

UGANDA / JUDGMENT

Uganda v Nsamba & 3 Others (Criminal Session 245 of 2024) [2025] UGHC 51 (31 January 2025) [2025] UGHC 51

COURT

High Court of Uganda

BEFORE

Karemani Jamson K, J

CASE / FILE NUMBER

Criminal Session 245 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KIBOGA

CRIMINAL SESSION CASE NO. 0245 OF 2024

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

VERSUS

A.1. NSAMBA JOHN Alias Kakongoro John Alias Ismail

A.2. MAWANDA ALLAN

A.3. SSONKO SAMUEL MUGANGA

A.4. OBED SSALI KIWANULKA Alias Kiwa

::::::::::::::::::ACCUSED

BEFORE HON. MR. JUSTICE KAREMANI JAMSON. K**JUDGMENT****Introduction**

A1 Nsamba John Alias Kakongoro John alias Ismail, A2 Mawanda Allan, A3 Ssoko Samuel Muganga, A4 Obed Ssali Kiwanuka alias Kiwa and others still at large (herein after referred to as accused the persons) are charged with three offences of murder contrary Sections 188 and 189 of the Penal Code Act, Cap 120.

It is alleged in the three counts that on 11th December 2019 at Kawanda "B" Lwamata Subcounty in Kiboga District, the accused persons with malice aforethought caused the death of Natukunda Asina, Ayebale Nusura and Mutesi Shurat.

Al Nsamba John Alias Kakongoro John alias Ismail pleaded guilty, was convicted and sentenced accordingly. The remaining three accused persons, A2, A3 and A4 pleaded not guilty to the three offences, evidence was thereafter adduced by the prosecution against them. they defended themselves and hence this judgment.

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Burden of proof

In all criminal cases the prosecution has the burden of proving the case against each accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused persons can only be convicted on the strength of the prosecution case rather than on the weaknesses in their respective defences. See: Ssekitoleko V Uganda [1967] EA 531. The accused do not have any obligation to prove their innocence at all.

Once the accused person pleads not guilty he/she puts in issue each and every essential ingredient of the offence charged. The onus is on the prosecution to prove each of the ingredients beyond reasonable doubt before it can secure the conviction.

Proof beyond reasonable doubt though does not mean proof beyond any shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent. See: Miller V Minister of Pensions [1947] 2 ALL ER 372.

Ingredients of the offence of murder charged in this case are:

- 1. That there was death of a human being
- 2. That the death was unlawful
- 3. That it was a result of malice aforethought
- 4. That it is the accused persons that caused the death of the deceased.

Representation

At the trial, A2 and A3 were represented by Ms Kihumuro Sheila on state brief. Mr Mugoma Stephen represented A4 on private brief.

The state was represented by Mr Bakibinga Baxter a Chief State Attorney assisted by Mr. Ariong Stephen a Senior State Attorney.

Witnesses presented

The prosecution led evidence of eleven witnesses namely; Barigye Hassan (PW1), Nyanzi Emmanuel(PW2), Detective Assistant Inspector of Police Batambuze Grace (PW3),

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Detective AIP Bidangari Robert (PW4), Detective Sergeant Mukabya Justus (PW5), Nsamba John (PW6), Ngano Moses (PW7), Detective Inspector of Police Katumba Hasan (PW8), Detective Corporal Bokombi Edward (PW9), Dr. Muwesi Daniel (PW10) and Detective Corporal Mugweki John (PW11).

All the three accused persons gave sworn evidence and called no witness in their defence.

Issues for resolution

The issues this court has to resolve in each of the offences charged so as to establish whether the offences were committed or not are the following:

- 1. Whether there was death of a human being
- 2. Whether the death was unlawful
- 3. Whether the death was a result of malice aforethought
- 4. Whether it is the accused persons that caused the death of the deceased.

By nature of the charges in this matter I will handle all the counts together since the offences were allegedly committed on the same day, same place and by the same people.

Whether there was death of a human being

Death is the end of human being's life. It is the permanent cessation of all biological functions that sustain life, including the heart's beating, breathing and brain activity. Death of a human being may be proved by production of a post mortem report, evidence of witnesses who knew the deceased and attended the burial or saw the dead body.

In the instant case the prosecution adduced evidence of post mortem reports dated 15/12/2019 compiled by PW 10 Dr. Muwesi Daniel confirming the death of the three deceased persons which were admitted in evidence as exhibit P9, P10 and P11.

The prosecution further adduced evidence of the photographs of the deceased's bodies taken by PW9 and they were admitted as exhibit P.8. The photographs show the bodies at the scene. The same witness further compiled a report Exhibit P.7 which also confirm the death of the deceased persons.

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PW2 testified that he participated in the search of the deceased's bodies and their burial.

PW3 participated in the search and location of the bodies and confirmed that the deceased who were children had been killed.

PW5 saw the recovered deceased's bodies. He drew a sketch plan which was admitted as exhibit P.5. The sketch plan shows the location of the dead bodies of the deceased.

PW6 testified that he participated in the killing of the three deceased persons.

In their respective defences, all the accused persons did not deny that Natukunda Asina, Ayebale Nusura and Mutesi Shurat died.

Having considered the above evidence as a whole and I find that the prosecution proved beyond reasonable doubt that the three deceased died.

Whether the death of the three deceased persons were caused by unlawful acts.

The prosecution had the onus to further prove that the death of the deceased persons was unlawfully caused. 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.

PW10 who examined the bodies of the deceased stated that the body of Natukunda Asinah had external bruises. Had a deep wound on the head and neck. It had an amputated left hand. He concluded that the cause of death was deep lacerations on the neck and the amputated left hand.

That the body of Mutesi Sulat the 2nd deceased had a twisted neck, deep lacerations on the neck and concluded that the cause of death was laceration.

That the 3rd deceased Nayeale Nusula's body was examined by PW10 which concluded that the cause of death was lacerations on the neck using a sharp object causing the injury of the vessels leading to excessive bleeding.

The accused persons never adduced any evidence to prove otherwise.

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There is no lawful justification for the acts that caused the death of the deceased persons. The prosecution evidence as a whole has established that the deceaseds' death was a homicide.

The prosecution has therefore proved beyond reasonable doubt that three deceased persons' death was unlawfully caused.

Whether the acts which led to death were actuated by malice aforethought.

Malice aforethought is defined by section 174 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 question is whether whoever strangled the deceased intended to cause death or knew that the manner and degree of strangulation would probably cause death. See: R V Tubere s/o Ochen (1945) 12 EACA 63.

In order to determine whether there was an intention to cause death or that the person knew that his or her act will probably cause death, the court considers the weapon used, the part of the body targeted, the degree of injury and the conduct of the accused before and after the act. See: Uganda V Oromcam Stephen and Ors HCC Session case no. 0093 of 2015.

In the instant case, the post mortem reports show that the deceased persons had deep cut wounds on the necks that led severe bleeding and loss blood. The 1st deceased Natukunda Asinah had an amputated hand. All the cuts were on sensitive parts of the body i.e. the necks.

In the case Uganda V Kamuhanda Emmanuel Criminal Session Case No.0024 of 2012 at **Fort portal unreported** court made a finding which I associate myself with that *very sensitive parts of the body like the neck and head* which were aimed showed that the accused intended to kill.

In their respective defences the accused persons did not challenge the prosecution evidence on this ingredient.

I therefore, find that the prosecution has proved beyond reasonable doubt that the deceased persons' deaths were caused with malice aforethought.

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Whether it is the accused persons who caused the unlawful death of the deceased persons.

Before securing a conviction of an accused person in a criminal case, there should be credible direct or circumstantial evidence placing the accused person at the scene of the crime as an active participant in the commission of the offence.

In the instant case the accused persons save for A.1 (PW6) denied any participation in the death of the deceased persons. The prosecution relied mainly on circumstantial evidence and accomplice evidence of PW6.

The Supreme Court in **Mabira Siragi V Uganda SCCA No 07/2004** held that:

"... in a case depending exclusively on circumstantial evidence the judge must find before deciding upon a conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable upon any other reasonable hypothesis than that of guilt"

I would like to handle each of the accused persons separately since their roles in the commission of the offences seem to be separate.

Accused no.3 – Ssonko Samuel Muganga

With regard to the role of A3, the prosecution relied on the evidence of PW6 who was an accomplice and confessed to participating in the death of the three deceased persons. He pleaded guilty, was convicted and accordingly sentenced in a plea-bargaining procedure. PW6 in his admission and in his evidence implicated A3 Ssonko Samuel Muganga as the one who hired them to kill the deceased persons.

Black's Law Dictionary defines an accomplice as:

"Accomplice (is) a person who is in any way involved with another in the commission of a crime, whether as a principal in the first place or second degree or as an accessory"

In the case of *Nansolo V Uganda* [2003] EA 181 (SCU) where the appellant was convicted of murder. He successfully appealed to the Court of Appeal and finally to the Supreme Court it was held that: -

"In a criminal trial a witness is said to be an accomplice if inter alia he participated as a principal or an accessory in the commission of the offence, the subject of the trial.

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One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after trial.

However even in absence of such confession or conviction, a court may find, on strength of the evidence before it at the trial that a witness participated in the offence in one degree or another. Clearly where a witness conspired to commit or incite the commission of the offence under trial, he would be regarded as an accomplice...."

In the instant case PW6 who is also A1 confessed right from the time of arrest to have participated in commission of the crimes in issue. He stated that he came to know A3 as a result of this case. That on a date he could not remember he met his former schoolmate called Patrick who told him that there was a rich person who wanted blood of human beings. That he agreed to participate in the act of securing the blood. That they went up to near the home of the rich person who turned out to be A3. That the rich man has a hardware shop in Lwamata Trading Centre. That they met with him and agreed to secure for him the blood. That he promised to help them in case they were arrested. That he promised them shs.20,000,000/= as a whole. That he gave them a deposit of shs.2,000,000/= and he personally received shs.1,000,000/=.

That him and Patrick murdered the three children of his friend Hassan Barigye (PW1) which children knew him well. That he cut one child and Patrick cut two children. That they collected blood in a kavera. That to prove that blood was for human beings they cut a hand of one of the children and put it in the blood.

That they packed the bodies in sacks and dropped them near the deceased's home.

That thereafter him and Patrick met A3 Sonko Emmanuel Muganga and two other men he didn't know in A3's car. That A3 drove them in his car up to Mogas Petrol station where him and Patrick were dropped. That the blood and the hand in the "kavera" were taken by A3. That they were informed to be patient for the balance to be paid. That he remained demanding for the balance until he was arrested.

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He identified exhibit P.1 a note he personally wrote and left at the scene of crime. This witness remained consistent and firm throughout cross-examination by counsel for the accused persons.

In his defence DW3 Sonko Samuel Muganga stated that he never hired PW6 to get him any blood. He set up a defence of alibi that he was at the time in Kampala.

The learned Chief State Attorney submitted that A3 procured PW6 and others to cause the death of the deceased and that he is a principal offender. He referred to Section 19 of Penal Code Act and also cited the case of Mureeba and Ors V Uganda [2006] UGSC 7 where the Supreme Court upheld the conviction of a procurer.

In their joint submissions in reply, the learned counsel for A2, A3 and A4 submitted that it was only the evidence of PW6 which linked A3 to the crime.

I have examined the evidence of PW6 and it is my conclusion that his evidence against A3 is evidence of an accomplice. He was charged with the same offences, he pleaded guilty to all of them, was sentenced and later called as a prosecution witness.

In the case of **R V Baskerville** (1916) 2 KB 658 reproduced in the case of **Rwalinda John V Uganda** Supreme Criminal Appeal No.03 of 2015 (unreported) it was held that: -

"... where on the trail of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness have told the truth in matters unconnected with the guilt of the accused,"

In **Ramaeshwar V V. A** 1952 sc. 54 it was held that there must be additional evidence rendering the story of the accomplice true and that it is reasonable to act upon it.

In Nasolo V Uganda (supra) the Court of Appeal of Uganda held that: -

"... the judge must warn himself and the assessors of the danger of acting on an accomplice evidence without corroboration. However, failure to warn himself of

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the necessity for corroboration is not fatal to the accused's conviction if the judge made a finding that the evidence was corroborated."

In the instant case PW6 kept consistency through his testimony and was a credible witness. What PW6 stated in his evidence aligned well with other evidence already presented. He referred to the cutting of the deceaseds' necks and one of the victim's hand. The evidence of the postmortem report showed that the bodies' necks were cut and that one of them had a hand cut off. The evidence of the other prosecution witnesses like PW1 and PW2 was also to the effect that the bodies had been hidden near the home of the deceased persons and PW6 equally stated so. PW6 stated that he personally wrote a note with a telephone number in order to receive a ransom through it. The same note was later found the scene and exhibited as P.1. When it was showed to him (PW6), he owned it as the one he wrote.

I find no evidence to suggest that in implicating A3, PW6 was motivated by any ill intention save the allegation that he was not paid his balance for the mission which is in tandem with the guilt of the accused person \$(A3)\$.

I find corroboration of the evidence of the accomplice PW6 in the evidence relating to the status of the deceased's bodies' which had cut necks and an amputated arm.

Further still, even if there was no corroborative evidence, I would still have found the evidence of the accomplice credible enough to convince me to convict A3 upon warning myself of the danger relying on uncorroborated evidence of an accomplice.

I am therefore convinced that A3 procured the killing of the deceased persons and had a common intention with PW6 and others to cause the death of the three deceased persons.

The gentleman and lady assessor advised me to convict A3.

Based on the above findings, it is my conclusion that A3 is guilty of the offences of Murder contrary to Sections 188 and 189 of the Penal Code Act in the three counts and I convict him on each accordingly.

Accused no. 2 - Mawanda Allan

From the evidence adduced there is no evidence of a witness who saw A2 committing the crime. The evidence based on to implicate A2 is the evidence that his telephone line 0708047543 received money shs.500.000= for a ransom involving the death of the three deceased persons.

PW6 explained how he got the phone from A2 and how he used it without involvement of A2.

A2 equally explained how PW6 took his phone and how he returned it. He denied ever being involved in committing the crime.

I have looked at the whole evidence of the prosecution and I believe the evidence of PW6 and A2 that A2's phone was used in receiving ransom money for the crime by PW6 without A2's knowledge. I hence find no credible evidence to implicate A2.

The gentleman and lady assessor advised me to acquit A2 and I agree with their opinion and find A2 not guilty and acquit him of all the three offences charged.

Accused no.4 - Obed Sali Kiwanuka alias Kiwa

According to the evidence adduced, A4 was implicated because of being a traditional healer who was suspected to have been involved in the ritual murder.

He was further arrested based on the charge and caution statement of A3 which was not admitted in evidence by this court.

All the exhibits recovered from A4's place marked Exh. P.3 contained no relevant evidence against A4.

A4 denied being involved in the commission of the offences in this case.

In his written submissions, the learned Chief State Attorney stated that A4 aided and abetted A3 in committing the offences.

In their joint written submissions, the learned counsel for A2, A3 and A4 submitted that there was no evidence adduced to show that A4 participated in the murders of the deceased. That

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whereas A4 doesn't deny being a traditional healer, he denied participation in the crimes in issue.

I have looked at the evidence of the prosecution as whole and the accused's evidence as a whole, I do not find any credible evidence to convince me that A4 participated in the murder of the deceased persons in this case.

The exhibits P.3 recovered from A4's place did not portray any picture of his involvement in the commission of the crime in issue.

The assessors advised me to find A4 innocent of all the three offences charged and to acquit him. I do agree with their opinion in all the three counts and I find A4 not guilty of the offences charged and I acquit him.

All in all, A2 and A4 are acquitted of all the offences charged in counts 1,2 and 3 and are set free unless held on other lawful charges.

A3 is found guilty in all the three offences charged and I convict him on each of the counts.

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KAREMANI JAMSON. K

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