

UGANDA / JUDGMENT

Mukankusi and Another v Uganda

(Criminal Session 42 of 2023)

[2024] UGHC 1233 (16 July 2024)

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COURT

High Court of Uganda

BEFORE

Emokor, J

CASE / FILE NUMBER

Criminal Session 42 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE

CRIMINAL SESSION NO. 0042 OF 2023 (Arising from Kisoro – AA – No. 0027 of 2022) (Arising from Kisoro CRB No. 584 of 2022)

UGANDA :::::::::::::: PROSECUTION

VERSUS

A1: MUKANKUSI FAUSTA A3: HAKIZIMANA BRIAN

A2: NIYONZIMA INNOCENT ::::::::::::::ACCUSED

BEFORE: HON. JUSTICE SAMUEL EMOKOR

JUDGMENT

Mukankusi Fausta (A1), Niyonzima Innocent (A2) and Hakizimana Brian (A3) were jointly charged with the offence of **Murder** contrary to **Section 188 and 189 of the Penal Code Act**.

The particulars giving rise to the indictment are that Mukankusi Fausta, Niyonzima Innocent and Hakizimana Brian on the 02/09/2022 at Nyaruyaga cell in Kisoro District with malice aforethought unlawfully caused the death of Bashimiki Florence.

Mukankusi Fausta (A1) and Niyonzima Innocent (A2) pleaded not guilty. Hakizimana Brian (A3) under a plea bargain agreement pleaded guilty and upon conviction was sentenced to 19 years imprisonment.

Representation.

Ms. Najjunju Julie (Senior State Attorney) appeared for the Prosecution while Mr. Bakanyebonera Felix represented A1 and A2 on state brief. The Assessors for this trial were Ms. Sylvia Muhawenimana and Ms. Christine Kembabazi.

During the preliminary hearing sanctioned under **Section 66** of the **Trial on Indictment Act (TIA)** medical evidence in PF48A, PF48B, PF24, a search certificate, 14 photographs and a sketch plan were received as uncontested evidence.

PF48A is the request for Post-Mortem examination originated by the OCCID Kisoro Police Station dated 05/09/2022 to the medical officer Kisoro Hospital. The same was received as Exhibit P1.

PF48B is the Post-Mortem report in respect of Florence Bashimiki dated 05/09/2022 prepared by Dr. Kutunga and it was received as Exhibit P2.

PF24 in respect of the medical examination of Mukankusi Fausta (A1) indicated that she was of a normal mental status and it was received as Exhibit P3.

PF24 in respect of the medical examination of Niyonzima Innocent (A2) that indicated that he was of a normal mental status was received as Exhibit P4.

The search certificate was received as Exhibit P5.

14 photographs of the body of the deceased and house were received collectively as Exhibit P6.

The sketch plan was received as Exhibit P7.

The burden and standard of proof.

This being a criminal case it is one whose proof lies squarely on the Prosecution and the Accused has got no duty to prove their innocence. It is also proof beyond reasonable doubt and the Accused persons must only be convicted on the strength of the Prosecution case and not on the weakness of the defence case. Any contradictions unless fully explained must be resolved in favour of the Accused persons.

See Ssekitoleko versus Uganda (1961) EA 531.

Ingredients of the offence.

The Prosecution must prove each of the following essential ingredients beyond reasonable doubt.

- 1) Death of a human being.

- 2) That the death was caused by some unlawful act.
- 3) That the unlawful act was actuated by malice aforethought.
- 4) That it is the Accused who caused the unlawful death.

a) Death of a human being.

Death may be proved by production of a Post-Mortem report or evidence of a witness who states that they knew the Deceased and attended the burial or saw the body.

Mbonye Deo (PW1) testified that in the night of the 02/09/2022 he went to the house of Florence Bashimiki where he and others forcefully gained entry to her house and found her body lying in the corridor in a pool of blood. His evidence is corroborated by that of Nizeimana Fred (PW2) a son to the Deceased Florence and brother to A1 who testified that he viewed the body of his mother Florence Bashimiki at Kisoro Hospital mortuary.

Corroborative medical evidence is obtained in the Post-Mortem report in Exhibit P2 that lists the cause of death of Florence Bashimiki as being severe head injury and depressed skull fractures. The Accused persons throughout the trial did not contest the fact that Florence Bashimiki was dead. A1 in fact referred to the same as being true. I have also viewed photographs of the body in Exhibit P6.

It is therefore my finding that the prosecution has proved beyond reasonable doubt the death of Florence Bashimiki.

b) That the death was caused by some unlawful act.

The law presumes that any homicide (killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or authorized by law.

See R versus Gusambizi s/0 Wesonga (1948) EACA 65.

It is the evidence of Mbonye Deo (PW1) that in the night of the 02/09/2022 when he and others forcefully gained entry into the house of Florence Bashimiki they found her body lying in the corridor in a pool of blood. The Post-Mortem report in Exhibit P2 describes the injuries to the body as having a deep cut wound on the left frontal scalp measuring about 6cm, a depressed skull fracture with a deep cut wound on the right temporal scalp measuring about 8cm with the cause of death being listed as severe head injury with depressed skull fractures.

The positioning of the body in the corridor of the house in a pool of blood coupled with the extensive injuries described in Exhibit P2 leave this Court with no doubt that the death of Florence Bashimiki was neither accidental nor authorized by law.

It is my finding that the Prosecution has proved the second ingredient beyond reasonable doubt.

c) That the unlawful act was actuated by malice aforethought.

Under **Section 191** of the **Penal Code Act**, malice aforethought may be proved by direct evidence or may be inferred from the evidence indicating knowledge that the conduct of an Accused would probably cause the death.

Malice aforethought may also be inferred in regard to the following:

- a) The weapon used i.e whether it is a lethal weapon or not.
- b) The part of the body that was targeted i.e whether it is a vulnerable part or not.
- c) The manner in which the weapon was used i.e whether repeatedly or not, or number of injuries inflicted and
- d) The conduct of the Accused before, during and after the incident i.e whether there was impunity.

See R versus Tubere s/0 Ochen (1945) 12 EACA 63.

It is the evidence of Nizeimana Fred (PW2) that when he viewed the body of his mother in the mortuary at Kisoro Hospital he observed that her skull had been struck and almost flattened, she was bleeding through the eyes, nose and mouth, her chest and belly had piercings and her legs were bruised. D/Sgt Francis Tumwesigye (PW5) the investigating officer in this case testified that on the 04/09/2022 when he learnt of the report made of murder at Kisoro Police Station he moved to the scene at Nyarugaya village where he found the body of the Deceased lying face down with wounds to the front and back of the head.

The Post-Mortem report in Exhibit P2 describes the body as having injuries to the head, a deep cut wound on the left frontal scalp measuring about 6cm a depressed skull fracture with a deep wound on the right temporal scalp measuring about 8cm with the cause of death being listed as severe head injury with depressed skull fractures.

The head is a vulnerable and sensitive part of the body that when targeted can cause death.

See Okello Okidi versus Uganda SCCA No. 0003 of 1995.

The decision to target the head of the Deceased with such brutal force leaving her with extensive injuries leaves no doubt that the intention of the assailant(s) was to cause death to the Deceased. I have viewed the photographs in Exhibit P6 and they tell a gruesome story of how the Deceased met her death.

I am therefore sufficiently satisfied that the prosecution has proved that the death of Florence Bashimiki was actuated by malice aforethought

d) Participation of the Accused persons.

This Court notes that the precise date of death of Florence Bashimiki is not clearly nailed down by the evidence presented on record that appears to be contradictory in this regard.

The indictment mentions the Murder of the Deceased as having occurred on the 02/09/2022. Mbonye Deo (PW1) testified to having gone to the home of the Deceased Florence in the night of the 02/09/2022 having been requested to check on her by his boss Nizeimana Fred (PW2) and that upon discovering her death that very night the matter was reported to Police.

Nizeimana Fred (PW2) on the other hand testified that it was in the evening of the 03/09/2022 that he instructed Mbonye Deo (PW1) to check on his mother Florence having lost contact with her and that it was that night that he learned from Mbonye Deo (PW1) of her death. While D/Sgt Tumwesigye Francis (PW5) and D/AIP Tukwasibwe Nesta (PW6) both testify to the report of the death of Florence Bashimiki being made at Kisoro Police Station on 04/09/2022 and that they visited the scene that very evening.

D/AIP Tukwasibwe places the time they arrived at the scene as 8:30PM on 04/09/2022 and that he observed that the body was lying in a pool of clotted blood showing that she had been dead for some time maybe even days. It is unfortunate that the Post-Mortem report in Exhibit P2 did not provide information on approximately how long the body had taken before the Post-Mortem.

The above notwithstanding, I do not find this omission on the exact date of death of Florence to be fatal to the Prosecution case.

The date of 02/09/2022 to 04/09/2022 is not too wide a discrepancy given that the Deceased lived alone and as such it is expected that discovery of her death would not be immediate.

I therefore find that no prejudice was caused to the Accused persons in this regard.

I will now turn to the evidence presented by the prosecution and the defence.

Mukankusi Fausta (A1) gave her evidence on oath and denied being responsible for the death of her mother Florence Bashimiki. A1 denied the allegations that she had conflicts with her mother over the house in which she had lived when she separated with her husband. According to A1 she did not threaten her mother nor refuse to hand over the house to her when she demanded for the same. A1 states that Kampire (PW4) the probation officer told lies against her and that she did not go to her office but rather to the office of the senior probation officer one Muhumuza Alex.

That PW4 told lies that she threatened her mother while in her office. A1 also denied plotting with her son Hakizimana Brian (A3) to kill her mother testifying that instead A3 had threatened to behead her, stolen her goat and she had reported this theft to the Police. A1 also gave evidence that her relationship with her brother Nizeimana (PW2) was not good because he used to quarrel about her children eating his mother Florence's food. It is also the defence of A1 that she only got to know A2 in Court over this matter in Court and did not know him before.

A1 therefore denies the charge of Murder.

Niyonzima Innocent (A2) in his sworn defence denied the charge of Murder stating that he only got to know A1 over this case. It is the evidence of A2 that he drives a personal car as a taxi on the Kisoro Kabale road and that it was while on this route with passengers that he met A3 Hakizimana Brian who did not have the money to pay for his fare and that in exchange he purchased from him an Itel phone blue in colour with buttons at UgX 30,000/=. According to A2 he placed his simcard in this phone and that he gave it to his mother. CDW

According to A2 it is when the phone was tracked back to him that he learnt of the death of the original owner. A2 also denies knowing Monday Ivan (PW9) and that he told lies against him.

A2 denies ever selling any beans to Monday (PW9), A2 also tendered to Court Exhibit D1 a purchase agreement for the phone. A2 therefore denies murdering the Deceased Florence Bashimiki.

It is trite law that where an Accused person raises the defence of alibi the onus is on the Prosecution to discredit this defence and to place the Accused person(s) at the scene of crime.

See Kyalimpa Edward versus Uganda SCCA No. 0010 of 1995.

To discharge this burden, the Prosecution relied on the evidence of D/Sgt Nkurunziza Kenneth (PW12) the second investigating officer in this matter who testified that he took over the investigations in this matter on the 25/10/2022 and that at this time A1 was already in custody. It is the evidence of D/Sgt Nkurunziza (PW12) that the Police file already contained a printout of the call data from MTN that he used to confirm with a receipt for the phone given to him by Nizeimana (PW2) that the serial numbers contained in the call logs and that in the receipt were the same.

According to PW12 he tracked the sim card first used on the phone leading to the arrest of A2 and that A2 admitted that he knows the phone having obtained it from Hakizimana Brian (A3) and that he had given the phone to his mother. A2's mother CPW was also arrested and the phone recovered from one Promise Habitumana who she had given the phone to use.

It is the evidence of PW12 that he exhibited the phone and on the 04/03/2023 Brian (A3) was also arrested having been in hiding all this time. PW12 states that he interrogated him and Brian (A3) promised to tell him the whole truth which was that the Deceased Florence was his grandmother and he had grown up with her from Primary Seven to Senior Four and that when his mother Fausta (A1) developed misunderstandings with the Deceased asked him to return to his parents. PW12 states that A3 told him that he knew A2 and that A2 used to meet his mother and he had seen them constantly planning.

That on 02/09/2022 A1 told Brian (A3) that she had found a person to kill her mother because of their land wrangle and that A3 was to guide the killer to the scene of the crime and make sure that the Deceased is killed.

It is the testimony of PW12 that A3 told him that he met A2 at Gasa camp and A2 was driving a Motor Vehicle Corrolla with its number plates concealed and that A2 had a hammer and together they proceeded to his grandmother's house and that A2 entered the house while A3 remained outside on guard. It is the evidence of PW12 that A3 narrated to him that he heard A2 strike his grandmother and she cried out once and that she had been struck on the head. That thereafter they carried out her sack of beans which they took to the Motor Vehicle and stole her solar battery and phone. That on the 03/09/2022 they sold the beans at Natete trading centre to a businessman one Monday Ivan (PW9) to whom they sold 130Kg of beans at UgX 3,500/= per kilogram and received UgX 455,000/= from the sale. That he handed over all the money to A2 and A2 also took the phone. It is the evidence of PW12 that A3 led them to Natete where he had sold the beans to Monday Ivan (PW9) who upon being arrested confirmed to PW12 that he had bought the beans from A3. It is the evidence of PW12 that A3 made a charge and caution statement before D/AIP Ahimbisibwe (PW10). According to PW12 he decided to obtain fresh Court orders for MTN to provide new call logs for the recovered phone ITEL Model 2160 Serial Number. 357675278060708 and sim No.0785569688 recovered from A2 and 0773834993.

It is the evidence of PW12 that the number of the Deceased Florence Bashimiki Mobile No. 0783305857 was inserted into the phone on the 07/08/2022.

The Court order to MTN was received as Exhibit P13 while the MTN print out call logs were received as Exhibit P14.

The Prosecution also presented IP Ahimbisibwe John Bosco (PW10) who testified to taking down the charge and caution statement of Hakizimana Brian (A3).

The prosecution however was unable to tender in the charge and caution statement due to the fact that A3 had pleaded guilty and was not invited as a Prosecution witness on grounds that witnesses of that nature more often than not are likely to turn out as hostile witnesses.

It is for this reason that the evidence of IP Ahimbisibwe (PW10) regarding the charge and caution statement cannot be relied upon in the absence of the said accused. It is my considered opinion that the evidence of D/Sgt Nkurunziza Kenneth (PW12) is largely admissible as regards his interrogation of Hakizimana Brian (A3) as the investigating officer in this matter as it is his investigation that can be considered the glue that holds together the pieces of evidence gathered and presented by the Prosecution. Be that as it may the Accused persons cannot be convicted entirely on his testimony alone. There is need for other corroborative evidence to be adduced by the Prosecution.

It is also imperative to note that the prosecution has not presented direct evidence in terms of eye witnesses to the death of the Deceased Florence Bashimiki.

The evidence presented therefore is circumstantial.

In this regard the Court in **Simon Musoke versus Uganda (1958)** EA held that *"in a case depending exclusively on circumstantial evidence the Judge must find* *before judging upon conviction that the exculpatory facts were incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than the guilt"*

The evidence of PW12 that A2 told him that he knew the Itel phone and had given it to his mother was corroborated by the mother of A2 Bankumiye Juliet (PW8) who testified that A2 gave her a black phone to use in December 2022 and she used it for 3–5 months before it was retrieved by the Police in February 2023. Nizeimana Fred (PW2) tendered to this Court a receipt in Exhibit P15 for the purchase of the Itel phone under his name "Fred" under Serial Number 357675298064708 while D/C Kansima Pius (PW11) tendered to this Court the Itel phone marked CRB 584/2022 together with an Exhibit slip indicating the Serial Number as 357675298064708. The same were received as Exhibit P11 and P12 respectively. A2 in his defence does corroborate the evidence of PW12 that he acknowledged that he was the one who gave the Itel phone to his mother.

D/AIP Tukwasibwe (PW6) the Scene of Crime Officer in this case corroborates the testimony of PW12 when he testified that when he visited the scene at the home of the Deceased Florence they were informed that a sack of beans and the solar battery were missing. This corroborates PW12's evidence that A3 told him that he and A2 had stolen beans from the house of the Deceased together with the solar battery. Further corroboration to PW12's evidence is given by Monday Ivan (PW9) a businessman dealing in dry produce at Natete trading centre in Kisoro-Bunagana High way who testified that on the 04/03/2023 Police officers went to his shop with Brian (A3) and they told him that A3 had claimed that he had sold beans to him. Monday (PW9) testified that he confirmed to the Police that he had in September 2022 purchased beans from Brian (A3) with another man that they came in a motor vehicle a small car 4 seater and that he purchased from them 130 kilograms of beans at UgX 3,500/= per kilogram. According to Monday he also later recalled that Brian (A3) used to sell beans to him with an old woman. PW9 also testified that he was familiar with the face of the man, Brian (A3) came with because he was a taxi driver along Kisoro-Bunagana road and he identified Niyonzima (A2) as the man he was familiar with who had come with Brian to sell the beans to him and that he had known him for the last 1 – 2 years. Monday (PW9) therefore corroborates the evidence of PW12 that A3 told him that they had together driven to the home of the Deceased Florence in a Motor Vehicle Corolla when he testifies to A3 and A2 arriving in a 4 seater motor vehicle when they brought him the beans. Furthermore, A2 corroborates the evidence of Monday (PW9) when he admits to being a taxi driver albeit on a different route using his personal car.

I have no doubt in my mind that the evidence given by Monday is truthful and that he was familiar with A2 for the last 1 – 2 years and that A2 was the driver of the car. I therefore reject the defence of the A2 that he merely purchased the Itel phone in Exhibit P12 from A3 and had nothing to do with the murder of its owner.

I also reject as forged the purported purchase agreement in Exhibit D1 that A2 purchased the phone from A3.

The purchaser A2 did not even sign the sales agreement and the same is also lacking in material particulars like the serial number of the phone being sold. This defence is a work of fiction coined by A2 to evade the course of justice.

The evidence of A1 that she did not have any grudges with her mother Florence Bashimiki and that she made no threats against her are completely false.

The evidence on record clearly shows that the relationship between A1 and her Deceased mother was anything but cordial.

According to Nizeimana Fred (PW2) he witnessed many quarrels that A1 had with their mother Florence.

Moirah Kampire (PW4) the District Probation and Welfare Officer- Kisoro testified to handling a dispute between A1 and her Deceased mother over a house that the Deceased had let A1 occupy when she had split with her husband and when they reunited the Deceased demanded that A1 vacates her house but A1 did not relinquish the house peacefully and when handing over the keys to A1 in the presence of Moirah (PW4) is stated to have said "You will either enter this house when I am dead or I will enter it when you are no longer there"

I am inclined to believe that these words were not uttered in good faith and indeed PW4 testified to cautioning A1 not to use such language because in case of anything happening to her she will be a suspect. It is therefore not strange that A1 uttered her words in August 2022 and in the month of September on about 02/09/2022 A1's mother was murdered and this at the hand of Brian (A3) a son to A1. I am not persuaded that this was a mere coincidence.

The narration by A3 to PW12 that his mother A1 was the architect of the plot to kill her mother Florence in my considered opinion rings true. This is because A3 lived with his grandmother from primary school (primary seven) to his Secondary school (senior four). I am not persuaded that he would on his own hatch a plan to kill his grandmother at whose table he was brought up. I reject the fable attempt made by A1 to paint A3 as a son who also wanted to kill her by beheading her. This is obviously a work of fiction. A3 lived with his parents until the death/murder of his grandmother and only disappeared thereafter. How convenient this was, A1 admits to never reporting the death threats by A3 save for when she suspects he stole her goat.

There appears to be no nexus between A2 and A3 prior to the murder of Florence and the only possible linkage between the two was A1.

The results of the suspected blood stains recovered when the house of A1 was searched on a yellow jacket and delivered to DGAL was never tendered in by the Prosecution. It is therefore impossible to tell whether the blood spots in Exhibit P6 which is a photo of the blood stained jacket belonged to the Deceased or not. A1 however according to D/AIP Tukwasibwe claimed it to be from her menstrual cycle but this cannot also be proved.

I therefore find A1 to be intrinsically linked with the plot to kill her mother Florence Bashimiki.

I do not find any exculpatory facts in this case that would absolve the A1 and A2 of the murder of Florence Bashimiki.

The Court in Teper versus R (1952) AC 480 held that:

"It is necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"

I have carefully considered the circumstantial evidence in this case and found no co-existing circumstances which would weaken or destroy the inference of the Accused's guilt.

It is my that the defense of alibi raised A1 and A2 has been successfully discredited by the Prosecution evidence and the evidence on record points strongly to the fact that A3 led A2 to the house of his grandmother to kill her while A1 the architect remains far away.

Section 20 of the Penal Code Act provides that:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the Prosecution of that purpose an offence is committed of such nature that the commission was a probable consequence of that purpose, each of them is deemed to have committed the offence"

It therefore follows that A1 is just as guilty as A2 who carried out the actual murder with A3.

After considering the evidence adduced by the Prosecution and the defence together and in full agreement with the lady assessors it is my finding that the Prosecution has proved its case beyond reasonable doubt and I accordingly find A1 and A2 guilty of murder Contrary to **Section 188 and 189 of the Penal Code Act** and convict them of the same.

Before me,

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Samuel Emokor Judge 16/07/2024

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