

UGANDA / JUDGMENT

Uganda v Byamukama (Criminal Session Case 151 of 2023) [2024] UGHC 862 (23 September 2024)

[2024] UGHC 862

COURT

High Court of Uganda

BEFORE

Allan Nshimye, J

CASE / FILE NUMBER

Criminal Session Case 151 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA**CRIMINAL SESSION CASE NO 151 OF 2023****5 [ODPP NO: NTUNGAMO 1257 OF 2022, POLICE NO: NTUNGAMO CRB 935 OF 2022]****UGANDA VS BYAMUKAMA DEUSDEDIT****10 BEFORE:** Hon. Justice Nshimye Allan Paul. M.**JUDGMENT****REPRESENTATION**

15 The accused was represented by Adv. Julian Kamusime on state brief, while the state was represented by Jacob Nahurira from the ODPP.

INTRODUCTION.

The accused person was indicted for the offence of Murder contrary to Sections 188 20 and 189 (*currently section 171 & 172 of CAP 128*) of the Penal Code Act. The particulars of the offence as stated in the indictment are that;

> *Byamukama Deusdedit alias kabwisho and others still at large on 22nd day of July 2022 at kyarukonjo village kayonza Subcounty in Ntungamo District with malice afore thought caused the death of Muhimbise Josephine*

The Accused person (*Byamukama Deusdedit)* took Plea on 22 April 2024 and he pleaded not guilty.

BURDEN AND STANDARD OF PROOF.

30 It is a principle of law that in criminal cases it is the Prosecution that has a burden of proving all the ingredients of the offence stated in the indictment against the accused (**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

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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**)

5 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 at the prehearing were exhibited and made part of the evidence, they are;

1. Police Form 48C, a postmortem report signed by Dr Twesiime Innocent was 10 exhibited as **PEX1**, In the form, a medical officer confirmed on **22 July 2022** that the cause of death was a cut throat injury

The State Attorney Jacob Nahurira informed court on 19 April 2024 that the Police form 24 stated that the accused was 16 years, but did not exhibit the Police form 24, which in my opinion ought to be exhibited because of its vital importance. I will address this 15 the issue of the police form 24 during determination of the matter.

WITNESSES

The prosecution relied on five witnesses, that is PW1 Dr Twesiime Innocent, PW2 Ndiwayereza Eric, Pw3 Gumisiriza Josephat, Pw4 Bigombe Jorum and Pw5 Sunday 20 peter. The defence relied one witness, the accused person.

SUBMISSIONS

The lawyers representing the state and the accused made oral submissions. I have considered the submissions on court record in making this judgement.

ASSESSORS' OPINION

The assessors gave a joint opinion, wherein they recommended that the accused (*Byamukama Deusdedit*), be acquitted.

30 DETERMINATION

It is trite that a person cannot be charged with a criminal offence in Uganda if they are below the age of 12 years. Secondly a person ought to be of sound mind able to understand the charges in order to take plea. This is the reason as to why it is necessary for police to subject an accused to medical examination on a police form 24.

The police form 24 is the form for medical examination of persons accused of serious crime. Part B of the police form 24 enables a medical examiner upon the examination of a suspect to state the age of the accused and state if he or she is of sound mind.

The law in SECTION 133(1) OF THE CHILDREN ACT CAP 62 provides that;

5 *133 Age of criminal responsibility*

(1) The age of criminal responsibility shall be 12 years" (emphasis mine)

In the case at hand the prosecution did not exhibit the police form 24 of the accused despite having the form on the police file. The form was then put on record after court demanded for it. The police Form 24 of the accused signed on 26 July 2022 states his 10 age as 16 years old. This implies that according to the medical examiner the accused was below 18 years, making him a child as defined in section 2 of the Children Act Cap 62.

The prosecution produced a baptism certificate exhibited as PEX2 and witnesses that the accused was above 18 years at the time of the alleged commission of the offence. 15 This evidence was contested by the accused who stated that he was a child, having been born on 17 April 2006. He stated that the baptism certificate produced by the prosecution was not his and the man (PW5 Sunday Peter) that testified as his God father was not his God father.

The law in SECTION 133(5) OF THE CHILDREN ACT CAP 62 provides that;

20 *"A person shall be presumed to be a child if he or she claims or appears to be younger than eighteen years old pending a conclusive determination of age by court".*

In this case the accused claimed to be under 18 years, the prosecution evidence on court record to counter this claim do not fall under those stipulated in **SECTION 133(4) 25 OF THE CHILDREN ACT CAP 62**, yet the evidence that is contained in the police form 24 that was in possession of the state, clearly shows that a medical examination put his age at 16 years. I am compelled to believe that he was 16 years in 2022 as stated in the police form 24.

The State Attorney's at the ODDP ought as officers of court to have brought the Police 30 from 24 to the attention of the Magistrate when the charges were first presented to the accused, this would have guided the Magistrate as to where to remand the accused as a child. The child has now been on remand in an adult prison despite his Police Form 24 showing that he was a child in 2022, this is a breach of his constitutional rights under Article 34 (6) of the Constitution of the Republic of Uganda, which provides that;

"A child offender who is kept in lawful custody or detention shall be kept separately from adult offenders"

To deter such violations, the Magistrate before whom an accused person is brought should ask the State to provide a copy of the Police Form 24 on which the accused was examined, for the court to study it before remanding the accused to the appropriate place of custody. This requirement by the Magistrate would be in conformity with the law in **SECTION 133 (2) OF THE CHILDREN ACT CAP 62**, which states that;

"In determining criminal responsibility or an order for a child offender, the police, prosecutor or person presiding over the matter shall consider the age of* 10 *the person at the time the offence was alleging committed".(emphasis mine)*

I find that the accused's constitutional right was violated when he was kept on remand in a prison housing adult prisoners. The practice of the Magistrate demanding from the prosecutors the police form 24 of the accused before remanding, will deter such violations, and ensure that children are remanded in appropriate places of custody.

I will now discuss the ingredients of the offence.

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 20** and as is confirmed in the 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 25 person.

The ingredients of the offence of murder were stated in **MATOVU FRANK & ANOR VS UGANDA COA CRIMINAL APPEAL NO. 111 OF 2018**, as;

1. Death of a human being;
- 30 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.

Ingredient 1

Death of a human being.

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).*

I agree with the prosecution submissions that this ingredient was proved by Police Form 48C, a postmortem report signed by Dr Twesiime Innocent which was exhibited as PEX1, In the form, a medical officer confirmed on 22 July 2022 that the cause of 10 death was a cut throat injury

I find that the evidence of the Post-mortem report marked as exhibit PEX1 confirms the death of a Human being, called *Muhimbise Josephine*. Ingredient 1 relating to death of a human being has therefore been proved beyond reasonable doubt.

15 Ingredient 2

The death of the deceased was caused unlawfully.

It is the 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 authorized by law *(see R v. Gusambizi s/o Wesonga (1948)15 EACA 65, Uganda Vs Bosco Okello [1992-* 20 *93] HCB 68*)

The evidence on court record contained in the postmortem report exhibited as PEX1, is a form, signed a medical officer confirming that the cause of death was a cut throat injury. The part of the body that was cut is the neck, which is a sensitive part of the 25 body. There is no evidence to show that this death was authorized by law, I therefore find that the evidence on court record mainly from the postmortem report exhibited as PEX1 proves beyond reasonable doubt that the death was unlawful, so ingredient 2 has been proved.

30 Ingredient 3

The death of the deceased was caused with a malice aforethought.

Ingredient 3 requires the prosecution to prove that the death of the deceased was caused with malice aforethought.

35 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*). I will summarize the evidence on court record linked to Malice aforethought.

1. Police Form 48C, a postmortem report signed by Dr Twesiime Innocent was exhibited as PEX1, In the form, a medical officer confirmed on 22 July 2022 5 that the cause of death of *Muhimbise Josephine* was a cut throat injury

I find that the evidence of the postmortem report that was exhibited as PEX1, shows that the mental element of malice aforethought is proved. The neck of *Muhimbise Josephine* is a sensitive part of the human body, so cutting it can cause death. I base on this to conclude that ingredient number 3 has been proved by the prosecution 10 beyond reasonable doubt.

Ingredient 4

Participation of the accused persons.

The fourth ingredient that the prosecution is duty bound to prove relates to 15 participation of the accused persons in the offence.

The accused's participation can be proved by direct and circumstantial evidence placing them at the crime scene as an active or remote control participants in the commission of the offence (**Uganda Vs Philliam Yona & ors High Court Criminal 20 Session No 49 of 2015 & Uganda vs Kalungi Abubakar & anor High Court Criminal Session No 171 of 2019**).

Circumstantial evidence is evidence of surrounding circumstances which, by intensified (Sic) examination, is capable of proving a proposition with the accuracy of 25 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**).

It should be noted though that where a case is 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 35 the decision of the Court of Appeal for East Africa in **Simmon Musoke Vs. R (1958) EA 715**)

I will summarize the evidence on court record linked to the allegation of participation by the accused person.

1. PW2 Ndiwayereza Eric, 42 years testified that the accused is his cousin. That 5 the accused was staying with his mother, who is the deceased. That on that day he learnt from olive about the incident, he rushed to the home of the deceased and found when her throat had been cut. That at that time the accused was not there, but after he came, **he was wearing village clothes that had blood on them and also had bruises on the hand**. That PW2 then 10 called police and the Chairman LC, who is a brother of the accused. During cross examination, he stated that the accused told him that he was coming from grazing, and

some people blindfolded him and cut his mother's throat.

PW2 further testified that his house is opposite the deceased's house, so in 15 the morning **he had heard the accused quarrel with his mother.** he said he did not interfere but had the accused tell his mother that **"you will give me my things"**

- 2. Pw3 Gumisiriza Josephat, 48 years testified that the accused is his brother, a 20 child of his stepmother. That the accused is 22 years of age. That the accused had a quarrel with his mother over a kibanja. That when he saw the accused, **he had injuries on the hand, they asked him about the injuries, but he just kept silent.**
- 25 3. Pw4 Bigombe Jorum testified that the deceased was his neighbor. He stated that the accused told him that people attacked his mother. The accused was wearing a tracksuit, his finger was injured and had blood. **He stated that the accused told him that the attackers tied him and killed his mother.**
- 30 The defence evidence on court record.

Dw1 the accused testified that he was 17 years old and denied committing the offence. **He stated that on the fateful day he went to graze leaving the stepbrother with is mother at home. When he returned, he found his mother was dead.** He made noise and the Bataka (residents) came.

That his brother brought police and told them he had killed the mother. he denied having any grudge with the deceased. He also denied wanting a boda boda because he could not ride being bellow the age required to ride a

motorcycle. He stated that his late father named him the heir that is why his brother were conspiring against him. During cross examination he testified that he did not have any blood on his cloths as claimed by the prosecution witnesses.

5 In my analysis of the evidence on court record, I note that there is no person that witnessed the killing of *Muhimbise Josephine.* The case against the accused is categorized by the evidence of Pw3 Gumisiriza Josephat, who stated that he is a neighbor who claims that he heard the accused quarreling with his mother in the morning. The other evidence on record by PW2 Ndiwayereza Eric and Pw3 Gumisiriza

10 Josephat is that the accused had blood on his clothes and bruises on his fingers.

I am mindful of the fact that the evidence of PW2 and PW3 is circumstantial evidence since no one saw the person that killed the deceased. The evidence of PW2 and PW3 has to be contrasted with that of the accused. The accused while testifying as Dw1, 15 stated that **on the fateful day he went to graze leaving the stepbrother with is mother at home. When he returned, he found his mother was dead.** He also stated that he did not have any blood on his clothes, contrary to what the prosecution witnesses stated.

20 In my analysis of the evidence on both sides, I find that the prosecution allegation that the accused had blood on his clothes is fundamental and if the prosecution can prove that the alleged blood on his clothes forensically matches with the blood sample from the deceased then it would amount to circumstantial evidence sufficient to lead to a conviction in this case.

I note that police in its investigation did not carry out any forensic test of any fluids, if any, on the accused's clothes. Considering that the accused has denied having blood on his clothes, it is his word against that of the prosecution witnesses. I find that without a police forensic report to confirm if he had any blood on his clothes and if so 30 if it was that of the deceased, the prosecution has not executed its obligation to prove

that as a fact. I find that the prosecution has failed to prove beyond reasonable doubt that the accused participated in the killing of Muhimbise Josephine.

The prosecution has therefore not proved all the four ingredients of the offence of 35 murder that they are duty bound to prove, to lead to the conviction of the **BYAMUKAMA DEUSDEDIT**.

I note that the assessors gave a joint opinion, wherein they recommended that the accused, **BYAMUKAMA DEUSDEDIT** be acquitted. I agree with their recommendation.

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In the circumstances I acquit **BYAMUKAMA DEUSDEDIT** of the charge of murder of Muhimbise Josephine Contrary to section 188 & 189 (currently section 171 & 172 of CAP 128) of The Penal Code Act.

I order that **BYAMUKAMA DEUSDEDIT** be set free from Prison custody in respect to this offence for which he has been acquitted.

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NSHIMYE ALLAN PAUL M. **JUDGE** 23-09-2024

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