

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
HCT-00-CR-SC-028-2019

UGANDA

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PROSECUTOR

VERSUS

1. BASIKANA JAMES

2. NTEGE FRANCIS BULESA

3. KAKOOZA BERNARD

4. SEKITOLEKO HENRY

ACCUSED

5. BUKENYA PETER

6. KIMEZE JOSEPH

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

The accused persons, **A1 - Basikana James; A2 - Ntege Francis a.k.a Bulesa; A3 - Kakooza Bernard; A4 - Sekitoleko Henry; A5 - Bukenya Peter; and A6 - Kimeze Joseph** were indicted on two counts of the offence of Murder contrary to sections 188 and 189 of the **Penal Code Act**.

It is alleged in the particulars of offence that the accused persons on the 26th day of February 2019 at Bulamazi Village in Wakiso district, with malice aforethought unlawfully caused the death of **SERUGO LAWRENCE**.

The particulars of offence in the second count stated that the accused persons on the 26th day of February 2019, at Bulamazi Village in Wakiso district, with malice aforethought unlawfully caused the death of **MUSISI CHARLES**.

All the accused persons pleaded 'Not Guilty' thus bringing the elements of these offences into issue. The prosecution thereafter called 8 witnesses to prove its case.

The brief facts for the prosecution are that one Musisi Charles (the 2nd deceased person) was a resident of Nansana in Wakiso district. On the night of the 26th of February 2019, he went to visit his mother, PW 3 Nakawooza Margaret, who lived in Sigi, found in Muduuma in Mpigi district. He was in the company of a brother in law called Serugo Lawrence (the first deceased person). Later that night, the two left Sigi, riding on a Bajaj motorcycle, to go and visit Musisi's uncle in Kisasi. When they got to Bulamazi, in Bujjuko near the Kampala Mityana road, they were mistaken for thieves. A group of people using sticks, logs and stones descended on and beat them to death.

The bodies were abandoned on the road. At about 8.00 am in the morning, when PW 1- Kiggudde John Patrick (the LC I chairman of the area), was going to work, he saw the bodies and called the Officer in Charge Bujjuko Police station, PW 5 - Assistant Superintendent of Police, Namanya Justus.

PW 5 led a team of police officers to the scene of crime where pictures were taken by the scenes of crime officer, PW 6. There was a motor cycle Reg No. UEB 587V near the dead bodies. Also observed were pieces of timber, sticks and stones used to assault the deceased persons.

The police thereafter transferred the bodies to the city mortuary where post mortem examinations were conducted. In the case of Serugo Lawrence, his body was observed to be mud soiled and it was established that he had suffered multiple abrasions on the face. The lips and eyes were swollen. The bones in his skull were fractured and there was bleeding all over the brain. It was concluded that he died as a result of the head injury from a blunt force.

As for Musisi, his body was also mud soiled and had multiple abrasions on the face, and cuts on the ear and the head. His skull bones were fractured and there was bleeding in the neck area. His death was determined to have resulted from head injury following blunt force trauma.

The Post Mortem reports were tendered as prosecution exhibits.

The prosecution relied on the charge and caution statement of A1 Basikana James where he narrated that that he joined in the beating which was led by the LC I Vice chairman Mubiru and one Kimeze the LC I defence secretary. He thereafter fled the area for Wabigalo, Mityana where his uncle PW 4, Mubiru Sam lived.

Meanwhile all the other accused persons fled the village and were arrested one by one over the course of the next 6 months.

The accused persons were placed on their defence. A2 to A6 elected to remain silent while A 1 testified. He disputed the charge and caution statement relied on by the prosecution saying the police officer who extracted it tortured him extensively. That was what compelled him to sign pre-recorded sheets of paper. Otherwise he did not know the other accused persons nor did he participate in the beating of the deceased persons.

As this is a criminal case it is trite law that the burden of proof rests with the prosecution and never shifts (**Okethi Okale vs R 1965 E.A 555**). The standard of proof is beyond reasonable doubt (see **Kamesere Moses vs Uganda S.C.C.A 8/1997** (unreported)).

With regard to charges of Murder contrary to sections 188 and 189 of the **Penal Code Act** the essential elements are:

- i. There was a death
- ii. The death was caused unlawfully
- iii. With Malice aforethought
- iv. The accused participated.

i. Whether there was a death

From the evidence, on the 26th of February 2019, two young men were beaten to death in the small town of Mabanda located in Balamazi in Bujjuko, Wakiso district. PW 3 - Nakawoza Margaret identified the bodies as that of her son Musisi Charles and his brother in law called Serugo Lawrence.

The then LC I Chairman of Balamazi village Kiggude John testified as PW 1. Anthony Kiyimba is a businessman who ran in a shop in Bujjuko but lived in Balamazi. He was PW 2. Then PW 5 was Assistant Superintendent of Police Namara Justus who was the Officer in Charge Bujjuko Police Station. All these witnesses saw the dead bodies of the deceased persons lying in Mabanda town.

Two post mortem reports, one in respect of each deceased person were exhibited.

The defence did not contest the aspect of death in this matter. From all the foregoing there is overwhelming evidence that Musisi Charles and Serugo Lawrence are both dead.

The first element of this offence has therefore been proved to a standard beyond reasonable doubt.

ii. The death was caused unlawfully

The position of the law is that all homicides are presumed to be unlawful unless authorized by law or proved to have been accidental or excusable (see **Gusambizi s/o Wesonga [1948] 15 EACA 63**). This finding is an inference to be drawn from the facts of a particular case.

A homicide is the killing of one human being by another. In this case the deceased were beaten by several people and it was the beating that led to their injuries ultimately resulting in death. This was definitely a homicide.

There is nothing to show that the beating was either justified or lawful. Nor could it be excused in anyway. In the result I find this second element proved.

iii. With Malice aforethought

Malice aforethought is provided for in S. 191 of **the Penal Code Act** and is deemed to be proved by evidence showing a positive intention, by the accused, to cause death although such knowledge is accompanied by an indifference whether death is caused or not.

In this case the evidence appears to show that the deceased people were beaten, however, there is no first hand description on record of how the beating was done. The court therefore relies on other evidence.

There are photographs of the bodies. The deceased persons are seen lying in muddy soil. However, it is the detailed description of the injury from the post mortem examination that paints a picture of how they were beaten. I have already restated what the post-mortem examination revealed. It is clear that the assaults in both cases targeted the head and the injuries sustained led to the death.

Turning back to malice aforethought, it is not easily proved by direct evidence, as intention resides in the mind. For that reason, the High Court and superior courts have held in a long line of decisions, that malice aforethought can be inferred from: the type of weapon used; the nature of the injuries inflicted; the part of the body affected; and the conduct of the perpetrator before and after the attack. (See **Amis Katalikawe & 2 Ors V Ug SCCA 17/94** Unreported).

In the present matter, both persons suffered broken skulls. There was bleeding in the brain and wounding all over the head. That evidence is an indication that their heads were targeted for assault. The police found several weapons like sticks, timber and stones around the scene of crime which are all capable of causing such damage. It was these injuries that led to death.

It is therefore this court's finding that by targeting such a critical but vulnerable part of the human anatomy, the assailants acted with malice aforethought. I therefore find that the third element of the offence has been proved.

iv) Whether the accused person participated in the commission of the offence

The prosecution relies on the charge and caution statement of A1 James Basikana. That statement was admitted after a trial within a trial which determined that it was made voluntarily. It was the evidence of A1 that at 2:00 am on the night of the 26th of February 2019, one Serwadda had knocked on his door and told him that there were thieves being seriously beaten outside. They both ran to the place where the two men were being beaten. A1 stated that he joined in the beating because thieves had become a problem in their area. That it was the LC I vice chairman Mubiru Joseph and one Kimeze Joseph - the LC I defence secretary who led the beating. That the thieves were beaten with pieces of wood.

They afterwards all dispersed in different directions. A1 went back to his house with Serwadda who spent the night there. In the morning he went to his garden and it was there that someone told him that the beaten people had died and the police was at the scene. A1 went to watch what the police was doing while hiding in a mango tree a distance from the place.

A1 added that he stayed in the bush the whole day. At night he returned home but very early the next day fled the area for Wabigalo, Mityana where his uncle PW 4, Mubiru Sam, lived. He narrated to his uncle what had happened to make him run away from Bulamazi. That PW 4 provided A1 a place to sleep. The next morning police officers came and arrested him.

That he does not deny beating but that they were led by Mubiru and Kimeze.

Later when he made his defence, A1 denied making the statement or voluntarily providing this narration to PW 5. His counsel also reiterated the submission that because the statement was not translated, it could not stand in court. In addition, he also challenged the charge and caution statement on the basis that it was

obtained after promises to help the accused were allegedly made to by the police officer who extracted the statement.

I have already noted the court found the statement voluntary. Secondly, it is a fact that the guidelines requiring that a statement be recorded first in the language the accused spoke and then translated into English were not adhered to. The requirement to translate is a matter of prudence and not of law. It is meant to ensure probity. In this case however, PW 5 was proficient in both languages. I see nothing that would appear to degrade the accuracy of the statement simply because it was not recorded in vernacular first.

It will not automatically follow that where a charge and caution statement is not made in strict conformity of the guidelines it is excluded from evidence. The primary consideration is whether it is voluntary. Every case is considered on its unique merits (see **Pyaralal Melaram Bassan and Wathobia s/o Kiambu v R [1961] 1 EA 521**).

In this case PW 5 promised to help the accused if he stated the truth. That in itself is not unlawful. The mere promise to help would fall under Section 26 of **the Evidence Act** which stipulates that such a confession statement does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on the accused person for the purpose of obtaining it. Again as I have already stated above, the primary consideration is always whether the accused made the statement voluntarily. This court found that the statement was voluntary.

The accused denied making the statement of his free will. That he simply signed because of pain inflicted on him by PW 5. This means that he repudiated the charge and caution statement. A court will not ordinarily rely on such a statement unless it has been corroborated. But first it should be determined whether this was a confession.

That query has been answered by the Court of Appeal for East Africa in **Anyangu and others v Republic [1968] EACA 239 at 240** where it held that:

“A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried”.

The accused admitted to beating the deceased persons. I have already found that it was that beating that led to death. The admission to beating meant that the statement amounted to a confession.

The prosecution also adduced evidence to show that the accused person left his village on the morning after the beating and went to the home of PW 4. He states that it was a visit. However, PW 4 in his testimony said the accused told him he was fleeing the village. I noted that PW 4 was not challenged in cross-examination on this aspect of his evidence. He also stated that it was he who called the police. Ostensibly PW 4 asked the police whether harbouring a fugitive was an offence. When he learnt it was, he let the police know the accused was at his home and they immediately came and arrested A1. There is nothing on record that would water down the credibility of the testimony of PW 4.

That evidence is therefore an admission by A1 to PW 4 that he fled the village after beating. Secondly it is an admission that he beat the deceased persons and lastly that he was arrested at his uncle's home. An admission is evidence that can furnish corroboration (see **Minani Joseph vs Ug SCCA 30 of 1995**). The admission by A1 to PW 4 therefore corroborated the charge and caution statement in a material way.

The conduct of the accused person in fleeing his home immediately after the assaults also furnished the corroboration required to lend credence to the charge and caution. Evidence of an accused person disappearing from his home

immediately after an incident is circumstantial evidence which can provide corroboration (**Uganda vs George Wilson Simbwa SCCA 37 of 1995**).

Indeed, the only way both the police and PW 4 got to know of A1's involvement in this matter is when he told them. It was this that precipitated all other lines of inquiry in this matter.

A court is required to evaluate evidence adduced in its totality and not by examining isolated pieces or looking at the prosecution testimony in isolation of the defence. Here A1 confessed to the commission of the offence. From the manner in which the confession made by A1 is corroborated, I find that his denial was unfounded.

The gentleman assessor advised this court to find A1 participated in the commission of this offence.

In the result, and in agreement with the assessor, I find that the prosecution has proved the participation of A1 in the commission of this offence.

There is no mention made anywhere on record about the participation of **A2 - Ntege Francis a.k.a Bulesa; A3 - Kakooza Bernard; A4 - Sekitoleko Henry; A5 - Bukenya Peter**. These persons however are said to have fled the area of Bulamazi immediately after the murder. While such conduct may raise serious cause for suspicion, it cannot be the basis of establishing the participation of an accused person in the commission of a crime.

In **Sawe V R [2003] EA 208** the court of appeal had this to say about suspicion,

The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

This court finds that the fact of fleeing the area, cannot on its own prove participation of these four persons to a standard beyond reasonable doubt.

As for A6, Kimeze Joseph, A1 named him as the one who led the beating. This evidence amounts to the evidence of an accomplice.

In a criminal trial, a witness is said to be an accomplice if, *inter alia*, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence (**Nasolo vs Uganda [2003] 1 EA 181**)

Since A1 has confessed to the commission of the offence, he is clearly an accomplice. While the evidence of an accomplice may be proved and used against another person accused of the same crime (S. 27 of **The Evidence Act**), it remains only evidence of the weakest kind.

It is the held and agreed position that such evidence must be properly corroborated before a court can rely on it. This court therefore warns itself of this danger. The supreme court of Uganda in **Rwalinda John vs Uganda SCCA 3 of 2015** cited the case of **R. vs Baskerville (1916) 2 KB 658** where it is stated that,

"the evidence of an accomplice must be confirmed not only to the circumstances of the crime but also to the identity of the prisoner... (it) does not mean that there must be confirmation of all circumstances of the crime, as we have already stated, that is not necessary. It is sufficient if there is confirmation as to the material circumstances of the crime and the identity of the accused in relation to the crime. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection to the crime."

From this excerpt, there must be independent evidence, direct or circumstantial, identifying an accused person as one of the persons responsible for the commission of the offence. That would mean evidence placing him at the scene of crime.

The accomplice testimony, in those circumstances, would then be used as corroborative evidence. In this case however the only available evidence is the one furnished by the accomplice. There is no other evidence for the court to rely on.

In the result, the evidence of A1 saying he was led by A6 in the beating has not been corroborated. No other evidence places Kimeze Joseph at the scene of crime. In the result I find that the prosecution has not proved his participation to the standard required in criminal cases.

The gentleman assessor advised this court to find that A2 to A6 did not participate in the commission of this offence. I agree.

In light of the above A1, Basikana James is found guilty of the offence of murder c/ss 188 and 189 of the **Penal Code Act** and is hereby convicted.

A2 - Ntege Francis a.k.a Bulesa; A3 - Kakooza Bernard; A4 - Sekitoleko Henry; A5 - Bukenya Peter; and A6 - Kimeze Joseph are all acquitted.


Dated at Kampala this Day of September 2023



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Michael Elubu

Judge