



THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA  
CRIMINAL SESSION CASE NO 499 OF 2019  
[DPP NO: IB-CO-366/2019, POLICE NO: IB CRB 313/ 2019]

UGANDA VS KYARIMPA BENA

BEFORE: Hon. Justice Nshimye Allan Paul. M.

JUDGEMENT

REPRESENTATION

Adv. Jacob Nahurira for the ODPP representing the state.  
Adv. Suwaya Matovu on state brief.

INTRODUCTION.

The accused

The accused **KYARIMPA BENA** was indicted on the charge of **Murder** Contrary to section **188 & 189** of The Penal Code Act. The particulars of the offence are that;

**Kyarimpa Bena & others still at large on 13<sup>th</sup> day of April 2019 at Kagango 1 Village in Ibanda District murdered Banyenzaki Tomasi.**

The Accused person took Plea on 22<sup>nd</sup> May 2023 and she 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. The form was exhibited as **PEX1**. In the form a medical officer confirmed on **15<sup>th</sup> April 2019** that the accused person was of normal mental condition to stand trial.
2. Police Form 48B, a postmortem report. The form was exhibited as **PEX2**. In the form a medical officer (Dr Baguma) confirmed on **13<sup>th</sup> April 2019** that the body of **Banyenzaki Thomas** was identified by **Deo Byanyima**. The cause of death was stated as **raised intracranial pressure due to blunt force trauma**.

## WITNESSES

The prosecution called two witnesses, **PW1 Mugisha Joseph** and **PW2 Byarugaba John Patrick**. The defence produced one witness, the accused person.

## ASSESSORS' OPINION

The assessors gave a joint opinion, where in they recommended that the accused, be convicted.

## SUBMISSIONS

The court issued out a schedule on 10 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

It is a principle of law that the prosecution has a duty to prove all the ingredients of the offences 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**.

The question for determination is whether the prosecution has proved all the ingredients of the offence of murder beyond reasonable doubt against the accused person. 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.
3. The death of the deceased was caused with a malice aforethought.
4. The accused participated in causing the death of the deceased.

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### **Ingredient 1**

The evidence on court record that was agreed upon by both the prosecution and the accused is a postmortem report that was exhibited as PEX2. In that postmortem report it was stated that the cause of death was **raised intracranial pressure due to blunt force trauma**. The evidence in PEX2 is also corroborated by the evidence of **PW1 Mugisha Joseph** that testified that as they were getting a boda boda to move the deceased to Mbarara he died. In my analysis this evidence proves ingredient 1, in the sense that the postmortem report and witness testimony confirm the death of a Human being, which is a requirement to prove ingredient 1 of death of a human being.

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### **Ingredient 2**

The fact that the postmortem report exhibited a **PEX2** states that cause of death was raised intracranial pressure due to blunt force trauma. Since in this case the accused as DW1 testified that the deceased came home drunk to attack her, he picked a panga so she run to the house and when she went out he threw it at her but she dodged it. This raises a possible defence of self defence, which court is obligated to investigate basing on the evidence on court record because if it is successful it would absolve the accused of criminal responsibility as can be inferred from section 15 of The Penal Code Act.

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Lawful self-defense exists when the accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt; the accused must reasonably believe that the immediate use of force is necessary to defend against that danger, what is necessary is that the accused should demonstrate by his or her actions that he or she does not want to fight. (see **Uganda v Ijjo High court Criminal Session 76 of 2017**).

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I find from DW1, the accused's testimony that the deceased threw the panga, which means that after she dodged it all apprehension of imminent attack possible of causing death had passed. I note also that PW2 and DW1 all testify that the deceased came home to attack the accused.

I have also considered the evidence of **PW1 Mugisha Joseph** that in the scuffle or fight between the deceased and the accused, "the accused also came with a stick and beat his head then he started bleeding" this is collaborated by PW2 **Byarugaba John Patrick's testimony** that on 12 April 2019 at around 2pm he saw a boda boda man called Justus carrying his uncle (deceased) who was bleeding on the head. Clearly the fact that he was bleeding on the head is stated by both PW1 and PW2. This means that the defence of self defence cannot be fully available to the accused, the death resulted from the fight.

I therefore conclude that the homicide was not authorized by law or accidental, yet 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*). This therefore means that the evidence in PEX2 and the evidence of PW1 and Pw2 rules out any defences, thereby proving ingredient number 2 that the death was unlawful.

### Ingredient 3

Ingredient 3, 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*). In this case **PW1 Mugisha Joseph** testified that the accused sent a girl to call him when there was a problem at home after the deceased had come from town quarreling to attack the wife for harvesting his coffee. He stated that when he got to the home a fight ensued with the son and mother on one side beating the now deceased father. **PW2 Byarugaba John Patrick** testified That in the past he had witnessed the deceased beat the accused.

That coffee is what caused the problem. That the coffee was for the family, the man and woman. That someone told the man that the wife had harvested his coffee so he left the trading center to go and attack them. Dw1 also testified that the deceased came home drunk and attacked her, in cross examination she stated that during the scuffle, the deceased beat her on the shoulder, for which she got treatment in Prison.

In My analysis the actions of the accused don't show the actions of a premeditated plan to kill the husband, besides it was the husband who return home quarreling and a fight ensued, in the fight Dw1 states he beat her and she was treated in Prison, while Pw1 states that the accused beat him on the head with a stick.

5 In these circumstances, that are characterized by a fight between husband and wife arising from a disagreement related to coffee they both own as a family, and also given that they both hurt each other without use of unproportionate superior weaponry. This means that although the defence of self defence cannot be fully available to the accused, the injuries inflicted in the fight and given that there is no indication of  
10 premeditated plan to attack the deceased do not point to an inference of malice aforethought. I find that the mental element of malice afore thought is not proved, therefore ingredient number 3 was not proved.

#### Ingredient 4

15 The fourth ingredient that the prosecution is duty bound to prove relates to participation of the accused. I will summarize the evidence on court record relating to participation of the accused. The evidence of **PW1 Mugisha Joseph** places the accused at the crime scene as an active participant in the scuffle and also states that she beat the deceased with a stick. The accused (DW1) also in her testimony states that the  
20 deceased came home and attacked her, in cross examination she says he beat her and as a result she received treatment on her shoulder while in Prison. This testimony places the accused at the crime scene as an active participant during the crime. I find that the 4th ingredient regarding the participation of the accused is proved.

25 The prosecution has proved three of the four ingredients of the offence of murder that they are duty bound to prove, in order to lead to the conviction of the accused. In the circumstances I depart with the advice of the assessors who advised court to convict the accused of murder, because the assessors did not ably consider the aspect of malice aforethought. I therefore acquit the accused, **KYARIMPA BENA** of the charge of  
30 murder of **Banyenzaki Tomasi** Contrary to section 188 & 189 of The Penal Code Act.

#### MINOR AND COGNATE OFFENCE

In principle an accused can based on the evidence on record be convicted of a minor and cognate offence to the offence he was charged as is stated in the law in section 87  
35 of the Trial on Indictment Act, which provides that.



*"When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it."*

5 The ingredients of manslaughter a minor offence of murder were listed in **Uganda v Alijuna Matia High Court Criminal Case 131 of 2011** as follows.

1. death of a human being
2. unlawful causation of death and
3. participation of the accused persons in causing the said death

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The ingredients of manslaughter listed in **Uganda v Alijuna Matia High Court Criminal Case 131 of 2011** were proved in the discussion of the ingredients 1, 2 and 4 of the offence of Murder when it was analyzed above. I therefore find that the evidence on court record proves the ingredients of Manslaughter contrary to section 187 and 190 of the Penal Code Act.

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### CONCLUSION

I therefore convict the accused, **KYARIMPA BENA** of the offence of Manslaughter contrary to section 187 and 190 of the Penal Code Act.

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Nshimye Allan Paul M.

JUDGE

06-09-2023