

**Uganda v Byenkya and Another  
(Criminal Session 655 of 2019) [2023]  
UGHCCRD 13 (25 January 2023)**

[2023] UGHCCRD 13

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At the hearing, the prosecution was represented by Mr. Amerit Timothy State Attorney while A2 was represented by Counsel Sselwanga Geoffrey.

In criminal cases, the prosecution bears the burden to prove the offence against the accused. This burden of proof does not shift to the accused to prove himself innocent. The burden of proof always rests on the prosecution. The prosecution must adduce evidence to discharge its burden of proof. **See: Ssekitoleko v. Uganda [1967] EA 531).**

The prosecution has to prove the offence against the accused beyond reasonable doubt. If there is any doubt in the prosecution case, then the accused is entitled to an acquittal.

For the offense of murder, the prosecution must prove the following ingredients:

- **1. Death of a human being occurred.**
- **2. The death was caused by some unlawful act.**
- **3. That the unlawful act was caused by malice aforethought**
- **4. That is the accused who participated or caused the unlawful death.**

The prosecution called two witnesses i.e. Bukenya Musa and Detective Muteesi Jabu the investigating officer to prove the above ingredients.

The death of Bugembe Twaha alias Aziz was not contested. Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body.

PW1 told court that the deceased died a few minutes after he was picked by the police. It was also the evidence of PW2 that he got a postmortem report from Mulago Hospital. Although the same was not exhibited in court, I have no reason to doubt the prosecution especially where the death was not contested.

On whether death was caused by some unlawful act, 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. PW1 told court that he found the person lying in the trench with blood all over his face before he later died. The evidence of PW1 as to the unlawful death is also not contested, he had the opportunity of seeing the deceased and confirmed that indeed the death was caused unlawfully

On whether the unlawful act was caused by malice aforethought, Malice aforethought is defined by section 191 of the Penal Code Act as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person.

The evidence of bleeding on the face of the deceased as told by PW1 indicates that the deceased was beaten and abandoned in a trench. This fact points to malice or knowledge by whoever did it that the beating would lead to the death of their victim. This ingredient was therefore proved by the prosecution.

To prove that it was the accused who participated in the commission of the offence, the prosecution adduced the evidence of PW2 the investigating officer.

PW2 told court that when he was allocated the case file, he visited the crime scene where the deceased was picked from by the Police. He also told court that he later visited the bar wherein it was said that the accused persons had fought from with the deceased.

He further testified that he got two witnesses who gave him information that on the night of 23rd January 2019, the deceased had been involved in

bar brawl with the accused person. It's however important to note that these two witnesses were never produced in court to give this evidence.

In her defense the accused person chose to keep silent. The implication of keeping silent in a criminal trial was stated in the case of **James Sawoabiri & Another V. Uganda Criminal Appeal no. 5 of 1990** it was stated;

**"An omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue."**

Conclusively, it can be said that although the accused has a right to silence in criminal proceedings, this silence is not absolute as an adverse inference can be drawn when the accused fails to challenge the evidence of the prosecution in cross examination. This inference, therefore, can be used to implicate the accused as it infers that the evidence adduced by the prosecution is accepted by the accused.

It should be noted, however, that a conviction cannot be based on inference alone drawn from silence. There must be some other evidence because inference is weak evidence and it might be too easy to jump to wrong conclusions. This means that inference must be backed by other types of evidence if a person is to be convicted.

The prosecution relied entirely on information given to the investigation officer PW2 during his investigations. He did not disclose the two witnesses who he mentioned had given him information as to the alleged brawl in the bar between A2 and the deceased. Neither PW1 nor PW2 testified to having witnessed or seen the accused participate in the murder.

Section 59 of the Evidence Act requires that oral evidence must, in all cases whatever be direct that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. The nature of evidence presented by the prosecution does not meet this standard.

The prosecution must adduce evidence direct or circumstantial placing the accused person at the crime scene not as mere spectator but as the perpetrator of the offence.

The evidence of participation of A2 has not been proved beyond reasonable doubt, the prosecution failed to place her at the crime scene as the perpetrator of the offence.

A2 is accordingly acquitted of the offence of murder, she should be set free unless being held on other lawful charges

I so order.

**JUDGE**

**25/01/2023**

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