counsel Lwanga submitted that **Article 28 (3) (a)** of the **Constitution of the Republic of Uganda, 1995** provides for the presumption of innocence of an Accused person until proven guilty. It is a cardinal principle of criminal law that the burden of proving the guilt of an accused person solely lies on the prosecution. He pointed out that;

**Sec. 101 (2) of the Evidence Act Cap. 6** provide;

*“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

It is further provided under **Sec. 103 of Cap. 6** that;

*“The burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence, unless it is provided by law that the proof of that fact lie on any particular person.”*

It is always the duty of the Prosecution to prove its case beyond reasonable doubt as discussed in the case of **Woolmington vs. DPP, Supra** except in certain instances where the burden shifts to the Accused.

### ***Ingredients of the Offence of Murder***

Counsel Lwanga did not dispute the first three elements of the Offence of Murder namely,

- a) That there was death,
- b) That the death was unlawful caused,
- c) Malice a fore thought.

However, Mr. Lwanga contested that Kivumbi Vincent (A1) ever participated in the Offence of Murder of one, Kabugo Yusuf. He submitted that the record has no evidence pointing to the participation of Kivumbi Vincent (A1) in the murder. While evaluating the evidence on record, Counsel Lwanga submitted that it was the testimony of **Kato Deziderio (PW2)** that on the 27<sup>th</sup> day of March, 2011, as he was returning from his work place, he passed by his bar. This was around 2:00Am. He saw people gathered at the road leading to the school and was raining heavily, did not join the mob. According to PW2, his wife told him that during the previous night, there were alarms being raised throughout the night long relating to theft. PW2 went to the gathering and met the vice chairman of Bulunda village, one, Mr. Mwanje who told him( PW2) that people in the entire village were under panic as there were thefts all around the village. It was Counsel Lwanga’s submission that PW2 did not identify any of the people that had gathered during the mob.

In cross examination, PW2 denied having seen any person beat up the deceased person. PW2 testified that he only saw people gathered when he

went to inform police about the angry mob that was beating the deceased. PW2 identified A1 while at police.

**Detective Constable Asimwe Ason (PW3)** testified that upon a tip off from PW2, they went to the scene of crime and took the deceased who was in a critical condition to Buwama health centre where and he died upon arrival at the hospital. PW3 testified that he went back to arrest the suspects together with one Mwanje Richard. According to PW3, Kivumbi Vincent (A1) was the first person to be arrested while in his house sleeping. A1 neither tried to resist arrest nor did he try to flee.

In cross examination, PW3 testified that at the scene of crime, he only found the said Mwanje Richard and the deceased person. According to Mr. Lwanga, Kivumbi Vincent (A1) was not at the scene of crime neither did PW3 see him anywhere near which connotes that indeed, Kivumbi Vincent (A1) did not participate in the angry mob.

**Detective AIP Benon Asingwire (PW4)** testified that deceased's relatives including one, Ssali Ibrahim brother to the deceased told him that the people who picked the deceased from his house included A1 (Kivumbi Vincent). In the same vein, Counsel Lwanga wondered why the said Ssali Ibrahim was not called to testify in this Honourable Court. Counsel Lwanga's contention was that in the absence of Ssali Ibrahim's testimony to back up PW4's allegations that A1 had picked the deceased from his house. This left PW4's evidence in suspension credible to warrant Kivumbi Vincent (A1) to be put on his defence.

In cross examination, PW4 told Court that he took a Charge and Caution Statement of Kivumbi Vincent (A1), who told him that they saw the deceased stealing from one, Mukasa Fred. Further, that they run after the deceased. Thereafter, they took him to the chairman's place. Counsel Lwanga pointed out to this Honourable Court that the record has a totally different statement and it contradicts with the Charge and Caution Statement on record. Mr.

Lwanga clarified the fact that the Charge and Caution Statement on record indicates clearly that it is **Gitta Kizito (A5)** and not Kivumbi Vincent (A1) who made a Charge and Caution Statement. Counsel Lwanga's analysis on this mis-up was that PW4 was just coached to testify in Court.

It was Counsel Lwanga's submissions that from the Charge and Caution Statement though not made by A1, it does not in any way indicate that the Accused persons participated in the beating of the deceased that caused his death. It rather indicated that Gitta Kizito (A5) and others arrested the deceased and took him to the local authorities which showed the good conduct of responsible citizens.

When Court sought clarity from PW4 about the Charge and Caution Statement, PW4 stated that a Charge and Caution Statement stands for itself. According to PW4, a Charge and Caution Statement can be relied upon to convict an Accused person even without other evidence. Counsel Lwanga submitted to this Honourable Court that the Charge and Caution Statement does not in any way place any of the Accused persons at the scene of crime. In cross examination, PW4 testified that he never went back to the scene of crime. PW4 told this Honourable Court that he based his investigations upon information being supplied to him by PW2.

Counsel Lwanga submitted that the Investigating Officer (**I.O**) was not called to testify in this case. Therefore, he argued that the matter was not investigated properly since Prosecution did not call the Investigating Officer. According to Mr. Lwanga, it is not enough to merely record statements at the Police Stations in criminal cases, but that, such statements need to be adduced in Court in order to verify its credibility of the Investigating Officers' testimonies or evidence. Counsel Lwanga noted that investigations in Criminal Proceedings are very important. Hence, where the Prosecution fails to carry on investigations properly, it is an abuse of the fundamental rights of an Accused person. Counsel Lwanga relied on the case of **Uganda vs.**



**Robert Sekabira & 10 Ors. HCCC No. 0085 of 2010**, where Court strictly condemned and was greatly disappointed with the manner in which Prosecution handled its case. It was held that investigations done by Police were all a nullity. In the premises the Accused persons were all acquitted on submissions of no case to answer.

Counsel Lwanga's prayer was that this Honourable Court follows the decision in the above mentioned case of **Uganda vs. Robert Sekabira & 10 Ors, Supra** since there is no record of investigations done.

Counsel Lwanga also considered the conduct of the Accused person before, during and after commission of the Offence. He relied on the evidence of PW3 that during the arrest of the A1 (Kivumbi Vincent), he was found in his home sleeping at around 4:00AM in the morning and that there was no resistance which is a conduct of an innocent person who did not involve himself in the plan to cause the death of one **Kabugo Yusufu**. In his final submissions, Counsel Lwanga submitted that Prosecution evidence is not enough to sustain the Offence of a Murder Charge against the Accused person (A1).

**Issue (3): Whether the accused has a case to answer or can be put on defence:**

Counsel Lwanga submitted that the decision as to whether there is a *Prime Facie* case or not has been left to the discretion of Court based on the evidence on record and submissions of an Accused person (A1). He relied on the case of **State Vs. Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul. H.C.A No. S. 104/1997**, J.P. Moosali while quoting Lord Parker C.J. in **Sanjit Chaittal Vs. The State (1985). 39. WLR. 925** stated that:

*"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence adduced by the Prosecution to*

*prove an essential element in the alleged Offence; b) when the evidence adduced by the Prosecution has been so discredited that no reasonable tribunal could safely convict on it..."*

Counsel Lwanga further submitted that based upon the above reasoning, there has been no evidence to prove an essential ingredient of the Offence. Thus, the Court should uphold a submission on no case to answer. **See also State vs. Marion Bradshaw H.C.A No. 291/98.**

In his closing submissions, Counsel Lwanga submitted that having properly evaluated the evidence on record as well as the law governing the Offence of Murder, there was no sufficient evidence against him to warrant his being put on his defence. His prayer to this Honourable Court was that of acquittal of the Kivumbi Vincent (A1). He further pointed out that Prosecution evidence is full of inconsistencies, contradictions, lies and deceits all of which can hardly be relied upon by this Honourable Court to secure a conviction and/or put the Accused person (A1) on defence but only to acquit him.

**Counsel Jurugo Isaac for Kigozi Joseph (A3) and Byakatonda Deogratus (A6)**

Counsel Jurugo submitted that the four elements of the Offence of Murder had not been proved beyond reasonable doubt by the Prosecution. Counsel Jurugo pointed out that, in his testimony, PW2 denied ever having seen **Kigozi Joseph (A3)** and **Byakatonda Deogratus (A6)** beating up the deceased though they were seen at the scene of crime quarrelling about the rampant thefts that had been in their village.

While evaluating the evidence of PW3, Counsel Jurugo submitted that PW3 arrested Kigozi Joseph (A3) and Byakatonda Deogratus (A6) after complaints by one, Kato Deziderio (PW2). It was PW3's evidence that Kigozi Joseph (A3) caused the death of Kabugo Yusuf because he tried to jump out of the window during his arrest. According to the testimony of PW4, one, Kato

Deziderio (PW2) told him that the Accused persons were among the people who beat and killed the deceased.

Mr. Jurugo submitted that the evidence adduced to establish the participation of Kigozi Joseph (A3) and Byakatonda Deogratus (A6) for the Offence of Murder of Kabugo Yusuf is not sufficient. Counsel Jurugo contended that the evidence of PW2 contradicts that of PW3 regarding participation of A3 and A6 in the beating of the deceased. PW2 told this Honourable Court that although he saw Kigozi Joseph (A3) and Byakatonda Deogratus (A6) at the scene of crime, he did not see them beating up the deceased yet PW3 and PW4 relied on the evidence of PW2 to draw a conclusion that A3 and A6 participated in the beating of the deceased.

Counsel Jurugo relied on the case of ***Uganda vs. Nakato Perepetwa Criminal Case No. 255 of 2009 (unreported)***, where Court held that inconsistencies and contradictions unless satisfactorily explained should benefit or be resolved in favour of the Accused person. He submitted that the contradictions amongst PW2, PW3 and PW4 are major and they go to the root of the case in as far as the participation of Kigozi Joseph (A3) Byakatonda Deogratus (A6) is concerned, which is a major element in an Offence of Murder.

In his closing submissions, Counsel Jurugo submitted that this Honourable Court should be pleased to make a Ruling in favour of the Accused persons that a *prima facie* case has not been made against them. He prayed that the Accused persons, Kigozi Joseph (A3) Byakatonda Deogratus (A6) be acquitted of the Charge of Murder preferred against them.

#### **Counsel Natukunda Juliet for Ssengendo Lawrence (A4)**

Counsel Natukunda submitted that Prosecution proved the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> elements of the Offence of Murder but failed to prove the 4<sup>th</sup> element regarding participation of the Accused person (A4). Ms. Natukunda submitted

that none of the three Prosecution witnesses gave any evidence implicating Ssendendo Lawrencio (A4) in the participation of the murder of Kabugo Joseph. Counsel Natukunda pointed out to this Honourable Court that the only evidence available on record is that Ssendendo Lawrencio (A4) was at the scene of crime.

In her submissions, Counsel Natukunda submitted that the Prosecution has failed to adduce evidence to prove the essential element of the Offence of Murder with which Ssendendo Lawrencio (A4) is charged with. Ms. Natukunda contended that whereas A4 was arrested on the basis of PW2's information to the Police. PW2 distanced Ssendendo Lawrencio (A4) from the crime. PW2 testified that he did not see A4 participate in the beating of the deceased although he was at the scene of crime.

Counsel Natukunda submitted that it would be a denial of justice to the Accused person, Ssendendo Lawrencio (A4) to put him on defence when there is no credible evidence pointing to his guilt. She therefore prayed that this Honourable Court finds the Ssendendo Lawrencio (A4) not guilty under Section 73 (1) of the Trial Indictment Act, Cap 23 and acquit him of the Offence with which he is charged with and set him free.

## **RESOLUTION**

It is trite law that prior to placing an Accused person to his/her Defence, the Prosecution is required to have established a *prima facie* case against such Accused person. It is now a well-established law 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 vs. R [1957]E.A 332**, in the **Bhattcase**, the East African Court of Appeal held that a *prima facie* case could not be established

by a mere *scintilla* of evidence or by any amount of worthless, discredited Prosecution evidence.

Also, in the Ugandan case of ***Uganda vs. Mulwo Aramathan Criminal Case No. 103 of 2008***, Court further clarified on proof of a *prima facie* case as follows:

*'A prima facie case does not mean a case proved beyond any reasonable doubt since at this stage, Court has not heard the evidence for the Defence'.*

I agree with the above position.

I have carefully evaluated the Prosecution evidence. I find that, in the absence of any explanation to the contrary from the Defence, the Prosecution evidence does not establish the three (3) ingredients of the Offence of Murder. It is not in dispute that there was death as a result of an angry mob. On the question of the Accused's participation, this Court finds that, in the absence of any evidence to the contrary, the evidence of PW2, PW3, and PW4 does not establish participation of the Accused persons. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required for a fully-fledged criminal trial. Rather, what is essential is such evidence which if taken literally or on the face of it would establish the essential ingredients of the Offence of Murder, as well as the Accused's participation therein.

For those reasons, I find that there is no evidence adduced against the Accused persons to establish a *prima facie* case against them. Categorically, the Prosecution evidence is insufficient to require the Accused persons to be put each to his own defence for the Offence of Murder Contrary to Sections 188 and 189 of the Penal Code Act Cap 120.

## **DETERMINATION**

I accordingly **ACQUIT** you **KIVUMBI VINCENT** of the Offence of Murder that you are charged with and set you free unless there are other Charges against you.

I accordingly **ACQUIT** you **MUGERWA LAWRENCIO** of the Offence of Murder that you are charged with and set you free unless there are other Charges against you.

I accordingly **ACQUIT** you **KIGOZI JOSEPH** of the Offence of Murder that you are charged with and set you free unless there are other Charges against you.

I accordingly **ACQUIT** you **SSENGENDO LAWRENCIO** of the Offence of Murder that you are charged with and set you free unless there are other Charges against you.

I accordingly **ACQUIT** you **GITTA KIZITO** of the Offence of Murder that you are charged with and set you free unless there are other Charges against you.

I accordingly **ACQUIT** you **BYAKATONDA DEOGRATIUS** of the Offence of Murder that you are charged with and set you free unless there are other Charges against you.

**SIGNED.....**

**HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA**

**J U D G E**

**12<sup>TH</sup> MAY, 2014.**