

UGANDA / JUDGMENT

Uganda v Bwambale & 2 Others (Criminal Session Case 17 of 2024) [2024] UGHC 684 (22 July 2024) [2024] UGHC 684

COURT

High Court of Uganda

BEFORE

David S.L. Makumbi, J

CASE / FILE NUMBER

Criminal Session Case 17 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KASESE

HCT-25-CR-SC-0017-2024

UGANDA=====PROSECUTOR

VERSUS

1. BWAMBALE NATHAN
2. BIKANSOBERA JULIUS alias KAMUYONDO ACCUSED
3. THEMBO JOCKUS

BEFORE JUSTICE DAVID S. L MAKUMBI

RULING ON SUBMISSION OF NO CASE TO ANSWER

BACKGROUND:

The Prosecution case in brief is that during the night of 22nd April 2020 the deceased Baluku Nelson Bwahuha was called from his home by one Kabugho Nehema. He subsequently left with her and did not return. When the deceased's wife tried to inquire from Kabugho as to her husband's whereabouts, Kabugho informed her that she had left him at A2 Bikansobera Julius' home. On the following morning of 23rd April 2020, the deceased's wife received information that the body of her husband had been found along Kitsutsu-Katoha road.

It was also alleged that A1 Bwambale Nathan had been seen at around 1.00AM on 23rd April 2020 moving hurriedly around the same area where the deceased's body was found. When the deceased's body was examined, it was found that the cause of death was manual strangulation leading to cardio-respiratory failure.

Upon further investigations the deceased's phone was tracked down and found with one Masika Fedrine, a girlfriend to A3 Thembo Jockus. A3 revealed that he had given the phone to his girlfriend after he found it discarded in a banana plantation near the crime scene on 30th April 2020.

The Accused persons were subsequently arrested and indicted for the offence of murder under Section 171 of the Penal Code Act. It should be noted though that whereas the indictment was originally brought against four persons, one of the Accused Kabugho Nehema entered a plea bargain agreement and was subsequently convicted and sentenced prior to this trial and the Prosecution amended the indictment to exclude her.

EVIDENCE:

The Prosecution relied upon evidence of a Medical Report admitted in evidence as part of the Agreed Facts in the matter. The medical report received and marked in evidence as Prosecution Exhibit No. 1 detailed the post mortem examination of Baluku Nelson Bwahuha on Police Form 48B. The post mortem examination was done at Bwera Hospital on 23rd April 2020 and revealed external injuries described as “*swollen mandible and neck and scratches*”.

The post mortem examination also revealed internal injuries described as “*otorrhea/ conjunctival haemorrhages with mouth full of clotted blood*”.

The Prosecution further relied on the evidence of six witnesses who testified in court.

SUBMISSIONS:

In submitting that the Accused persons had no case to answer Counsel for the Accused focused on the question of cause and participation of the Accused in the murder. As concerns A1 Bwambale Nathan, Counsel contended that PW2 had testified only about A1 having made threats to the deceased as the basis for her belief that he was responsible for the murder. Counsel went on to contend that whereas PW4 Masereka Joel had testified to seeing A1 on the fateful night wearing shorts of a particular description that were recovered by the police, the said shorts were never produced in court. PW3 Masereka Nexon had also testified that his basis for believing A1 was culpable was the threats by A1 against the deceased. Counsel for the Accused contended that threats cannot form a basis for proving murder without corroboration.

Counsel for the Accused went on to argue that the primary basis for the arrest of A2 was due to intelligence information suggesting that the murder was arranged at A2s premises. Counsel contended that to the extent that the sources of the information were never produced in court, the said information amounted to hearsay and was therefore not admissible in proving A2s participation.

Counsel for the Accused also argued that A3s participation had not been proved as the only evidence against him suggested that he picked up a phone close to the murder scene and nothing more.

In reply to the submission of no case to answer the Prosecution argued that it was under duty to prove all the ingredients of murder for which death, unlawful death and malice aforethought were not contested. As concerns participation the Prosecution cited decisions in **Kifamutwe v Uganda – Supreme Court Criminal Appeal No 10 of 1997**; **Okecha s/o Olilya v R (1940) 7 EACA 74**; and **Waibi & Another v Uganda (1968) EALR 228**.

The Prosecution contended that based on the decisions above evidence of prior threats was relevant and that such evidence showed expression of intention beyond mere motive and tends to connect the accused to the killing. The Prosecution therefore argued that A1s expression of intent had resulted into the killing of the deceased and he needed to explain himself in that regard. The Prosecution further pointed out that PW4 Masereka Joel had seen A1 near the scene of crime acting strangely and that furthermore PW4 knew A1 very well.

As concerns A2, Prosecution contended that PW7 (it was PW5 per court record) established that A1, A2 and Kabugho Nehema were known to each other and pursued a common intention to murder the deceased. The Prosecution cited the cases of **No 441 Ismael Kisegerwa and Another v Uganda (1978) Supreme Court Criminal Appeal No. 6 of 1978** and **Ssimbwa v Uganda – Criminal Appeal No. 023 of 2012** in support of the argument that there was a common intent.

With regard to A3, Prosecution contended that he was found with the phone of the deceased soon after he had died and that his failure to report the phone as lost to police was not consistent with his innocence. Prosecution argued that based on the case of **Kasaija v Uganda – Supreme Court Criminal Appeal No. 12 of 1991** A3s recent possession of the phone required an explanation.

Counsel for the Accused reiterated in rejoinder that A1 had not been identified and that there was no evidence in corroboration of the same. He further reiterated that there was no evidence led to prove common intent on the part of A2 and that A3s possession of a lost phone was only evidence that he had picked up a lost phone.

ANALYSIS OF EVIDENCE:

In criminal trials, it is trite that the burden of proof is always on the Prosecution and never shifts save for specific statutory exceptions of which the offence of Aggravated Defilement does not qualify.

Section 74(1) of the Trial on Indictments Act Cap 25 provides that upon the closure of the prosecution case if the evidence of the prosecution is found not to be sufficient then the court shall record a finding of not guilty after hearing from the advocates for the prosecution and the accused.

Section 74(2) of the same Act conversely provides that where the evidence of the prosecution is found to be sufficient then the accused is informed of their rights and accordingly given the option to commence their defence.

The sufficiency or insufficiency of the evidence as referred to in Section 74 of the Trial on Indictments Act is what ultimately determines whether or not there is a prima facie case against the accused by the close of the prosecution case.

While the standard of proof criminal trials is proof beyond reasonable doubt the standard for determining whether an accused person has a case to answer is evidence of a prima facie case. It is also trite 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.

In the case of **Bhatt v R (1957) EA 322**, the East Africa 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.

The standard of proof for a prima facie case therefore may not reach proof beyond reasonable doubt but should also not be based on whimsical evidence and allegations.

To that extent therefore the sum total of the evidence adduced by the close of the Prosecution case must be of such sufficiency that in the absence of any evidence being led in defence of the Accused it would result in a conviction.

The main issue therefore is whether the Prosecution has established a prima facie case warranting the Accused being put to his defence.

In addressing this issue the central elements required to prove the offence of murder flow out of Section 171 of the Penal Code Act Cap 128 which provides that,

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission commits murder.”

This court must therefore consider the following in determining whether each of the Accused persons has a case to answer.

1. Death of a human being;
2. Death was caused unlawfully;
3. Death was caused with malice aforethought; and

4. The Accused person is responsible for the death.

As concerns death, it was held in **Kimweri v Republic (1968) EA 42** that death may be proved by production of a post mortem report or evidence of witnesses who knew the deceased and attended burial or saw the dead body. In this case, there was uncontested evidence of the post mortem report (Prosecution Exhibit No. 1). Furthermore, there was evidence of PW2 the deceased's wife and PW3 his brother who both saw the body of the deceased on the 23rd of April 2020. There is therefore no doubt that the deceased died.

Regarding the unlawful nature of the death it is trite law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental, or it was authorised by law (see **Gusambizi s/o Wesonge v R [1948] 15 EACA 65**). The uncontested evidence in this regard is derived from the post mortem report (Prosecution Exhibit 1) in which the cause of death is cited as manual strangulation. There is therefore no doubt the deceased died in unnatural and unlawful circumstances.

With regard to malice aforethought in the case of **Mumbere v Uganda – Supreme Court Criminal Appeal No 15 of 2014**, the Supreme Court held that,

“The elements of malice aforethought are well set out under Section 191 of the Penal Code Act Cap 120 as follows:

***Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—*

(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.’

*We also wish to note that this Court in****Nandudu Grace & Another v. Uganda, Criminal Appeal No.4 of 2009**reiterated the ratio in the earlier decision of this Court in**Francis Coke v. Uganda [1992-93] HCB 43****that the existence of malice aforethought is not a question of opinion but one of fact to be determined from the available evidence.*

We also hasten to add that in determining whether the prosecution has proved malice aforethought, the Court has to examine the circumstances surrounding each case. These circumstances include: (i) the nature of the wounds inflicted; (ii) the part of the body injured; (iii) the type of weapon used; (iv) the conduct of the accused person immediately before and after the injuries causing death were inflicted; and, (v) the manner in which the weapon was used-whether repeatedly or not.’

The question of whether there was malice aforethought was also uncontested and was also evident from the findings in the post mortem report (Prosecution Exhibit 1). The cause of death being manual strangulation meant that someone deliberately and forcefully strangled the deceased to death. The targeting of the neck and the slow nature of strangulation as a cause of death meant that whoever killed the deceased acted with intent to kill and therefore with malice aforethought.

This leaves the question of the participation of the respective Accused persons, which I shall address in order of indictment.

With regard to A1 Bwambale Nathan, Counsel for the Defence argued that evidence of threats he made was not enough to link him to the offence of murder and that furthermore the Prosecution had failed to adduce sufficient evidence to prove his participation in the murder. I have had the benefit of analyzing the evidence and arguments in this regard. In my view there is ample evidence proving that A1 did in fact make threats against the Accused for which he ordinarily would have to explain himself. However, in this instance the issue for which he is indicted is not threatening violence but murder. As much as the Prosecution cited authorities concerning the relevance of intent in connecting the Accused to murder, it must be understood that intent alone cannot stand as proof of participation in murder. In fact, Section 8(2) of the Penal Code Act provides that,

“Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or in part, by an act or omission, the result intended to be caused by an act or omission is immaterial.”

When read alongside the authorities cited by the Prosecution on intent, what is clear from the aforementioned is that the intended result of an unlawful act is immaterial in proving the act itself. Intention only serves to establish the mental element or **mens rea** necessary for the particular crime and cannot stand without proof of the act or **actus reus**. Once the act has been linked to the Accused then intent or **mens rea** comes in to help prove that the Accused intended to act or omit to act in relation to the offence tried.

This therefore means that the threats A1 made are immaterial unless it can be proved that he actually killed the deceased. In this regard, the main evidence that the Prosecution relied upon was that PW4 Masereka Joel saw A1 at around 1AM in the vicinity of the murder scene. In his testimony, he stated that he observed A1 moving without a shirt and wearing black shorts with yellow stripes. PW5 D/AIP Ilukol David who testified as the investigating officer testified that the shorts in question were recovered as a police exhibit. Curiously, the shorts in question were never exhibited in court. This therefore left only the eye-witness testimony of PW4.

As concerns identification evidence the defunct East African Court of Appeal held in the case of **Abdalla Bin Wendo and Another v R (1953) 20 EACA 166** that,

1. **The testimony of a single witness regarding identification must be tested with greatest care.**

2. *The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.*
3. *Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.*
4. *Otherwise subject to certain well known exceptions, it is lawful to convict on the identification of a single witness as long as the judge cautions himself or herself on the danger of basing a conviction on such evidence alone.*

In this particular case, PW4 is the sole identifying witness and the circumstances involve identification at night. PW4s testimony was to the effect that he saw A1 by way of electric lights at a distance of 100 metres. These were clearly not ideal circumstances for identification and required other evidence. This evidence would have probably come in the form of a sketch plan of the crime scene and the surrounding area highlighting where PW4 observed A1 in relation to the lights at his house. However, once again curiously the Prosecution did not tender in this evidence despite the reference to the same by PW7 the Investigating Officer. PW7 testified that a Scene of Crimes Officer by the names of D/ASP Kahamba Alex cordoned off the crime scene and conducted investigations at the scene. This officer was never produced despite clearly being central to the Prosecution case especially as concerns gathering and recording of physical evidence at the crime scene.

In light of the above, I cannot safely conclude that PW4 correctly identified A1 at 1AM without some form of corroborative evidence confirming presence and adequacy of lighting. This is especially the case since by PW4s own testimony, the person he observed as A1 did not respond to him when he called out to him. This left room for doubt as to whether PW4 correctly identified A1.

With regard to the participation of A2, Counsel for the Accused argued that the only available evidence linking him to the crime amounted to hearsay. Indeed PW5 the Investigating Officer, testified that he had learnt by way of crime intelligence that A1, A2 and Kabugho Nehema had met at A2s premises and conspired to kill the deceased. However, by his same testimony he stated that the witnesses to the alleged conspiracy declined to testify out of fear. The rule on hearsay evidence is clear. Section 58 of the Evidence Act provides that all facts except content of documents may be proved by oral evidence. Section 59 of the Evidence Act goes on to provide inter alia that oral evidence must in all cases be direct, that is to say, if it refers to a fact which could be seen, it must be the evidence of the witness who says they saw it, and; if it refers to a fact which could be heard, it must be evidence of a witness who says that heard it.

The reasons for the provisions above are well understood. The witnesses must be available for their testimony to be heard and tested through cross-examination. In this particular case, there is no witness who testified to directly seeing or hearing the alleged conspiracy to murder the deceased take place. One cannot therefore conclude that A2 was part of a conspiracy to murder the deceased. However, in this regard I also find it curious that whereas the Prosecution agreed to a plea bargain in which one of the original accused persons in this murder pleaded guilty to

murder, the said person was never produced in court to testify against his co-accused. I am mindful of the caution needed with regard to reliance on accomplice evidence but in this case such evidence would obviously be more relevant than hearsay evidence which is clearly not admissible.

In light of the above, even the argument that A2 shared a common intention with A1 and others to kill the deceased cannot hold as it is entirely based upon hearsay evidence.

Finally, as concerns the participation of A3, the only evidence that the Prosecution relied upon pointed towards A3 making the foolish decision to pick up a phone close to the crime scene and then keep it for himself. There is no evidence at all that he knew or had associated in any way with A1 and A2 as to become a murder suspect. The Prosecution argued that the doctrine of recent possession has been held to be a species of circumstantial evidence which shows an accused person is in possession of stolen property for which he cannot explain. While I do agree with the doctrine in principle, I find that its contextual application to this matter irrelevant. A3 stands accused of murder and not theft or receipt of stolen goods. Without evidence that he was in some way linked to a conspiracy or present when the deceased died then the only explanation he would need to make is in relation to how he came to be in possession of a dead man's phone. This explanation was alluded to in PW7 SPC Baluku Jackson's testimony who said A3 told him he picked up the phone as lost property. This is not the sort of evidence that warrants A3 being put to his defence in a case of murder. The circumstances under which he came into possession of the phone could even include him having removed it from the body of the deceased but it certainly does not mean he could be convicted for murder by that misguided act alone.

Going by the decision in the **Bhatt** case as cited hereinabove, a prima facie case cannot be founded on a mere scintilla of evidence or any amount of worthless discredited evidence by the Prosecution. In my view, the evidence in this matter being premised primarily upon hearsay and questionable identification is insufficient to put any of the Accused persons to their defence. It is my finding therefore that the Prosecution evidence in this matter on the question of the participation of A1, A2 and A3 falls short of the standard required for a prima facie case and could not sustain a conviction if all the Accused opted to remain quiet.

ACQUITTAL:

Considering the analysis of this Court above, it is my conclusion in line with Section 74(1) that the Prosecution has not made out a prima facie case against A1, A2 and A3 in this matter.

I therefore find A1, A2 and A3 not guilty of the offence of murder and accordingly acquit them. A1, A2 and A3 are all discharged and free to go unless there is any other pending case.

Ruling delivered this 22nd day of July 2024.

David S. L. Makumbi

JUDGE

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