



**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBARARA**  
**CRIMINAL SESSION CASE NO 241 OF 2022**

[DPP NO: MBR-CO-2509/2020, POLICE NO: RUBINDI CRB 205/ 2020]

**UGANDA VS NUWABIINE ANDREW & ORS**

**BEFORE:** Hon. Justice Nshimye Allan Paul. M.

**JUDGEMENT**

**REPRESENTATION**

Adv. Jacob Nahurira and Adv Ramla Ddamba for the ODPP representing the state.

Adv. Ronald Kwikiriza on state brief.

**INTRODUCTION.**

The accused **Nuwabiine Andrew alias Mujungu, Nuwahereza Nicholas, alias Kabahindi, Abweine Barnabas** were indicted on the charge of **Murder** Contrary to section **188 & 189** of The Penal Code Act. The particulars of the offence are that; **Nuwabiine Andrew alias Mujungu, Nuwahereza Nicholas alias Kabahindi, abweine Barnabas** and others still at large on 7<sup>th</sup> November 2018 at Kyakazizi Cell , Rwenjojo Ward, Rutoma Bwizibwera Town Council in Mbarara District Murdered Shaba Oswald. The indictment initially had A4 as Abaho Bosco, who was released due to the fact that it was discovered that he had not been committed for trial to the high court. The trial then proceeded against **Nuwabiine Andrew alias Mujungu (A1), Nuwahereza Nicholas alias Kabahindi (A2) and Abweine Barnabas (A3).**

The accused person took Plea on 02<sup>nd</sup> June 2023, and they pleaded not guilty.

### **BURDEN AND STANDARD OF PROOF.**

It is a principle of law that in criminal cases that the Prosecution has a burden of proving all the ingredients of the offence (**Nandudu Grace & anor Vs Uganda Supreme Court Criminal Appeal No 4 Of 2009, Section 101 & 103 of the Evidence Act**). In Criminal cases the standard of proof that is required is to prove all the ingredients beyond reasonable doubt (**See Miller Vs Minster of Pensions [1947] 1 ALLER 372, Uganda vs Monday Wilson high court Criminal case 22 of 2017**)

### **PRE-HEARING**

The prosecution and defence during the pre-hearing agreed on some facts under section 66 of the Trial on Indictments Act. The documents that were agreed upon by both parties were exhibited and made part of the evidence; they are:

1. Police Form 24, a medical examination of a person accused of serious crime. **A1 Nuwabiine Andrew alias Mujungu** was examined and a form was exhibited as PEX1. In the form a medical officer confirmed on 20<sup>th</sup> November 2020 that the accused person was of normal mental condition to stand trial.
2. Police Form 24, a medical examination of a person accused of serious crime. **A2 Nuwahereza Nicholas alias Kabahindi** was examined, and a form was exhibited as PEX2. In the form a medical officer confirmed on 04<sup>th</sup> January 2021 that the accused person was of normal mental condition to stand trial.
3. Police Form 24, a medical examination of a person accused of serious crime. **A3 Abweine Barnabas** was examined and a form was exhibited as PEX1. In the form a medical officer confirmed on 04<sup>th</sup> January 2021 that the accused person was of normal mental condition to stand trial.

## WITNESSES

The prosecution called ten witnesses, while the defence produced five witnesses.

## ASSESSORS' OPINION

- 5 The assessors gave a joint opinion, where in they recommended that the accused persons be acquitted.

## SUBMISSIONS

- 10 The court issued out a schedule on 17<sup>th</sup> August 2023 for the parties to file written submissions. The parties did not file any, so the court will consider the evidence on the court record.

## DETERMINATION

- 15 It is a principle of law that the prosecution has a duty to prove all the ingredients of the offence as is stipulated in the law in **Section 101 & 103 of the Evidence Act** and confirmed in case law in **Nandudu Grace & anor Vs Uganda Supreme Court Criminal Appeal No 4 Of 2009**.

- 20 The question for determination is whether the prosecution has proved all the ingredients of the offence of murder beyond reasonable doubt against the accused persons. In **MATOVU FRANK & ANOR VS UGANDA COA CRIMINAL APPEAL NO. 111 OF 2018** the ingredients of the offence of murder were stated as;

1. Death of a human being;
2. The death of the deceased was caused unlawfully.
- 25 3. The death of the deceased was caused with a malice aforethought.
4. The accused participated in causing the death of the deceased.



### **Ingredient 1**

Death may be proved by production of a postmortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body.

5 **(Uganda v Endrio & 3 Ors high court Criminal Session 172 of 2016).**

Police Form 48B, a postmortem report that was exhibited as PEX4 confirmed that on 9<sup>th</sup> November 2020 a body of Shaba Oswald was identified. The cause of death was stated as asphyxiation following wet drowning associated with manual strangulation.

10 The Postmortem report proves ingredient 1 of death of a human being.

### **Ingredient 2**

It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it is found to be accidental or authorized by law

15 **(see R v. Gusambizi s/o Wesonga (1948)15 EACA 65, Uganda Vs Bosco Okello [1992-93] HCB 68).**

Police Form 48B, a postmortem report that was exhibited as PEX4 confirmed that on 9<sup>th</sup> November 2020 a body of Shaba Oswald was identified. The cause of death was stated as asphyxiation following wet drowning associated with manual strangulation.

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I therefore conclude that the homicide associated with manual strangulation was not authorized by law or accidental and since the law presumes any homicide (the killing of a human being by another) to be unlawful (see **R v. Gusambizi s/o Wesonga (1948)15 EACA 65, Uganda Vs Bosco Okello [1992-93] HCB 68**), I therefore based on the evidence in the postmortem report (PEX4), find that the prosecution proved ingredient number 2 that the death was unlawful.

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### Ingredient 3

Ingredient 3 requires the prosecution to prove that the death of the deceased was caused with a malice aforethought. Malice aforethought is a mental element which can be established from the surrounding circumstances, the parts of the body injured and the nature of the injuries (*see Uganda Vs Bosco Okello [1992-93] HCB 68*).

The evidence on court record from PW7 Dr Atwine Raymond that testified that the body had wound abrasions around the upper eye lid and around the neck and PW8 No 29140 DET SGT Magezi Onesmus that testified seeing the body floating in the dam, all confirms what is stated in the post mortem report Police Form 48B that was exhibited as PEX4 stating the cause of death was stated as asphyxiation following wet drowning associated with manual strangulation.

I find that the mental element of malice aforethought is proved, from the testimony of Pw7 and PW8 as well as the evidence in the postmortem report PEX4, that refers to strangulation on the neck a sensitive part of the body that can lead to death before drowning. I therefore find that these circumstances as shown in the evidence show that ingredient number 3 is proved.

### Ingredient 4

The fourth ingredient that the prosecution is duty bound to prove relates to participation of the accused persons. I will summarize the evidence of on the court record on this matter.

PW1 Muhumuza Osbert testified that the deceased was his brother. That he last saw him alive on 7th November 2020. That he went to Rwentojo Town and PW1 followed him, that they linked up at the Mechanics place where they were repairing a Bluetooth speaker, that while there Karugaba Sam joined them and

asked the deceased to buy him a drink at Gifts shop. That they got information that curfew police were in Rwentojo so they were locked Inside the shop to avoid arrest. that at 10pm Pw1 got a boda boda rider to take them home, but the deceased declined stating that he will come later with the Karugaba's, so PW1 was taken home by Benard. That the deceased did not return home at night , the next morning they searched for him at Akanyasi and Gifts bar but he was not there..... That there was an incident at Gifts bar on 24th October 2020, he was with the deceased, Karugaba, Misaki, Fred and Nuwabine (A1) at the bar, when Misaki picked a quarrel with the deceased, with Misaki claiming that the deceased had slept with his girl. A scuffle ensued and the fight was taken outside the bar, prompting PW1 to call the police. That A2 Nuwahereza Nicholas then attacked PW1 , until Karugaba pushed him away he left saying we have beaten the sons of Kiromba.

Pw2 Jolly Kiromba testified that the deceased was her son, that she last saw him on 7th November 2020. ...That the girl told her that Shaba had been in the bar ..... That on 9th November 2020 they found out that Shaba had died

PW3 Mutesi Gift testified that she has a bar business, that she knew the deceased and she also know all the accused. She stated that on 7th November 2020 in the evening at around 9.30pm the deceased entered her bar, and on seeing karugaba and kalisa he went to join them. He then ordered for a drink called Enyonyozi , but he had another in his hand. He then kept conversing with his friends, that at around 10.30pm he was leaving, then Karugaba and Kalisa told him to wait for them but he refused and left. That at that time in the bar there was A1, A2, and A3 who left at around 11pm. That the accused (A1, A2 & A3) left around 1 hour after the deceased left, that it was the deceased that left first. That from the time the deceased left, A2 Kabahindi left the bar, going out



and back around three times, that when the deceased left it took about 15 minutes and A2 moved out but she did not know how long he would stay before returning to the bar. That he kept going in and out.

5 PW4 Ndyamuyaka John testified that he knows A1 Nuwabiine Andrew, that in 2020 as he was closing church at around 7pm , Nuwabiine came and asked him to pray for him saying that they are putting allegations on him that he killed a person. That he counselled him telling him that if he did not do it, he should not run away. That A1 was drunk when he saw him. He stated that he did not know  
10 the deceased. During cross examination he stated that A1 Andrew used to pray at his church, that when he went seeking prayers, the deceased had already been buried. That when he advised him that if he didn't do it he should not run away , he did not run away.

15 The defence evidence on court record

DW1 Nuwabiine Andrew , the accused NO 1 testified on oath that he knew the deceased , he used to see him pass on a boda boda. That on 7th November 2020 , he got up in the morning rode his boda and got home in the evening since they were not allowed to ride at night. That he had no grudge with the deceased.  
20 That he drinks alcohol, but he does not know the bar owners except Kennedys bar where he would sometimes drink. That he has never taken alcohol in Rwentojo with any of the accused. That he learnt from locals that someone had been killed, he went to the crime scene. That he did not kill the deceased.

25 DW2 Nuwahereza Nicholas the accused NO 2 testified on oath that he was a milk vendor but after he was cheated his mother told him to move to Mbarara where she had a shop , that he had been in Mbarara staying with his mother for three weeks before the death , that he did not go to the crime scene , and it is

his mother that informed him that some one had been killed in the village after she came from Rwentojo to Mbarara. During cross examination he stated that he his 17 years in 2020, that he was born 5th March 2004 . that his mother went to Rwentojo to buy banana's on 7th November 2020 that is when she learnt that some one had fallen in Gashijas farm . that the mother came back the same day . He denied knowledge of gift Mutesi or going to bars. During re-examination he re stated that his mother went to Rwentojo on 7th November 2020 and returned the same day.

10 In the analysis of the evidence above, the accused person denied murdering the Shaba Oswald. It is important to note that there is no witness that physically witnessed the murder, this implies that we have to consider the circumstantial evidence.

Circumstantial evidence is very often the best evidence available to the state . It is evidence of surrounding circumstances which, by intensified (Sic) examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial (*See High Court of Kenya at Nairobi Criminal Case No. 55 of 2006, Republic Vs. Thomas Gilbert Chocmo Ndeley, quoted and stated to be representative of the position of the law on Circumstantial evidence in Uganda by the supreme court in Godi Akbar v Uganda Criminal Appeal No. 3 of 2013*). The courts have guided that when dealing with a case depending exclusively upon circumstantial evidence, "the Court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt" (*See Audrea Obonyo & Others Vs. R (1962) EA 542, Godi Akbar v Uganda Supreme Court Criminal Appeal No. 3 of 2013.*)

In my analysis I find that there is sufficient evidence on record from PW1 and PW6 that points to a conflict between the deceased and the accused over a girl that led to a fight



on 24<sup>th</sup> October 2020, where it was alleged that after the fight the accused threatened that they would do something that will make the deceased's family cry for the rest of their lives. It is this conflict and the associated threats that made the accused persons primary suspects.

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A2 in his testimony as DW2, stated that he had been in Mbarara staying with his mother for three weeks before the death of the deceased. That he did not go to the crime scene, and it is his mother that informed him on 7<sup>th</sup> November 2020 that someone had been killed in the village after she came from Rwentojo to Mbarara.

10 During cross examination he denied knowledge of gift Mutesi or going to bars. During re-examination he re-stated that his mother went to Rwentojo on 7th November 2020 and returned the same day.

This testimony by A2, in essence was setting up an alibi that he was not any where near the village where the murder occurred. In **Uganda v Kayinamura (high court Criminal Session 238 of 2019)** it was stated that;

20 "it is the position of the law that where an accused raises an alibi he bears no obligation to justify it. The burden lies on the Prosecution to discredit the alibi through cogent evidence placing the accused at the scene of the crime as the perpetrator of the offense he is charged with"

In **Buhingiro v Uganda (supreme court Criminal Appeal No. of 2014)**, the Supreme court stated that:

overwhelming evidence of the identifying witnesses placing the accused at the crime scene makes the defence of alibi was not sustainable.

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The evidence of PW3 (Mutesi Gift) who owns a bar, was to the effect that A1, A2 & A3 where in her bar at the same time when the deceased and others were also in the bar on 7<sup>th</sup> November 2020, which was the last time the deceased was seen alive. It is also

worth noting that A2 stated that he found out that the deceased had died on 7<sup>th</sup> November 2020 from his mother who had returned from Rwentjo on 7<sup>th</sup> November 2020. I nonetheless find the evidence that he was told by his mother about the death on 7<sup>th</sup> November 2020, to be false a testimony since the evidence on court record from the prosecution witnesses shows that the body of the deceased was not discovered on 7<sup>th</sup> November but later, as of 7<sup>th</sup> November 2020 no one save for the assailants knew that the deceased had died so it is not possible that A2's mother could have found out in the village that the deceased had died.

The fact that A2 repeated his testimony that the deceased had died on 7<sup>th</sup> November 2020 during his cross examination and reexamination raises questions how he knew the deceased had died on 7<sup>th</sup> November 2020, when the body was not discovered in the village until a couple of days later, which begs for further interrogation of the circumstantial evidence.

PW3 Mutesi Gift stated in her testimony, That from the time the deceased left, A2 Kabahindi left the bar, going out and back around three times, that when the deceased left it took about 15 minutes and A2 moved out but she did not know how long he would stay before returning to the bar. That he kept going in and out.

The evidence on court record shows that on 7<sup>th</sup> November 2020 the A2 was in the bar along with the deceased, that when the deceased left the bar, A2 followed around 15 minutes later, and he kept returning to the bar where he was with A1 and A3. The evidence also shows that A2 knew that the deceased had died on 7<sup>th</sup> November 2020, when no one in the village knew that the deceased had died since the body was discovered a few days later. This evidence coupled with the fact that the Accused had a grudge with the deceased over a girl, which had led to a fight and threats to reiterate against the deceased all lead to the conclusion that the evidence discredits the alibi set

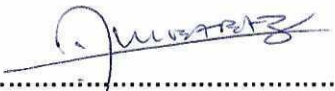
up by the accused number two (A2) and instead the circumstantial evidence makes him an active participant who had information as to the date of the death when no one knew since the body had not yet been discovered. I find that the information as to the date of death known by A2 as per his testimony could only have been known by the assailants. Secondly he is the only one that is said to have followed the deceased shortly after he had moved out of the bar as was sated by PW3. I find that the 4th ingredient regarding the participation of the A2 is proved from the circumstantial evidence.

In regard to A1 and A3, the evidence on court record is not sufficient to prove their participation in the murder or conspiracy to commit the murder of Shaba Oswald.

I therefore acquit the accused **Nuwabiine Andrew alias Mujungu (A1)** and **Abweine Barnabas (A3)** of the charge of murder of Shaba Oswald contrary to section 188 & 189 of The Penal Code Act. I order that **Nuwabiine Andrew alias Mujungu (A1)** and **Abweine Barnabas (A3)** be released from custody in respect to this charge, for which they have been acquitted.

The Prosecution has proved all the four ingredients of the offence of murder that they are duty bound to prove, to lead to the conviction of the A2, Nuwahereza Nicholas alias Kabahindi .

In the circumstances I convict Nuwahereza Nicholas alias Kabahindi (**A2**) of the offence of murder of Shaba Oswald Contrary to section 188 & 189 of The Penal Code Act.

  
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**Nshimye Allan Paul M.**  
**JUDGE**  
**12-10-2023**





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IN THE HIGH COURT OF UGANDA AT MBARARA  
CRIMINAL SESSION CASE NO 241 OF 2022

[DPP NO: MBR-CO-2509/2020, POLICE NO: RUBINDI CRB 205/2020]

UGANDA VS NUWABIINE ANDREW & ORS

BEFORE: Hon. Justice Nshimye Allan Paul. M.

SENTENCING OF NUWAHEREZA NICHOLAS ALIAS KABAHINDI (A2)

**BACKGROUND**

Nuwahereza Nicholas alias Kabahindi (A2) was on 12<sup>th</sup> October 2023 convicted of the offence of murder of Shaba Oswald contrary to section 188 & 189 of The Penal Code Act.


I have considered the aggravating and mitigating factors before sentencing.

**SENTENCE**

In sentencing it is important to consider the following;

*Nature of the offence, whether the case went to a full trial or not, the aggravating factors put forward by the state, mitigating factors put forward in favor of the convict and The need for consistency in sentencing as can be inferred from appeal decisions of the higher hierarchal courts.*

I will now consider sentences as prescribed by the law or given by courts of law in similar matters. These include;

  
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1. In Wasaja Fred vs Uganda COA CRIMINAL APPEAL NO.49 OF 2011. The Court of appeal found a sentence of 35 years' imprisonment would meet the ends of justice in a murder conviction.
2. In Befeho Iddi vs Uganda SC Criminal appeal 15 of 2017. The supreme court upheld a sentence of 30 years on a conviction of murder.
3. In Ndyomugenyi vs. Uganda, Supreme Court Criminal Appeal No.57 of 2016, the Supreme Court confirmed a sentence of 32 years' imprisonment for a murder.
4. In Mpagi Godfrey vs. Uganda Supreme Court Criminal Appeal No 63 of 2015, the Supreme Court confirmed a sentence of 34 years for Murder.

In this case the convict along with others had a grudge with the deceased, on the fateful day which was during the COVID lock down when people were not allowed to move, the convict was within proximity of the deceased in a bar. He left the bar shortly after the deceased had left and kept moving in and out of the bar. The deceased was later discovered dead in a water dam, bearing marks on the neck that were later confirmed to be a result of strangulation, before he was put in the water leading to his death.

I have considered the sentences given by the Court of Appeal and the supreme court in the cases highlighted above where the convicts had been convicted of murder.. I have also considered the fact that the convict was below the age of 18 years at the time he committed the offence having testified during cross examination that he was 17 years in 2020.

The fact that the convict was below the age of 18 at the time of commission of the offence is corroborated by the evidence of the prosecution contained in PEX2 , the Police form 24 signed by Dr Kassi, which clearly states that he was 17 years. In light of

the fact that even the prosecution evidence confirms that the convict was below 18 in 2020 when the offence was committed, it implies that his sentencing is guided the following;

1. Guideline 4 of the constitution (sentencing Guidelines for courts of Judicature (practice directions) of 2013 that defines a “child offender” means an offender below the age of eighteen years.
2. Section 94 (1) (g) of the children’s Act that prescribes for “detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and in the case of an offence punishable by death, **three years in respect of any child.**”

I find that the maxim punishment for the offence of murder is death, as such since the convict was below the age of 18 years at the time of commission of the offence, I follow the guidance in section 94(1)(g) of the children’s Act, and I sentence the convict to 3 years from the date of conviction, On the sentence, I deduct the period of 2 years, 9 months and 6 days spent on remand up to the date of conviction. The convict will therefore serve a sentence of 2 months and 24 days Starting from the date of conviction, today 12 October 2023.

The convict is informed of his right of appeal against the convictions and sentences within 14 days from today.



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**Nshimye Allan Paul M.**  
**JUDGE**  
**12.10.2023**