

UGANDA / JUDGMENT

Uganda v Musasizi & 4 Others (Criminal Session 406 of 2022) [2025] UGHC 42 (30 January 2025) [2025] UGHC 42

COURT

High Court of Uganda

BEFORE

Allan Nshimye, J

CASE / FILE NUMBER

Criminal Session 406 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

CRIMINAL SESSION CASE NO 406 OF 2022

5 [DPP NO: NTUNGAMO-CO-658/2021, POLICE NO: NTUNGAMO CRB 470/2021]

**UGANDA VS MUSASIZI GASTON, GUMOSHABE PATRICK, NATAMBA OBED,
KYOMUHENDO KEDRESS and NIWABAASA KERESSENSIO.**

10 BEFORE: Hon. Justice Nshimye Allan Paul. M.

JUDGMENT

REPRESENTATION

State Attorney Jacob Nahurira for The Office of the Director of Public Prosecutions and

15 Adv Maureen Nuwamanya for the accused persons on state brief.

INTRODUCTION.

The accused **MUSASIZI GASTON, GUMOSHABE PATRICK, NATAMBA OBED, KYOMUHENDO KEDRESS and NIWABAASA KERESSENSIO** were indicted on the charge 20 of **Murder** Contrary to section 171 & 172 of The Penal Code Act. The particulars of the offence are that;

MUSASIZI GASTON, GUMOSHABE PATRICK, NATAMBA OBED, KYOMUHENDO KEDRESS and NIWABAASA KERESSENSIO on the 20th day of April 2021 at Ntungamo cell in the Ntungamo district with malice aforethought caused the 25 death of NDEBESA JOHNSON.

The Accused person took plea on 14 October 2024, and he pleaded not guilty.

BURDEN AND STANDARD OF PROOF.

Page 1 of 8 It is a principle of law that in criminal cases, the Prosecution has a burden of proving all the ingredients of the offence (**Nandudu Grace & anor Vs Uganda Supreme Court Criminal Appeal No 4 Of 2009, section 101, 102 & 103 OF THE EVIDENCE ACT CAP 8**). In Criminal cases the standard of proof that is 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**)

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PRE-HEARING

The prosecution and defence during the pre-hearing agreed on some facts under section 67 of the Trial on Indictments Act. The documents that were agreed upon by both parties were exhibited and made part of the evidence; they are:

- 10
- 1. Police Form 48C, a postmortem report of the deceased. The form was exhibited as **PEX1**, In the form a medical officer (**Dr Mugisha**) confirmed on **21st April 2021** that the body of **Ndebese John** was identified by **Kyomuhendo Kedress**. The cause of death was therein stated as **closed head injury due to blunt trauma**.
- 15 2. Police Form 24 of A1 **MUSASIZI GASTON**, is a medical examination of a person accused of serious crime. The form was exhibited as **PEX2**, In the form a medical officer (**Dr Mugisha**) confirmed on **24th April 2021** that the accused person was of normal mental condition to stand trial.
- 3. Police Form 24 of A2 **GUMOSHABE PATRICK**, is a medical examination of a 20 person accused of serious crime. The form was exhibited as **PEX3**, In the form a medical officer (**Dr Mugisha**) confirmed on **24th April 2021** that the accused person was of normal mental condition to stand trial.

- 4. Police Form 24 of A3 NATAMBA OBED, is a medical examination of a person accused of serious crime. The form was exhibited as PEX4, In the form a medical officer (**Dr Mugisha**) confirmed on 24th 25 April 2021 that the accused person was of normal mental condition to stand trial.
- 5. Police Form 24 of A4 KYOMUHENDO KEDRESS, is a medical examination of a person accused of serious crime. The form was exhibited as PEX5, In the form a medical officer (**Dr Mugisha**) confirmed on 24th April 2021 that the accused 30 person was of normal mental condition to stand trial.
- 6. Police Form 24 of A5 NIWABAASA KERESENSIO, is a medical examination of a person accused of serious crime. The form was exhibited as PEX6, In the form a medical officer (**Dr Mugisha**) confirmed on 24th April 2021 that the accused person was of normal mental condition to stand trial.

35 WITNESSES

The prosecution relied on 5 witnesses, PW1 Dr Mugisha, PW2 Kapande Nelson, PW3 Ainemani Samuel, PW4 Balagude Benon, Pw5 No 65968 CPL Kyalya. The

defence relied on 5 witness, who comprised of the accused, Dw1 Musasizi Gaston, Dw2 Gumoshabe Patrick, Dw3 Natamba Obed, Dw4 Kyomuhendo Kedress And Dw5 Niwabaasa Keresensio.

5 ASSESSORS' OPINION

The assessors gave a written joint opinion that was put on court record. They recommended to court that the accused A1, A2, A3 & A4 be convicted, while they recommended that A5 be acquitted.

10 SUBMISSIONS

The lawyers did not make submissions when given an opportunity to do so, the court will consider the evidence on the court record.

DETERMINATION

- 15 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 101, 102 & 103 OF THE EVIDENCE ACT CAP 8 and confirmed in case law in NANDUDU GRACE & ANOR VS UGANDA SUPREME COURT CRIMINAL APPEAL NO 4 OF 2009.
- 20 The question for determination is whether the prosecution has proved all the ingredients of the offence of murder beyond reasonable doubt against the accused person. In MATOVU FRANK & ANOR VS UGANDA COA CRIMINAL APPEAL NO. 111 OF 2018 the ingredients of the offence of murder were stated as;

- 1. Death of a human being;
- 25 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

- 30 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. (*Uganda v Endrio & 3 Ors High Court Criminal Session 172 of 2016).^{*} Police Form 48C, a postmortem report, that was exhibited as **PEX1**, confirms the death, since the body of **Ndebese Johnson** was examined by a doctor. The postmortem report confirms the 35 death of a Human being, which is a requirement to prove ingredient 1 of death of a
- human being.

Ingredient 2

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-^{*}

5 *93] HCB 68^{*}). The Police Form 48C, a postmortem report, that was exhibited as **PEX1**, confirms the cause of death as **closed head injury due to blunt trauma**.

I therefore conclude that the homicide was not authorized by law or accidental, yet the law presumes any homicide (the killing of a human being by another) to be unlawful (see R v. Gusambizi s/o Wesonga (1948)15 EACA 65, Uganda Vs Bosco Okello 10 [1992-93] HCB 68).

Therefore, based on the postmortem report, that was exhibited as **PEX1**, the prosecution proved ingredient number 2 that the death was unlawful.

Ingredient 3

- Ingredient 3, requires the prosecution to prove that the death of the deceased was 15 caused with a malice aforethought. 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^{*}). The Police Form 48C, a postmortem report, that was exhibited as **PEX1**, confirms that the cause of death was a **closed head injury due to blunt trauma**. This resulted into death,
- 20 and is thus a homicide.

I find that the mental element of malice afore thought is proved, from the postmortem report. **Closed head injury due to blunt trauma**, may result into death as it did. The Doctor states in PEX1 an attack on the head leading to injury imputes malice aforethought. I therefore find that ingredient number 3 was proved.

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Ingredient 4

The fourth ingredient that the prosecution is duty bound to prove relates to participation of the accused. I will summarize the evidence of on the court record on this matter.

30 A. Pw2 Kapande Nelson testified that the deceased was his bother. He also stated that he knows the accused, who include his nephews and sister-in-law. He stated that on the morning of 20th April 2020 his mother called him to tell him that the deceased was lost. He stated that kedress (A4) and the sons told him that if the deceased is lost, he must be in the water. That they checked everywhere for him 35 without trace, until they went to the water, and it was Obed (A3) that found him

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in a hard place to find. That the body was inside the elephant grass in the water hidden. That PW2 called the LC chairman and police. The police sniffer dog was introduced to the location and the deceased walking stick that was nearby. The dog then moved to the home of Gastone (A1). That after the burial the deceased 5 blood stained trouser was found under the deceased's bed.

- B. PW3 Ainemani Samuel testified that Patrick (A2) and Obed (A3) were fighting with Mzee (deceased) for land. He stated that when he went home where he found blood prompting him to ask his mother where the father was. That as he 10 was running to tell his uncle, the mother caught him.
- C. Pw4 Balangide Benon testified that in 2021 Ndebesa and the wife had disagreements, that the wife hit his head. That Ndebesa's body was found in the water, police was called and it brought as sniffer dog which was introduced to 15 the walking stick next to the body. That, the dog went to the home of Gaston (A1), but Gaston was not at his home as he was in the forest where he was arrested.
- D. Pw5 No 65968 CPL Kyalya testified that the sniffer dog called Bruce was booked 20 out. It was introduced to a walking stick besides the deceased, it picked up the scent and trailed it to about one and half kilometers to the house of Gaston Musasizi and sat at the door. That Gaston was not at home but was hiding in the forest , he was picked up and brought to his home. That when the sniffer dog saw him (A1) it started barking, attempting to bite him.

The prosecution case does not have a witness that witnessed the murder and are therefore relying on circumstantial evidence against the accused persons.

The salient defence evidence to the ingredient is summarized as follows;

- 30
- 1. DW1 Musasizi Gaston testified on oath denying the charges and stated that he went to dig in the forest that is when his neighbor John told him that Ndebese had died. That the dog went to his home but he was not there, that at his home he stays with his mother and sister. That he was arrested as he left the farm and he did not reach 35 his home.
- 2. DW2 Gumoshabe Patrick testified on oath denying the charges and stated that his father (deceased) left home on 21st April 2021 to go get waragi but did not return. That Kapande told all of them to go check in the water saying that the deceased could have been drunk and fell in the water. DW2 stated that he went to police to make a statement, but the police asked him for one million and told if they don't pay they will be imprisoned.
- 3. DW3 Natamba Obed testified on oath denying the charges, stating that he was arrested on suspicion of killing his father, that when they got to the police they were asked for one million and told if they don't pay they will be imprisoned. That they didn't have money, and they were locked up.
- 4. DW4 Kyomuhendo Kedress testified on oath denying the charges, stating that the deceased is her husband and they have six children. That her husband left home to go buy waragi in April 2021, but did not return. That her husband would always return home by 7pm, that when he did not return, she told Patrick to go tell the mother-in-law. That, the children went looking for the deceased but failed to find him. That the next day after they checked everywhere, Kapande told them to check the water, where the body was finally found.
- 5. DW5 Niwabaasa Keresensio testified on oath denying the charges, stating that he was informed by Tumwesigye that Ndebese was missing. That, later the body was found, police was called and it brought a dog that was introduced to a stick found at the scene. That the dog moved up to the house of Gaston, that his mother told them that He (Gaston) was in the forest, he was then got, arrested and taken.

It is trite 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 the decision of the Court of Appeal for East Africa in *Simmon Musoke Vs. R* (1958) EA 715).*

In this case the prosecution did not bring any witness that witnessed the killing. The only evidence on record related to participation is in respect to the police sniffer dog that went to the home of Gaston (A1). The prosecution and defence witnesses namely PW2 Kapande Nelson, PW4 Balangide Benon, PW5 No 65968 CPL Kyalya, DW1 Musasizi

Gaston and DW5 Niwabaasa Keresensio all testified that a police sniffer dog was

introduced to the crime scene and it thereafter went to Gaston's home which was a distance away.

Pw5 No 65968 CPL Kyalya testified that the sniffer dog was called Bruce was booked 5 out. It was introduced to a walking stick besides the deceased, it picked up the scent and trailed it to about one and half kilometers to the house of Gaston Musasizi and sat at the door. That Gaston was not at home but was hiding in the forest, he was picked up and brought to his home. That when the sniffer dog saw him (A1) *it started barking, attempting to bite him.*

In my analysis of the above evidence, I note that the sniffer dog clearly followed a scent from the crime scene to the home of Gaston and upon seeing him it barked trying to bite him as the police officer handling it stated. It clearly shows that the dog picking him out of all the people, placed him at the crime scene. It means that the scent of the 15 person that the dog followed from the crime scene was not among all those that followed the dog, but it barked at Gaston. This is circumstantial evidence of Gaston's participation in the crime.

The evidence on record does not prove beyond reasonable doubt that accused A2 to A5 participated in the crime. The prosecution witnesses' states that they found the 20 deceased's blood stained trouser under his bed and there was also talk of blood in the house, but the prosecution never brought any evidence of any clothes with blood stains, non were exhibited and no evidence was brought that a lab analysis's was done to show it was blood of the deceased. If it is true that a blood stained trouser of the deceased was discovered and given to police, then the police's failure to exhibit it 25 amounts to failing the investigation and prosecution.

The evidence on court record does not prove beyond reasonable doubt that A2 to A5 participated in the commission of the offence.

I find that the evidence on the court record points to one hypothesis of the guilt of the accused number A1 Musasizi Gaston. I find that the 4th ingredient regarding the 30 participation of the accused A1 Musasizi Gaston is proved.

The accessors gave a written joint opinion wherein they recommended to court that Accused number A1, A2, A3, A4 be convicted, while Accused A5 be acquitted. I take their recommendation that Accused A1 be convicted and the recommendation that A5 35 be acquitted, but I do not take their recommendation in regards to Accused A2, A3,A4

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because they did not consider the rules governing the application of circumstantial evidence and the duty of the prosecution to prove all the ingredients beyond reasonable doubt.

I order that A2 GUMOSHABE PATRICK, A3 NATAMBA OBED, A4 KYOMUHENDO \$\mathsf{S}\$ \$ KEDRESS and A5 NIWABAASA KERESSENSIO be released from prison custody in respect to this case, since they have been acquitted of the charge of murder.

The prosecution has proved all the four ingredients of the offence of murder that they are duty bound to prove, to lead to the conviction of the accused A1 MUSASIZI 10 GASTON. In the circumstances I convict A1 MUSASIZI GASTON of the charge of murder of NDEBESA JOHNSON contrary to section 171 & 172 of The Penal Code Act.

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NSHIMYE ALLAN PAUL M. JUDGE 30-01-2025

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