THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0123 OF 2020

PC NTEGEKA ISMAIL::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala before Mubiru, J. dated 19th February, 2020 (conviction) and 21st February, 2020 (sentencing) in Criminal Session Case No. 0315 of 2019)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF THE COURT

Background

On 19th February, 2020, Mubiru, J. convicted the appellant on two counts – one count of the offence of Murder contrary to **Sections 188 and 189 of the Penal Code Act, Cap. 120**; and the second count of the offence of Theft contrary to **Sections 254 and 261 of the Penal Code Act, Cap. 120**. On 21st February, 2020, the appellant was sentenced to concurrent sentences of 37 years and 11 months imprisonment on count one and 5 years and 11 months imprisonment on count two.

The High Court decision followed the trial of the appellant on an indictment charging him with two separate counts of murder and aggravated robbery, although the latter offence was found not to have been proven, and instead a conviction for a minor but cognate offence of theft was entered. In regard to the murder count, the indictment alleged that on 28th February, 2018 at Kasato Zone, Kisenyi Parish in Kampala District, the appellant had, with malice aforethought, caused the death of Kaganda Adolf (the deceased). With regard to the second count of aggravated robbery, it was alleged that

at the same place, four persons, including the appellant, had stolen property of the deceased including a flat screen TV, D-Jack woofer, and a bag containing Ug. Shs. 400,000/=, and at or immediately before or immediately after the incident used a deadly weapon to wit a gun. As stated earlier, the learned trial Judge considered that certain elements of the offence of aggravated robbery were not proven and he instead convicted the appellant of the offence of theft.

The charges against the appellant arose out of an incident that took place in the wee hours of 28th February, 2019. There were two conflicting versions. The prosecution alleged that the appellant who was a police officer at the rank of constable, came across the deceased jogging, and without any provocation, shot and fatally injured him.

On the other hand, the appellant alleged that on the fateful day, he came across the deceased near a unit of houses where the appellant lived. At the time, the appellant was returning from a nearby police station where he had gone to report a case of burglary, as an unidentified person had earlier that night broken into his house and stolen some money. The appellant claimed that as he was returning to his house, he saw the deceased standing near the door of the house of one of his neighbours, and suspecting that the deceased was about to burgle that house, he decided to confront him. This caused the deceased to flee from the scene and the appellant went after him in pursuit. The appellant pursued the deceased for some distance, after which, as the appellant claimed, the deceased stopped running and instead turned back and started charging towards the appellant. The appellant saw the deceased armed with a weapon that looked like an iron bar, and fearing that the deceased would assault him, the appellant, who was at the time armed with a gun, fired a shot towards the deceased's legs, intending to immobilize him. Unfortunately, so the appellant claimed, the shot hit the deceased's abdomen causing fatal injuries from which he died later that day. The appellant maintained that he did not intend to shoot the deceased in the abdomen.

Shortly after the shooting of the deceased, the appellant and several other persons went to a kiosk belonging to the deceased, located only a short distance from the scene of shooting, and took certain property including a T.V and a woofer. The appellant stated that they went to the deceased's kiosk to search for suspected stolen property after receiving information that the deceased was a notorious thief. The items taken from the deceased's kiosk were therefore taken as suspected stolen property intended to be exhibited at the nearby police station. The appellant stated that he was unable to take the property directly to the police station and had instead kept it at his home until he could do so.

The learned trial Judge appears to have given the appellant benefit of the doubt about his version of events in respect to the shooting of the deceased. He also considered that the appellant's case was that he had not acted with malice aforethought when he killed the deceased and that he had killed him in what in law, amounted to killing in self defence or accident. The learned trial Judge however rejected the appellant's case. He found that it was unreasonable for the appellant to shoot the deceased in the circumstances. The learned trial Judge further considered the possibility that the appellant being a police officer could have shot the deceased as a means of effecting an arrest but found that it was disproportionate to shoot at the deceased for that purpose.

As for the aggravated robbery charge, the learned trial Judge found that the appellant had the intention to steal the items he took from the deceased's kiosk, and therefore rejected the appellant's version. However, he found that there was a lack of contemporaneousness between the theft and use of a deadly weapon during the commission of the theft, as was required to sustain a conviction of aggravated robbery. He therefore, convicted the appellant of theft, and in so doing rejected the appellant's defence that he had been acting within the course of police investigations when he removed items he suspected to be stolen property from the deceased's kiosk. After

entering the convictions, the learned trial Judge imposed the sentences alluded to earlier.

Being dissatisfied with the decision of the learned trial Judge, the appellant appealed to this Court on the following grounds:

"1. **The learned trial Judge erred in law and fact when he shifted the burden of proof from the prosecution to the accused thereby occasioning a miscarriage of justice.**

2. **The learned trial Judge erred in law and fact when he failed to properly evaluate all evidence adduced at the trial thus occasioning a miscarriage of justice.**

3. **The learned trial Judge erred in law and fact when he imposed manifestly harsh and excessive sentences against the appellant."**

The respondent opposed the appeal.

Representation

At the hearing of the appeal, Mr. Samuel Nsubuga, learned counsel, represented the appellant on State Brief. Ms. Emily Mutuzo Sendaula, learned State Attorney in the Office of the Director of Public Prosecutions represented the respondent.

The appellant followed the hearing via video link while he remained at the prison premises. This was owing to existing restrictions on movement of prisoners from prison premises as a way of preventing contracting and spreading of COVID-19.

The parties relied on written submissions filed in support of their respective cases.

Appellant's submissions

Counsel for the appellant submitted on each ground of appeal separately.

Ground 1

Counsel contended that the learned trial Judge shifted the burden to the appellant to prove the defences he had set up thereby occasioning a

miscarriage of justice. He cited two passages from the learned trial Judge's judgment, at page 112 lines 16-22 and at page 112 lines 23-26, to demonstrate the said shifting of burden of proof.

Ground 2

It was submitted that the learned trial Judge did not properly appraise the evidence regarding the circumstances under which the appellant shot the deceased. The learned trial Judge ignored to consider **Section 16** of the **Penal Code Act, Cap. 120** and the interpretation of that provision given in the authority of **Oruba and Another vs. Uganda, Supreme Court Criminal Appeal No. 41 of 2015 (unreported)**. In counsel's view, the issue was whether the force used by the appellant was necessary in the circumstances of the case, and that issue ought to have been answered in the affirmative. There was evidence that as the appellant was returning from making a report at a police station regarding theft of his money, he had found the deceased at the door of one of his neighbours, and considering that it was in the wee hours, the appellant had suspected that the deceased was about to commit a crime and had confronted him, and the deceased had, while armed with a weapon charged at the appellant and had ignored the appellant's warning not to go closer. Counsel submitted that in those circumstances, the appellant was justified to shoot at the deceased as he was about to commit a serious offence against the appellant.

In the alternative, it was submitted that were this Court to find that the appellant unlawfully caused the deceased's death, this Court ought to find that the appellant had not acted with malice aforethought. Counsel contended that the appellant had shot at the deceased intending to immobilize him and thereafter arrest him. He had tried to direct his shot at the deceased's legs and it was accidental that the shot struck the deceased's abdomen. Moreover, after the shooting, the appellant took the deceased for medical attention at the nearby Kisenyi Health Centre IV. In those circumstances, counsel submitted that death was not a natural consequence of the appellant's acts and neither was the appellant able to foresee death

as a natural consequence of the shooting. Counsel referred to the authority of **Nanyonjo Harriet and Another vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2002 (unreported)** for the principles on malice aforethought.

On the conviction for theft, counsel submitted that the learned trial Judge erred in taking into account the guilty pleas of the appellant's co-accused in arriving at that conviction. It was also submitted that the learned trial Judge erred to consider the lack of a search warrant, authorizing the search conducted by the appellant at the deceased's kiosk, as being indicative of intention to steal the said property. Counsel submitted that the appellant's evidence was that he went to the deceased's kiosk to conduct a search on suspicion that stolen property had been kept there, and that several items suspected to be stolen property had been recovered.

Counsel prayed that this Court reappraises the evidence and quashes the appellant's respective convictions.

Ground 3

Counsel submitted that there exist circumstances justifying this Court to interfere with the sentences that the learned trial Judge imposed on the appellant. He referred to the authority of **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001** (unreported) for the principle that an appellate Court may interfere with a sentence if, among other reasons, in imposing that sentence, the trial Court ignored to consider an important matter or circumstance which ought to have been considered. Counsel contended that the learned trial Judge failed to give due consideration to several mitigating factors in favour of the appellant, namely; the appellant was a first offender with family responsibility for his two children and a wife. He was a young man aged 29 years and was capable of reforming and being reintegrated into society. The appellant had also been remorseful and had apologized to the deceased's mother. Further, the appellant had taken the deceased for medical attention after the shooting.

In counsel's view, due consideration of the above mitigating factors would have led to imposition of shorter sentences.

It was further submitted that this Court ought to interfere with the sentence imposed for the murder conviction because that sentence was manifestly harsh and excessive in comparison with sentences imposed in previously decided murder cases. Relying on the authority of **Kamya and 4 Others vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2015 (unreported)**, counsel submitted that the need to ensure consistency in sentencing has been recognized as an important matter in sentencing.

Respondent's submissions

Counsel for the respondent replied to each ground separately.

Ground 1

Counsel disagreed with the contention that the learned trial Judge shifted the burden to the appellant to prove the defences he had set up, submitting that the learned trial Judge properly analysed all the evidence on record and satisfied himself that the prosecution had discharged its burden of proving all the ingredients of the relevant offences for which the appellant was convicted. The learned trial judge considered the defences of accident and self defence relied on by the appellant but rightly concluded that on the evidence those defences could not succeed. Counsel contended that the prosecution evidence of PW2 Katushabe Grace, PW4 Busingye George William and PW5 Detective Sergeant Okaro Ronald showed that the deceased was running away from the scene when the appellant shot at him and therefore the appellant's version that the deceased was charging towards him necessitating self defence was false and was rightly rejected by the learned trial Judge. In counsel's view, the learned trial Judge rightly concluded that the prosecution had proved the ingredients of murder beyond reasonable doubt. She submitted that ground 1 of the appeal must fail.

Ground 2

Counsel supported the learned trial Judge's handling of the evidence. On the criticism that the learned trial Judge erred in finding that the appellant acted with malice aforethought, especially considering that the appellant only fired once at the deceased and had even taken the deceased for medical attention at a nearby health facility, counsel submitted that the totality of the circumstances of the shooting of the deceased proved malice aforethought. She pointed out that malice aforethought is rarely proved by direct evidence but may be inferred from the circumstances. In the present case, there were circumstances from which malice aforethought could be inferred. The appellant deliberately pulled the trigger at the deceased under conditions of poor visibility and while the deceased was running away from him. In those circumstances, and as was rightly found by the learned trial Judge, malice aforethought could be inferred. Counsel invited this Court to reappraise the evidence and come up with similar conclusions.

Counsel also made submissions on allegations of contradictions and inconsistencies which were abandoned by the appellant.

With regard to the conviction for theft, counsel supported the learned trial Judge's decision. She submitted that PW4 and PW6 were present when a group including the appellant broke into the deceased's kiosk and took property. Some of the property was discovered at the home of the appellant and the rest at the home of Oguti who was part of the group that broke into the deceased's kiosk. In counsel's view, the allegation that breaking into the deceased's kiosk was in the course of investigations was an afterthought cooked up by the appellant to justify shooting at the deceased.

Counsel prayed that this Court disallows ground 2.

Ground 3

Counsel supported the sentences imposed on the appellant and urged this Court not to interfere because there were no grounds justifying such intervention. She referred to the authority of **Kiwalabye Bernard vs**

Uganda, Supreme Court Criminal Appeal No. 143 of 2001 for the proposition that an appellate Court can only interfere with the sentence of a lower court where in the exercise of its discretion, the court imposes a sentence which is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle.

Counsel submitted that contrary to the appellant's submissions, the learned trial Judge considered all the relevant mitigating and aggravating factors, as well as the period he spent on remand before passing sentences that were within the permissible statutory limits. It was also submitted that the aggravating factors outweighed the mitigating factors. Moreover, matters were aggravated by the fact that the appellant stole the deceased's property after shooting at him.

It was also contended that the sentence imposed for murder was within the permissible sentencing range discernable from case law. Counsel referred to the ranges set in the cases of **Bakubye Muzamiru and Another vs. Uganda, Supreme Court Criminal Appeal No. 56 of 2015, Tigo Stephen vs. Uganda, Supreme Court Criminal Appeal No. 08 of 2009, Muhwezi Bayon vs. Uganda, Court of Appeal Criminal Appeal No. 198 of 2013, and Bandebaaho Benon vs. Uganda, Court of Appeal Criminal Appeal No. 319 of 2014**.

Counsel urged this Court to find that the sentences imposed on the appellant were neither manifestly harsh nor excessive.

Resolution of Appeal

We have carefully studied the record, and considered the submissions of counsel and the law and authorities cited. We have also considered other relevant laws and authorities that were not cited. This is a first appeal and we are alive to the duty of this Court on first appeal which is to reappraise the evidence and consider all the material presented in the trial Court and

come up with its own conclusions on all issues of law and fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported).**

The appellant raised three grounds of appeal. We shall consider each ground independently in the following order; ground 2, followed by ground 1 and lastly ground 3.

Grounds 2

Ground 2 relates to the learned trial Judge's handling of the evidence with the appellant claiming that the learned trial Judge mishandled the evidence. The respondent supports the learned trial Judge's handling of the evidence.

We shall reappraise the evidence.

At the trial the prosecution alleged that the appellant came across the deceased jogging on the fateful day and without any reason, shot at him and caused him fatal injuries. Further, that after shooting the deceased, a group of persons including the appellant forcefully entered the deceased's kiosk and stole property belonging to the deceased. On the other hand, the appellant claimed that he came across the deceased attempting to burglarize a house in his neighbourhood, and decided to arrest him but the deceased attempted to flee. The appellant had gone in pursuit of the fleeing deceased but at some point the deceased had turned back and attempted to charge at the appellant. Fearing for his life, the appellant shot at the deceased's legs intending to immobilize him but the shot accidentally struck the deceased's abdomen instead.

As for the count of theft, the appellant claimed that he had no intention of stealing the deceased's property but had taken property from his kiosk, on suspicion that it was stolen property. He intended to take it to a nearby police station.

We must reiterate the principle stated in **Woolmington vs. DPP [1935] 1 AC 462** that subject to exceptions not relevant in the present case, it is the duty of the prosecution to prove the accused's guilt. If, at the end of and on the whole of the case, there is a reasonable doubt created by the evidence, the accused is entitled to an acquittal. We also note that the trial Judge has a duty to give a decisive determination of the facts in any case. As stated by Lord Hoffman in **Re B (Children) (Fc) [2008] UKHL 35**:

> **"If a legal rule requires a fact to be proved ("a fact in issue"), a judge or jury must decide whether or not it happened. There is no room for finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as not having happened."**

In the present case, the prosecution bore the burden of proof with regard to the murder and theft counts of which the appellant was convicted. In relation to the murder case, it was agreed that the appellant shot and killed the deceased. The only contested element was whether the appellant acted with malice aforethought when he shot at the deceased. In order to decide the case one way or the other, the learned trial Judge had to make a determination as to which of the appellant or the prosecution version of the facts was right. On reading the judgment of the learned trial Judge, one gets the impression that the learned trial Judge was indecisive as to which of the prosecution or the appellant's versions he had accepted. He appears to have been willing to accept the appellant's version that he came across the deceased attempting to burglarize a house in his neighbourhood, yet in parts of his judgment, he appears to have accepted the prosecution evidence that the deceased was jogging at the time he was shot by the appellant.

We note that none of the prosecution witnesses were present when the deceased was shot and the version that the deceased was shot at when he

was jogging appears only in the evidence of the deceased's mother PW3 Katushabe Grace. PW3 stated in evidence at page 53 of the record as follows:

> **"On that day I was sleeping at home. I received a call from the deceased and he told me he had been shot. He was shot from Kasaato Village where he was jogging. He was stopped and he refused to stop, he was shot."**

In cross examination, the possibility that her son was shot near another person's gate was put to PW3 and she stated that she would be surprised if that was the case. This showed that PW3 was not herself a witness to what actually happened before the appellant was shot. The learned trial Judge treated the deceased's statement to PW3 as a dying declaration. While he was entitled to do so, there was evidence given by the defence which he had to weigh against that declaration.

The relevant defence evidence was given by the people who were present shortly before and at the time the deceased was shot, and these included the appellant and DW2 Nanyanzi Berna, the appellant's land lady. DW2 lived on the same unit of houses as the appellant. The appellant stated that he found the deceased at the door of one of his neighbours at around 3.30 a.m. He was suspicious that the deceased was going to break into that house and tried to apprehend him. According to the appellant, the events that led to the killing of the deceased arose when the appellant attempted to arrest the deceased and the deceased attempted to evade arrest. The appellant's version was corroborated by the evidence of DW2 who testified to have heard the appellant confront a burglar who was trying to burgle one of the houses. Therefore, we find that the facts must have been as presented by the appellant and DW2, that the deceased was found trying to burgle a house in the appellant's neighbourhood and he was shot at in the process of being arrested.

What has to be determined next is whether the appellant acted with malice aforethought in shooting at the deceased. In determining that question, we

bear in mind that the appellant raised the defence of self defence stating that he shot at the deceased while defending himself against an imminent attack from the deceased. We note that as the learned trial Judge rightly observed, the defence of self defence is provided for under **Section 15 (a)** of the **Penal Code Act, Cap. 120** which provides:

> **"15. Defence of person or property and rash, reckless and negligent acts.**
>
> **Subject to any express provisions in this Code or any other law in force in Uganda, criminal responsibility—**
>
> **(a) for the use of force in the defence of person and property**
>
> **(b) ...**
>
> **shall be determined according to the principles of English law."**

The principles of English law with regard to self defence have been articulated in two leading common law cases, namely 1) **Palmer vs. The Queen [1971] 1 ALLER 1077; and 2) Beckford vs. The Queen [1987] 3 ALLER 425.** In the **Beckford case (supra)**, it was stated:

> **"The common law recognises that there are many circumstances in which one person may inflict violence on another without committing a crime, as for instance in sporting contests, surgical operations or, in the most extreme example, judicial execution. The common law has always recognised as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed." (Underlining is for our emphasis)**

An accused person relying on the defence of self defence must have used reasonable force to repel the attack, otherwise the defence will not be available. There can be no closed list of what amounts to reasonable force and the trial court will consider the unique facts of each case. The common law recognized the difficulty of providing an exhaustive definition of reasonable force, and instead offered guidance on what did not qualify as reasonable force. Thus in the **Palmer case (supra)**, the Court stated:

"It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence."

Further guidance offered by the common law was that determination of reasonable force requires a subjective test, in other words, a trial Court must consider the circumstances as the accused person honestly believed them to be at the material time. The Court should not conduct an objective test and consider the circumstances from the view point of a reasonable man. In the **Beckford case (supra)**, the Court observed:

"The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of all, that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions, second, that if the defendant may have been labouring under a mistake as to the facts he must be judged according to his mistaken view of the facts and, third, that that is so whether the mistake was, on an objective view, a reasonable mistake or not. In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one,

that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."

The common law was also wary of a trial Court overanalyzing circumstances and in the **Palmer case (supra)**, the Court stated:

"...a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."

We now proceed to consider the application of the above principles in the present case. We note that the findings from the post mortem examination on the deceased's body indicated that appellant shot the deceased on the abdomen. The appellant's evidence was that the shooting at the deceased's abdomen was accidental as he had intended to shoot at the deceased's legs to immobilize him. The appellant stated that after a brief period of pursuing the deceased, the deceased had turned back and charged at him. The deceased began charging at the appellant while about 5 metres away and the appellant had warned him to stop but he kept on getting closer. The appellant testified about what happened thereafter in his evidence at pages 65 to 66 of the record, as follows:

"At the dead end in the corridor, leading to another doorway to another tenant, he (the deceased) turned back and charged towards me (the appellant). He was about five metres from me. I could see his right and stretched in the air holding something which looked like a weapon. In his left hand he was carrying something that produced a dim source of light which looked like a small torch. He kept charging toward me and was so close to me. At about two metres I was feeling shock on seeing him raise a weapon toward me in close contact. I was moving backwards, trying to get away from him. Because he had charged so close I feared that my life was in danger since he was carrying a weapon which looked like an iron bar.

In an attempt to protect my life and also his life, I released a shot intending to immobilize him so that he could stop so that I arrest and disarm him. My intention was not to kill him. I tried to direct my shot towards his legs by pointing the weapon in a downward position. Because of the nature of the surface of the corridor and the situation under which the incident was happening, when I stepped backwards, I stepped onto a lower ground perhaps a lower ground which caused the shot to hit him on the lower part of his belly."

In cross examination, the appellant testified that the deceased had been aggressive and had shouted at him before charging towards him. He felt that the deceased had shouted with the intention of scaring him. The learned trial Judge appears to have disbelieved the appellant's evidence that he shot the deceased because he was charging towards him. He based his rejection of the appellant's evidence on what we believe was inferential reasoning whereby the learned trial Judge reached conclusions by reasoning his way through the prosecution evidence. For example, at page 106 of the record, in rejecting the appellant's claims that the deceased charged towards him, the learned trial Judge stated that those claims were inconsistent with the medical evidence contained in the deceased's post mortem report. He observed:

"On the other hand, the version by the accused is that the deceased was dashing towards him with his arm raised while armed with a one-and-a-half-foot long bar, intending to strike him with it. By the time he fired the shot, the deceased was within two metres of him. In the first place, this version is inconsistent with the medical evidence. <u>According to the post mortem report, exhibit PE1 dated 28th January, 2018, the bullet entry wound was to the left of the pelvic region and tangential, such that the corresponding exit wound was on the right buttock. The direction of the projectile was from front to back, left to right downwards. Had the shot been fired directly as the deceased was in the process of attacking the accused at such close range, both entry and exit wounds would have been to the left side of the body of the deceased, one at the front and the other at the back, in more or less a direct line and not a tangential one."</u>

On the basis of the above reasoning, the learned trial Judge concluded that the appellant had shot at the deceased as he was escaping from arrest. In other words, at the time of shooting, the deceased was not charging towards the appellant. We think, however, that findings on such difficult matters of science, are better informed by evidence, especially expert evidence as opposed to judicial inferential reasoning. In the present case, the prosecution failed to adduce evidence ruling out the appellant's version that the deceased was charging towards him when he shot at him. PW5 Detective Sergeant Okaro who conducted police investigations into the killing of the deceased testified that he neither made a sketch map of the scene of shooting nor did he investigate the circumstances under which the appellant killed the deceased. We therefore find that the learned trial Judge erred in finding that the deceased was shot while escaping from the appellant. We accept the appellant's version of events that he shot the deceased as he charged towards him, as there was no evidence contradicting that version.

We must also observe that there was no material contradiction between the evidence of the appellant and that of DW2, on whether the deceased was charging towards the appellant when the latter shot him. DW2's evidence was that after the shooting, the deceased was found lying at a distance of about 8 metres from the house where the appellant had first confronted him. This would support the appellant's version that the deceased had fled after he was confronted and later charged at him.

We now turn to determine whether in the circumstances, the shooting of the deceased constituted reasonable defensive action. The appellant stated that he targeted the deceased's legs when he shot at him in order to immobilize him and stop him charging aggressively towards him. He claimed that in the process he had accidentally shot the deceased in the abdomen. We observe that the appellant's version on the accidental shooting of the deceased was not challenged in cross examination, and neither did the prosecution adduced any evidence ruling out the facts as narrated by the appellant. Nonetheless, the learned trial Judge rejected the appellant's accident

defence, having noted that defence at page 116 of the record, although he never gave reasons for doing so.

It is trite law that a court may reject a defence set up by an accused person, such as the accident defence set up by the appellant, but the Court must give reasons for rejecting any such defence. Considering that the prosecution bears the burden of proving the case against an accused person, rejection of a defence must be based on plausible prosecution evidence destroying that defence. The corollary is that if the prosecution fails to adduce evidence ruling out a defence, that defence must succeed. In the present case, because no evidence was called for the prosecution to rule out the appellant's claims that he accidentally shot the deceased in the abdomen as he had intended to shoot at his legs, there was no basis for the learned trial Judge to reject it.

The next point for consideration is whether the appellant used reasonable force when he shot the deceased in the circumstances. We must emphasize that in answering that question, this Court must have regard to the circumstances as the appellant honestly believed them to be. The court is not to assess the circumstances from the view point of the reasonable person, which was the approach taken by the learned trial Judge. The learned trial Judge appears to have taken the objective approach, although in a passage from his judgment at page 108 of the record, he properly recited the principle that the circumstances must be considered from the point of view of the accused person's honest belief (subjective approach).

We must also state, and with the greatest of respect, that another key feature of the judgment of the learned trial Judge is over analysis of the circumstances of the deceased's shooting in a manner that amounted to "weighing to niceties" what the appellant should have taken as reasonable defensive action. This was discouraged in the **Palmer case (supra)**. For example, the learned trial Judge found that the appellant had an opportunity to retreat and should have done so instead of shooting at the appellant. He reasoned that this was because the deceased was armed with a weapon that could have only been used within a couple of feet from the deceased. The

learned trial Judge also continued to weigh to a nicety such factors as the nature and seriousness of the attack, and such things as "ability", "opportunity" and jeopardy. We believe all this was irrelevant in assessing the appellant's defence.

The law on self defence as we understand it is that where there is aggression against a person from which death or grievous bodily harm may occur, that person is in law entitled to take reasonable defensive action against the aggression. What amounts to reasonable defensive action is for the court to determine taking into account the unique circumstances of each case, but the court must consider the circumstances as the accused person honestly and genuinely believed them to be. Where a person attacked only did what he honestly and instinctively thought was necessary, he is deemed to have taken reasonable defensive action. If the court comes to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the court comes to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it. **(See: Palmer and Beckford cases (supra))**

Therefore, two questions arise in evaluating the appellant's claim of self defence: 1) whether the appellant took defensive action against the deceased genuinely and honestly believing that the deceased intended to attack him and that that attack could have resulted in him suffering death or grievous bodily harm; and 2) whether the appellant used such force as he honestly and genuinely believed was reasonable against the deceased. We would answer both questions in the affirmative. On the evidence, the appellant saw the deceased charging towards him when armed with what to him looked like a weapon, the appellant requested the deceased not to

charge any closer but the deceased defied that request. As the deceased got closer, the appellant aimed to shoot at the deceased's legs intending to immobilize him, but had accidentally caught the deceased on the abdomen. The appellant's honest and genuine belief was that shooting to immobilize the deceased would have prevented an impending attack on him. In our view, those circumstances indicated that the appellant acted in self defence and should not have been convicted for murder of the deceased.

We now turn to consider the challenge against the appellant's conviction for theft. The offence of theft is defined under **Section 254** of the **Penal Code Act, Cap. 120** which, in so far as is relevant, provides as follows:

> **"254. Definition of theft.**
>
> **(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.**
>
> **(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents—**
>
> **(a) an intent permanently to deprive the general or special owner of the thing of it;**
>
> **(b) ...**
>
> **(c) ...**
>
> **(d) ...**
>
> **(e) ..."**

The offence of theft is therefore committed when a person fraudulently and without any claim of right, takes another's property. A person is deemed to have taken another's property fraudulently, if he does so with the intent to permanently deprive the owner of that thing.

In the present case, the learned trial Judge found the appellant guilty of stealing property, namely, a Flat Screen L19 LED TV, from the deceased's kiosk, which property was later found at the appellant's home. The learned trial Judge found the appellant guilty of theft of some property belonging to the deceased and that he had an intention to permanently deprive the deceased of property he took from the latter's kiosk. The learned trial Judge based his finding on several strands of circumstantial evidence as follows. At page 120 of the record, he considered evidence indicating that the appellant conducted an illegal search at the deceased's kiosk as he had no search warrant and neither were there circumstances justifying carrying out that search. The learned trial Judge considered that the appellant had been assigned day guard duties and was not part of the police investigation department and as such could not carry out a search at the deceased's kiosk. Further, the learned trial Judge took into account the appellant's failure to take the items from the items he recovered from the deceased's kiosk to a nearby police station for safe custody, with the appellant instead keeping the items to his house. The learned trial Judge also took into account the guilty pleas of the other people who had also taken items from the deceased's kiosk, and who had been charged alongside the appellant as indicative of a common intention to steal the said items.

Counsel for the appellant faulted the learned trial Judge for taking into account irrelevant matters in reaching the decision to convict the appellant of the offence of theft. In counsel's view, these irrelevant matters included; 1) the guilty pleas of the appellant's co-accused, who pleaded guilty to theft of the deceased's property from the kiosk; in arriving at that conviction; and 2) the appellant having conducted a search at the deceased's kiosk without a search warrant.

Counsel for the appellant pointed out that the learned trial Judge should instead have taken into account the appellant's evidence that he went to the deceased's kiosk to conduct a search on suspicion that stolen property had been kept there, and that the items he took from the appellant's kiosk were suspected stolen property. Counsel for the respondent submitted that the

circumstances indicated that the appellant intended to steal the deceased's property when he broke into the deceased's kiosk. Moreover, some of the property taken from the deceased's home was found at the appellant's home, which meant that the appellant had the intention to steal that property. It was contended for the respondent that the appellant's evidence was an afterthought aimed at avoiding conviction for theft.

PW4 Busingye George William, the Secretary for Defence in the area where the deceased's kiosk was situated stated that at about 7.00 a.m on the fateful day, he was present when a group of police officers including the appellant forcefully entered the deceased's kiosk and took some of his property, namely, a TV, a woofer, among others. PW4 had inquired from the appellant why the group was breaking into the deceased's kiosk and the appellant stated merely that the deceased had been killed. PW4 testified that on taking the property, the appellant's group took the property to the nearby Kasaato Police Post. Later, PW4 went to Kasaato Police Post but did not find the property there. He later learnt that the stolen property was recovered from the homes of the police officers in the group that had broken into the deceased's kiosk. PW6 also testified that he was present when the appellant broke into the deceased's kiosk.

PW5 Detective Sergeant Okaro Ronald then attached to Old Kampala Police Station conducted investigations into the killing of the deceased. He also conducted a search and found the TV taken from the deceased's kiosk at the appellant's home.

The appellant's evidence was that following the shooting of the deceased, he had arranged for him to be taken for medical attention at a nearby health facility, but that the deceased had escaped from there. He had decided to go back home and wait for further developments in the matter. Later at around between 6.00 – 7.00 a.m, three police officers, two at the rank of Special Constable, namely Oguti Ali and Magumba Jimmy, and the other Police Constable Wateya Emmanuel arrived at his home and told him that they knew about the incident involving the shooting of the deceased. The

three stated that the appellant was a habitual thief and suggested that they go and search the deceased's kiosk for suspected stolen. The appellant obliged. He stated that his only purpose for breaking the lock on the deceased's kiosk was to recover suspected stolen property. They had recovered the property and intended to take it to the nearby Kasaato Police Post. However, according to the appellant, he received a call from the Officer in Charge Kasaato Police Post ordering him to hold onto the property. He stated at page 67 of the record as follows:

> **"We took the items to Kasaato Police Post. Along the way, I received a call from the O/C Kasaato Police Post Sgt. Otim who told me that he had got information about the incident. He asked me to wait for him to handle the situation as a senior officer and my immediate commander. I told the police officer and the two police constables that Sgt. Otim had asked me to wait for him until he came. I told them to keep the items in our houses and not at the police post."**

The appellant further stated that later at about 8.15 a.m, he went to Old Kampala Police Station to make a report about the killing of the deceased, but he was detained. He did not carry the stolen items when going to make the report. The appellant's evidence was not seriously shaken in cross examination.

We reiterate that the offence of theft is committed upon fraudulent taking of the property of another without any claim of right. If then, the offence of theft is committed where there is fraudulent taking of property of another, it should be a defence if the accused person claims that the property of another was taken for bonafide reasons. In the present case, the appellant's defence was that he took the deceased's property in the course of conducting investigations, because he suspected the same to be stolen property. The appellant's evidence in that regard was not contradicted by any prosecution evidence. It is curious as to why the prosecution did not call as a witness, Detective Sergeant Otim, the Officer in Charge of Kasaato Police Post on whose instructions the appellant based his decision to keep the deceased's property at his house.

In our view, the fact of the appellant having been found in possession of the deceased's property, alone, did not rule out that he had taken that property for bonafide reasons, namely in the course of investigations. Neither do we find the guilty pleas of the other police officers who had entered the deceased's kiosk to have decisively ruled out bonafide taking of that property by the appellant. The prosecution ought to have called one of those police officers to give an insight on the mindset of the group that forcefully entered into the deceased's kiosk, and particularly to destroy the appellant's assertion that the group went there to recover suspected stolen property. We are therefore unable to agree with the learned trial Judge's findings otherwise.

Furthermore, we note the learned trial Judge's finding that the appellant conducted an illegal search at the deceased's kiosk, which was premised on the reasoning that the appellant was not part of the Police Investigating Department and neither did he possess a search warrant, to justify his searching the deceased's kiosk. We are unable to agree, however, that conducting an illegal search perse, is indicative of mens rea for the offence of theft. We think that the appellant's conduct amounted to failure to follow prescribed procedure indicating erratic and unprofessional behavior, but we do not find that such conduct ruled out the appellant's defence, namely that the taking of the deceased's property was done not for fraudulent reasons but for bonafide reasons. The appellant's defence could only be destroyed by evidence and the prosecution adduced none.

For the above reasons, we are unable to agree with the learned trial Judge's evaluation of evidence nor with his conclusions that all the ingredients of the offences of Murder and theft of which he convicted the appellant, were proven beyond reasonable doubt.

Ground 2 of the appeal is therefore allowed.

Therefore, it becomes academic to resolve grounds 1 and 3 of the appeal, considering that the manner of resolution of ground 2 disposes of the whole appeal.

Accordingly, we hereby quash the appellant's convictions for Murder and Theft, and order that he is set free immediately unless he is otherwise held on other lawful charges.

We so order.

Dated at Kampala this 14th day of May 2021.

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Elizabeth Musoke

Justice of Appeal

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Catherine Bamugemereire

Justice of Appeal

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Stephen Musota

Justice of Appeal