

UGANDA / JUDGMENT

Uganda v Kalenzi & 5 Others (Criminal Session Case 368 of 2023) [2024] UGHC 716 (16 July 2024) [2024] UGHC 716

COURT

High Court of Uganda

BEFORE

Batema, J

CASE / FILE NUMBER

Criminal Session Case 368 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT IGANGA CRIMINAL SESSION CASE NO. 368 OF 2023

UGANDA:::::::::::::::::::::::::::::

VERSUS

\$10\$ A1. KALENZI MOHAMED A2. MUWABI PASKALI A3. KAIRU SULEIMAN A4. MULONGO
FRED aka KIBUKULA A5. WAISWA ROBERT alias KASAMBALA ROBERT A6. LWANGA FRED alias
Daali :::::::::::::::::::::::::::::::

BEFORE; HON. MR. JUSTICE BATEMA N. D. A,

JUDGMENT

The six Accused persons were jointly charged with the offence of murder contrary \$
\overline{20}\$ to Section 188 and 189 of the Penal Code Act Cap 120.

It is alleged that on the 2nd day of February 2009 at Bulongo village in Namutumba District, between 8:00am and 10:00am, the accused engaged in mob action resulting in the death of a one Kawama Musa. According to the postmortem report (Exhibit PE1) the cause of death was intra cerebral haemorage due to a deep cut wound on the head.

Burden of proof

The burden of proof in murder cases rests squarely on the Prosecution and does not shift to the Accused. This position of the law is based on the principle of presumption of innocence enshrined in Article 28 of the Constitution of the **Republic of Uganda, 1995**.

Standard of proof

The standard of proof is always proof beyond reasonable doubt. This means that Prosecution must turn all stones to uncover the guilt of the accused person while the Accused person has a right to remain silent. Any reasonable doubt is resolved in favour of the Accused. See *Woolmington v. DPP* [1935] AC 462.

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For that reason, Prosecution must prove its case against the Accused person by proving each ingredient of the subject offence to the satisfaction of the court of law that indeed the accused person should be convicted for committing such offence.

40 Ingredients of the Offence of Murder

- a. Death of a person. Death may be proved by production of a postmortem report or evidence of witnesses at the burial.
- b. Death was caused unlawfully. It is trite law that any homicide is presumed to have been caused unlawfully unless it was accidental or it was authorized by law.
- c. Death was caused with malice aforethought. In malice aforethought, court takes into account the number of injuries inflicted, the delicate part of the body where the injury was inflicted, nature of the weapon used and the conduct of the killer before and after the attack.
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- d. Participation of the Accused in the murder. There must be credible direct or circumstantial evidence planting the accused at the scene of crime as an active participant in the commission of the offence.

The unlawful death of Kawama Musa is not contested. The postmortem report was admitted as an exhibit PE1 in proof of death, that by hitting the head, which is a very delicate part of the body of the deceased, Prosecution had proved malice aforethought beyond reasonable doubt. The only remaining ingredient that was denied and must be proved by the Prosecution is participation of the Accused persons in the commission of the offence.

Evidence on record

60 There is evidence of eye witnesses giving various accounts of the mob action.

PW1, ABDALLA WAGUBI, aged 40, a younger brother to the deceased, testified that he knew all the accused persons prior to the death of Kawama Musa. He further testified that on the fateful day of 2/2/2009, he had gone to the garden and while there, he saw the late Kawama Musa and his two wives Namulondo Maria and Babirye Zaina digging in their garden which was about 20 meters away from his. He testified that when he heard the sound of the SOS drum, he became concerned and went home together with Kalenzi since they lived in the same court yard. PW1

testified that the SOS drum was an alarm signaling danger. As they were moving to their respective homes, the mob that was running began chasing the deceased.

PW1 told court that in the mob chasing and assaulting the deceased, he recognized Daali Fred (A6), Suleiman Kairu (A3), Waiswa Robert alias Kasambala Robert (A5), Mulongo Fred alias Kibukula (A4) and others still at large. That they were being commanded by Kalenzi Muhammed (A1).

He testified that the deceased first ran in the direction of Tom Mwagga's home. He was waded off, he reversed and ran towards to the direction of his father's home, Christopher Kadoma. In that process he met Daali Fred (A6) who cut him on the head using a panga. The deceased continued and entered his father's house and locked the door. The people chasing the deceased kicked open and destroyed the door. PW1 told this court that at that point, Tom Mwagga (now deceased) and Isaaya (still at large) pulled Kawama out of his father's hut to the courtyard and assaulted him using sticks and cut him using pangas.

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PW1 testified that Daali Fred had a hoe and panga, which he used to cut the deceased on the head. Kairu Sulaiman had sticks. Tom Mwagga waded off Kawama Musa. Mulongo Fred had a big stick. Kasambala had a spear and Kalenzi Muhammed was in full command with 2 pangas. Kawama Musa sustained injuries and later died. He testified that he saw everything since it took place within the same court yard which is a distance of the length of the court room.

PW1 finally testified that Kasambala (A5) then carried the corpse to the cassava garden, whereupon him and the rest uprooted cassava tubers and heaped them on the corpse claiming that he was a cassava thief. It is at that point that police came to the scene. PW1's cited a long standing land dispute between Christopher Kadoma, father to the deceased and Kalenzi Suleiman as the grudge that could have led to this murder.

PW2, WAGUBI HAWALI, aged 32, a biological son to the deceased testified that knew all the accused prior to Kawama's death. He testified that on that fateful day, he was at home when he heard a SOS drumming at 8:00am. That the sound was coming from the garden and on rushing there, he saw a group commanded by Kalenzi (\$\\Lambda\$ 1) which had between 4-5 pangas. PW2 testified that all the accused in the dock were present including a one Sowali and Aggrey Muluvu still at large.

He further testified that he walked back home while the deceased ran to his father (grandfather) Christopher Kadoma. PW2 also testified that Mwagga Tom dared the 100

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deceased to confront the assailants who were chasing him since he had previously claimed to be powerful. That when the deceased reversed, he met Daali Fred (A6) who cut him on the head. PW2 also named and identified to court Kalenzi Mohammed, Kairu Suleiman, Lwanga Daali, Lwanga Sabiiti and Tom Mwagga as the people he saw breaking the door where the deceased was hiding.

It was PW2's testimony that while he was standing across the road, about 100meters, he saw the accused persons assaulting the deceased. That Kalenzi and Kasambala used sticks. Kairu Sulaiman used bicycle locks with sticks and Isaaya used a stick with nails. That Mulongo Kibukula was also in the group. That it is at that point that Kalenzi commanded the group to kill the deceased by asking in lusoga, a local dialect "timwidi kibalese?" (Meaning why don't you execute the job that brought you).

PW2 finally testified that the accused then carried the corpse to the cassava garden which is roughly 500 meters away while he ran to hide at the neighbor's home.

PW3, MALINZI JAMES, aged 40, a younger brother to the deceased testified that he knew all the accused persons prior to the death of the deceased. That on his way from Busembatya to Bulongo village where he had gone to dig, PW3 met Paskali who was carrying Tom on his bicycle. Tom Mwagga had blood stained clothes. They were heading to Busembatya. He further testified that at Bukonte, people told him that his brother, Kawama had been killed. That PW3 linked Paskali and Tom to the killing because of the blood stains he had seen. PW3 also linked this murder to a long standing land dispute between Christopher Kadoma and Kalenzi.

PW4, KIIRE ZUBAIRI, LC1 Chairperson of Bulongo village, testified that he knew all the accused persons as village mates prior to the death of the deceased. That on the fateful day, his attention was drawn to the scene of crime by an SOS drum. That he met with his Vice Chairman, Wilber who told him that the deceased was found uprooting cassava and the said Vice chairman (now deceased) together with Kalenzi showed him the corpse of Kawama Musa. PW4 also testified that he found cassava tubers heaped on the deceased's corpse.

He told court that he had met A1, Kalenzi at the scene of crime. PW4 also confirmed that there had been a long standing land wrangle involving the deceased and Kalenzi.

PW5, BABIRYE ZAINA, aged 36, the deceased's wife, testified that on that fateful day, she went with the deceased to the garden and found Abdalla Wagubi (PW1)

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already digging. PW5 said that she later took off with the deceased to the home of their father-in-law when they were chased by a group that included Kalenzi (A1), Mulongo (A4), Muwabi (A2), Kairu (A3), Sowali, Isaaya, Kasambala (A5), Lwanga (A6) and others still at large whom she could recognize. That Kalenzi Muhammed commanded the mob to do work "as agreed".

PW5 further testified that on reaching Christopher's home, A1 Kalenzi, A4 Mulongo alias Kibukula, Tom Mwagga, A5 Kasambala and Isaaya break the door of the hut where the deceased had sought refuge. She recognized Kalenzi and Mulongo Fred cut the deceased on his head. She saw Kairu with a knife which he used to stab the deceased on the head. That Muwabi had a spear which he used to spear the deceased on his head. Lwanga had stones which he used to hit the deceased on the head. Kasambala had a hoe which he used to hit the deceased on his head. That they killed him from outside Christopher Kadoma's home and later lifted the corpse to the cassava garden.

PW5 also testified that later after police had come, Kalenzi told the police officers 150 proudly, that "I am the one who killed the deceased" and he was arrested.

PW6, D/SGT KATEO AMOS, aged 55 testified that his only role was to re-arrest some of the accused persons in July 2022.

PW7, D/SGT MUGOYA MUHAMED, testified that at 11:00am when he visited the cassava garden, he found the deceased's body lying lifeless and commenced investigations.

In cross examination, PW7 told court that he arrested Kalenzi from his home which was nearby.

PW8, D/ASP OSERE SHAPHAN, aged 65, a retired police officer, testified that he led a police team to Bulongo village and upon reaching the garden where the deceased 160 was, he noticed many foot marks that led to the grass thatched house. That on going to the said hut, PW8 found the door to the hut had been destroyed. That there were blood stains in the compound but with no corpse.

In cross examination, PW8 positively identified Kairu Sulaiman but mistook Paskali for Tom Mwagga (now deceased).

In their Defence, each Accused person raised an alibi. A1 Kalenzi testified that the deceased came to his cassava garden and began uprooting his cassava tubers without permission. Kalenzi took it that the deceased was a thief and on raising an

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alarm, the Defence Secretary, Tom Mwagga and Tenywa answered his call. That on getting closer to the accused, A1 realized that he had a panga. A1 testified that the 170 deceased used the panga to cut Tom Mwagga on the head and Tenywa on the right hand.

A1 testified that he ran away to save his life and also get assistance for the injured people, namely Tom Mwagga and Tenywa. That it was in the trading center of Bulongo that A1 met Paskali and told him what had happened. That at that point, Tenywa arrived in the trading center and Paskali rode him on a bicycle to Busembatya for first aid. That A1 remained in Bulongo trading centre.

A1 further testified that he heard that Musa Kawama had been killed in a mob action. He later heard an SOS drum which compelled him to return to the scene whereupon he found the deceased had been killed. A1 subsequently went home from where the Police picked him.

A1 finally testified that he had a long standing land dispute with the deceased's father, Christopher Kadoma and the same had been referred to the land tribunal from where he claimed to have emerged as the successful party.

In cross examination, A1 told court that he never reported the deceased to police in respect of the alleged theft of his cassava.

A2, PASKALI MUWABI aged 76, testified that on the fateful day, he rode to Bulongo trading center from where he saw Kalenzi Muhammed running. That Kalenzi came and told him that Kawama had cut Tom and Tenywa who had answered his alarm. That Tenywa arrived immediately and asked A2 to take him to a clinic in Busembatya which A2 accepted to do. That on his return from Busembatya, A2 heard an SOS drum announcing the murder of the deceased. That A2 then went home from where he was picked by police.

A3, KAIRU SULAIMAN, aged 39 testified that on the fateful day, he was in his rice garden with Nsaiga Michael the whole day. That on returning home at 6:45pm, he was told by his wife Eleta Alaisa of the death of the deceased. He was later arrested after 3 months

A4, MULONGO FRED aged 61, testified that on the fateful day of 2/2/2009, he was at Buwongo where he had gone to dig, which distance he compared to that of Court to Nakalama. That he left at 5:30 am with Musa Kawanguzi of Busembatya and

returned at 5:00pm. That he was told by his wife Florence Baseke of the death of Kawama.

A5, WAISWA ROBERT alias KASAMBALA ROBERT testified that on the fateful day of 2/2/2009, he was at home. He later took cows to graze in the swamp and at 9:00am he returned home and his brother informed him that a cassava thief had been killed (Kawama Musa). He was later arrested in July 2022.

A6, LWANGA FRED, testified that on the fateful day, he was at the village, Nabusolo, Bulongo but not at home. A6 denied knowing Musa Kawama and nothing about the case. He told court that he did not know what to say about his whereabouts between 8:00am and 12:00noon of the fateful day but simply denied the offence. In cross

examination, A6 confirmed to court that Daali is his nickname.

Analysis of the evidence by court

Prosecution adduced evidence of visual identification about the accused persons save for A2 Paskali Muwabi in the murder of Kawama Musa by way of mob action. The question to be determined by this court is whether the identifying witnesses were able to see and recognize the accused in a situation of relative commotion and where there is an established grudge arising from a long standing land dispute involving the deceased and A1, Kalenzi Muhammed.

My opinion is that in such circumstances, court is required to first warn itself of the likely dangers of relying on such evidence and only do so after being satisfied that correct identification was made which is free of error or concoction or glaring 220 exaggeration. That because of grudges, identifying witnesses are likely to be emotional, may fabricate evidence or make deliberate exaggerations aimed at implicating their perceived enemies.

In the case of Abudalla Nabulere & 2 ors Vs Uganda [1978] UGSC 5, the following conditions for proper identification were set by court;

- 1. There must be sufficient light.
- 2. No obstruction between the accused committing the crime and the identifying witness.
- 3. The distance must be short to enable the identifying witness see clearly the Accused person.

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- 4. The Identifying witness must be familiar with the Accused to rule out any case for mistaken identity.
- 5. The duration of the Identification must be long enough to enable the identifying witness recognize the Accused person.

Regarding the point of the accused person being familiar, the identifying witnesses, PW1, PW2, PW4 and PW5 identified the accused in the dock by name and appearance. They are all village mates well known to them. In terms of proximity, this offence of murder was committed within the courtyard surrounded by houses within a family setting where the identifying witnesses followed the events in a radius of about 20 to 100 meters. This distance is close enough for the identifying witnesses to have properly recognized the accused in broad day light save for A2 Paskali Muwahi.

As regards recognizing the accused without obstruction. There is no evidence indicating that there was any object obstructing the identifying witnesses from recognizing the accused save for A2 Paskali Muwabi. This murder took place in an open court yard in front of Christopher Kadoma's hut.

As regards duration. The events leading to the murder of Kawama Musa happened over a relatively long period of time on the said fateful day between 8:00am -10:00am. The deceased who was in company of the identifying witnesses was first chased from his garden and ran in the direction of Tom Mwagga's house. He was then waded off. He reversed and then ran to his father's hut from where he was found, removed and cut to death in the open court yard. The identifying witnesses closely followed and monitored the mob chasing the deceased. The chasing of the deceased by the assailants in different and reverse directions enabled the identifying witnesses to see and recognize the accused from different angles save for A2 Paskali Muwabi.

I have no doubt in my mind that the identifying witnesses clearly identified and recognized these assailants with the exception of A2 Paskali Muwabi.

However as regard the evidence of Babirye Zaina, PW5, I would agree with the 260 submissions of the defence that she created some minor contradictions as regards the assailants using a spear and a knife to cut the deceased. Her evidence was emotional and exaggerated. She is the wife of the deceased. Court warned it self of her emotions and exaggerations and cannot take her evidence as Bible truth. She happened so much on the grudge in a bid to implicate A1 Kalenzi Mohammed. Much as

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the evidence of the grudge was relevant, this court was more interested in knowing the role played by each accused in the actual murder of Kawama Musa on that fateful day. Court will rely more on the evidence of other unbiased, independent and composed witnesses.

On the other hand, the defences put up by the accused do not shake or raise any 270 doubt on the prosecution evidence. A1, Kalenzi Muhammed testified that the deceased was killed as a result of stealing cassava tubers from his garden. He overemphasized the claim that he found the deceased stealing his cassava. He raised an alarm that was answered by the mob. That the deceased attacked Tenywa and Tom Mwagga. The deceased used a panga to attack the mob that had answered his call including Tenywa and Mwagga.

This narrative surely defeats logic and does not add up. If the deceased was stealing cassava, there would be evidence of cassava tubers he had freshly dug up in the cassava garden. There would be signs of digging up the tubers as opposed to the evidence of cassava tubers heaped on the corpse of the deceased.

Secondly, if the deceased had attacked those who are said to have answered the alarm, there would have been a police report but instead the so-called victims ran into hiding and never reported anything to the Police or their Local Council authorities.

There is overwhelming evidence that proves that Kalenzi had a prior land dispute against Christopher Kadoma and the deceased being instrumental in advising the latter in respect of the said dispute inevitably put him in the line of fire. A1 personally spearheaded the attack on the deceased and used the sound of the SOS drum to attract illicit support to further his mischievous and malicious intentions. He dragged his relatives and friends (now accused) along with him and together descended on an innocent life and gruesomely put Kawama Musa out of action. A1, was the chief architect of this heinous crime and therefore is criminally liable for its subsequent outcomes.

A3, Kairu Sulaiman, A4, Mulongo Fred, A5, Waiswa Robert ailas Kasambali Robert, A6, Lwanga Fred aka Daali were clearly placed at the scene of crime and their defence of alibi was effectively broken down and destroyed by the Prosecution evidence save for A2, Paskali Muwabi who was never placed at the scene of crime.

According to Section 20 of the Penal Code Act, where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one

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another, and in prosecution of that purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that 300 purpose, each of the accused is deemed to have committed the offence.

In the instant case, A1, Kalenzi Mohamed, A3, Kairu Sulaiman, A4, Mulongo Fred, A5, Waiswa Robert, A6, Lwanga Fred were not only present at the scene but also actively participated in the commission of the offence. As a result of their unlawful and extra-judicial actions, the deceased sustained a deep cut wound on his head and multiple bruises on his trunk which led to his death.

As regards A2, Paskali Muwabi, there is no eye witness clearly identifying him at the scene of crime. The little evidence linking him to the crime is the evidence of PW3, Malinzi James who met him far away from the scene of crime riding away Tom to Busembatya. That Tom had blood stains. Tom was never arrested and the blood stains were never tested to link him to the deceased. In contrast, the defence speaks of Kalenzi, Tom and Tenywa meeting Paskali at Bulongo trading center and not the scene of crime. There is no prosecution evidence destroying that alibi.

I agree with the assessor's opinion that advised on the acquittal of Paskali Muwabi. Prosecution evidence was too weak to sustain the charge of murder against him. I hereby acquit A2, Paskali Muwabi of the offence of murder as charged and set him free.

I find A1 Kalenzi Muhammed, A3 Kairu Suleiman, A4 Mulongo Fred aka Kibukula, A5 Waiswa Robert alias Kasambala Robert and Lwanga Fred aka Daali guilty and convict each of them for the offence of murder C/s 188 and 189 of the Penal Code Act.

That is my Judgment.

BATEMA N. D. A JUDGE 18/07/2024

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