THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT BUSHENYI

HCT-05-CR-SC-0198 OF 2000

UGANDA :::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

BASHAIJA GEOFREY :::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE D.N. MANIRAGUHA

JUDGMENT:-

The accused person stands indicted for murder contrary to section 183 and 184 of the Penal Code Act, whereof the particulars are that 'BASHAIJA GODFREY on August 1st 2000 at Nyakasharira (sic) village, Mitooma sub county Bushenyi District MURDERED RWERIMBIRA LEO."

Since the accused persons denied the offence the prosecution bears the unshifting burden of proving each ingredient of the offence beyond reasonable doubt.

Mande Vs Republic [1965] EA 193, Woolmington Vs DPP [1935] AC 462, Miller Vs Minister of Pensions [1947] 2 ALL ER 372.

Thus the following ingredients have to be proved:-

(a) The death of Rwerimbira Leo;

(b) The death having been unlawfully caused,

(c) The existence of malice aforethought, and

(d) The responsibility of the accused

Uganda Vs Kassim Obura & Another [1981] HCB 9.

Concerning the defence raised by the accused person which is a complete denial, the facts disclosed by the evidence would leave no doubt that the deceased Rwerimbira was unlawfully caused, and looking at the

nature of the wounds which were two deep cut wounds on the head, then another deep cut wound on the left hand, the weapon used being a panga, then malice aforethought is prima facie established.

R Vs Gisambizi s/o Wesonga [1948] 15 EACA 65.

Uganda Vs Ochieng [1992-93] HCB 80.

Uganda Vs No. 13026 P/C Wakhasa Solomon & 2 others [1984] HCB 29.

So as conceded by both learned counsel the prime question is whether the accused person was the one responsible or not.

Mindful of the burden of proof that “In his consideration, the judge must always, of course, bear in mind the rule that the onus of proof is on the prosecution to establish

his innocence" – per Duffus P. in ***Bernardo Migayo Vs Uganda EACA Criminal Appeal No. 20 of 1971.***

I address my mind to the evidence in this case.

As there were no eyewitnesses to this incident, the court has had to rely solely on the testimony of the accused, plus circumstantial evidence, and a retracted confession made by the accused person.

It is on the said evidence that the court has to determine the guilt of the accused, which is in issue.

Lenton s/o Mkirila Vs Republic [1968] EA 9, p.11.

The accused having denied his confession made to I.P Kanyankole James (Rtd), this court held a trial within a

trial to determine the admissibility of the statement. court found it admissible and now will proceed to rely on it bearing in mind that at this stage the court is concerned with the weight to be placed on the same and its probative value.

“If in order to convict the appellant the court has to rely on that confession, that it applies the same basic principle used in all criminal cases i.e. that the court must be satisfied with that degree of certainty required in all criminal cases…. that the appellant is guilty….”

Sserwanda Vs Uganda [1978] HCB 175 as well as ***Uganda Vs Kiggundu [1978] HCB 281*** and ***Waibi Vs Uganda [1978] HCB 218, Uganda Vs Kabishanga & Another 1978 HCB 69.***

That degree is beyond reasonable doubt, and caution must be exercised by this court and be fully satisfied that in all the circumstances of the case that the confession is true. There is also the need for corroboration which can be direct or circumstantial evidence.

In the case of ***Andrew Walusimbi & 3 others Criminal Appeal No. 28 of 1992 S.C.U*** (unreported) at page 12 the principle was repeated and added that the essence of section 25 of the Evidence Act ”is not simply whether the statement is apparently true. Attention should be paid to the manner in which statement was made: Whether the circumstances made it likely that an untrue confession would be made, or whether the statement was voluntarily made and gave some grounds for believing it to be true. But even if admissible the usual safeguards should still be observed. The rules concerning corroboration … are still

to be acted upon. There is moreover, the general rule that the Judge may reject the evidence if it has been unfairly obtained... ***Kenyarithi s/o Mwangi Vs R [1956] 23 EACA 422***."

Having the above in mind, and turning to the statement by the accused, the circumstances in which it was made show that it was done voluntarily. Right from Mitooma where the accused person reported himself, nobody forced him to disclose the circumstances of his father's death but he freely volunteered the information to the police. Thus he was brought to Bushenyi Police Station before an appropriate officer to take down the statement, and there was no need to force him to disclose what he had voluntarily told the police when he reported himself.

Secondly, nobody had seen him commit the act of killing the deceased but for his own disclosure all would have remained suspicion, but he revealed all the circumstances if his father's death and his motive for killing the deceased matters that were not known to the police, hence his disclosure fits in with the circumstances of the case giving it the tint of truth.

Corroboration is found in the findings of the deceased at the home of the accused where he had been killed in the manner described by the accused himself to the police at Mitooma and supported by the LC1 chairperson to whom the first report was made.

Even the conduct of the accused going to report to the police alone avoiding the area neighbours and authorities in the deep of the night is circumstantial evidence pointing to his guilt otherwise an innocent person would

have raised an alarm to alert neighbours then go with them to police. His conduct shows he was seeking safe custody rather than reporting a murder by some other elements. Though it is circumstantial evidence it serves to corroborate his confession which I find voluntarily made and true hence I rely on it for the next step having found that it is the accused person who actually unlawfully caused the death of the deceased.

Having found as above, and in line with the submissions by Mr. Tumwesigye, learned counsel for the defence, court should proceed to address the defence of provocation and witchcraft though not set up by the accused as his defence in the proceedings.

It was the submission of defence counsel that if provocation and witchcraft are accepted, then malice

aforethought is negatived and the accused would deserve a conviction for manslaughter.

Mr. Mwesigwa, learned Resident State Attorney, on the other hand argued that for provocation to be available the action must have been spontaneous which he argued was not the case here looking at the charge and caution statement of the accused.

Whether this court should consider a defence not put forward or raised by the defence, this issue was dealt with in the case of ***Mincini Vs DPP [1942] AC 1*** and applied in ***Didasi Kebengi Vs Uganda [1978] HCB 216.***

That “it is the duty of the trial court to deal with all the alternative defences, if any, if they emerge from all the

evidence as fit for consideration notwithstanding that they are not put forward or raised by the defence, for every man on trial for murder is entitled to have the issue of manslaughter left to the assessors if there is evidence on which such a verdict can be given, to deprive him of his constitutes a grave miscarriage of justice."

Here one can understand the accused person in not raising the defence in these proceedings for fear of the unknown, and probably not having ample time to discuss with his counsel prior to his trial, as is common in these trials.

The law on witchcraft and provocation has been dealt with in a number of cases and generally it is that a belief in witchcraft perse will not constitute circumstances or mitigation when there is no provocation act.

Secondly a provocative act is not confined to an act of witchcraft at the material time.

Victory s/o Kigora Vs Republic EACA Criminal Appeal No. 161/75 cited in Kebengi (supra).

However, a genuine belief by someone that the deceased the deaths of his relative, coupled with words and insults by the deceased against the appellant in such circumstances as to cause any reasonable person of the appellant's (accused's) the appellant sudden and temporary loss of self control, See: ***Victory s/o Kigora (supra) Yovan Vs Uganda [1970] EA 405, Uganda Vs Kutosi [1987] HCB 139,*** and ***Uganda Vs Ntusi & Another [1977] HCB 64.***

Before an accused person can avail himself of this defence to negative malice aforethought, certain conditions must exist namely:-

(a) The death must be caused in the heat of passion before there is time for the accused to cool down;

(b) The provocation must be caused by a wrongful act or insult;

(c) The provocation must be sudden;

(d) The wrongful act or insult must be of such a nature as would be likely to deprive an ordinary person of the class to which the accused belongs of the power of control.

Sowedo Ndosire Vs Uganda [1992-1993] HCB 27.

The facts relied upon as provocation need not be strictly proved so long as there is evidence to raise a reasonable probability that they exist.

Festo Shirabu s/o Musungu Vs R [1955] 22 EACA 454.

Lastly, in a case of provocation the circumstances must be looked at as a whole to determine whether there is malice aforethought or not, since where such provocation is established the fact that a number of wounds have been inflicted and even the nature of the weapon do not prevent the offence from being one of manslaughter.

Kato Gabriel Vs Uganda Criminal Appeal No. 13/99 CA (unreported).

This is in consonance with the established principles of law that no conviction can be properly achieved for murder without establishing malice aforethought beyond reasonable doubt.

Lokoya Vs Uganda [1968] EA 332, 334.

So once malice aforethought is negatived by the availability of the defence of legal provocation murder is not established.

I did elaborately bring this position to the lady and gentlemen assessors in my summing up. However, in their opinion they disregarded witchcraft and provocation because they looked at the injuries and the use of a panga, which the accused armed himself with before leaving the house. I do disagree with them on this point,

which they disregarded in advising me to convict on murder.

Looking at the evidence carefully, the accused went out armed with a panga, but there is no indication that at that time he had formed any mens rea to kill his father. Instead he thought that if he bought his father booze he would recant and not bewitched him like he had believed had been the cause of his brother Kongo.

However, on the way the father insisted that even if the accused bought him alcohol that would not help. This statement, coupled with earlier actions forcing him to open and go out with him was the last straw that led the accused to suddenly react since all hope was lost, and cut his father the way he did. So the legal defence of provocation is available to the accused and I disagree with the assessors' opinion on this.

Consequently I find the accused not guilty and acquit him of murder contrary to sections 183 and 184 of the Penal Code Act.

However, the evidence discloses manslaughter and the accused is duly found guilty and convicted of manslaughter contrary to section 182 (1) and 185 of the Penal Code Act.

D.N. MANIRAGUHA

JUDGE

03/01/2003.

03/01/03:-

Accused present.

Mr. Mwesigwa for the state.

Mr. Tumwesigye for the defence.

Mr. Tumuhaise Court Clerk.

Judgment delivered.

D.N. MANIRAGUHA

JUDGE

03/01/2003.

Mr. Mwesigwa:-

I don't have any previous record of the convict. However, this is a very serious offence, where life was taken away. Society needs to be protected from such a person. It is the duty of this court to do so. The accused person did not appear repentant throughout the trial. I therefore

pray that he be sentenced under the provisions of section 185 of the Penal Code Act.

Mr. Tumwesigye:-

The state has conceded that the accused is a first offender. He has been on remand for a long period for about 2½ years. The accused according to the evidence killed his father. So it is a double loss as he will never get his father again. He is still capable of reform. So my prayer is that he be given a sentence to enable him go back to society.

Court:-

The accused person is treated as a first offender. He has lost his father due to his act, but the circumstances of the offence are in favour of the accused. Considering his youthful age, and the time spent on remand, his

willingness to reform, and the period already spent on remand, he is sentenced to six (6) years' imprisonment.

Right of Appeal explained.

Accused committed.

D.N. MANIRAGUHA

JUDGE

03/01/2003.