IN THE COURT OF APPEAL

AT MENGO

(CORAM: WAMBUZI, C.J, MANYINDO, V-P., LUBOGO, AG. J. A.)

CRIMINAL APPEAL NO.8 OF 1981

BETWEEN

CHARLES KAYUMBA ……………………………………………………………APPELLANT

AND

UGANDA……………………...…………………………………………………… RESPONDENT

(Appeal from a judgment of the High Court

of Uganda Holden at Masaka (Mr. Oteng, J.)

dated 16th November, 1981

IN

Criminal Session CaseNo.51/8l)

JUDGMENT OF THE COURT

The appellant, Charles Kayumba, was 16/11/81 convicted in the High Court at Masaka of the murder of one Innocent Kalemera, the deceased, contrary to section 183 of the Penal Code. The deceased was said to have been murdered during the night of 23rd - 24th of August, 1979. The appellant was sentenced to death. He appealed against both conviction and sentence.

There were two grounds of appeal namely,

> "(a) that the learned trial judge erred in law when he held that the Defence of alibi as set out by the appellant had been disproved by the prosecution;
> (b) that the learned trial judge erred in law when he held that the prosecution had proved its case beyond any reasonable doubt."

The facts of the case can be briefly stated as follows. The appellant and the deceased were at the time of the incident employed by the Priest in charge of Bukalasa Seminary as herdsmen at the Seminary's Animal Farm. For their residence they shared a room in one of the Farm's small houses that were used by the several workers employed at the Farm.

On the morning of 24th August, 1979 the deceased was found murdered. His body had been put in a gunny bag and thrown in a deep pit into which the cattle dip tank at the Farm emptied its contents. The body of the deceased was removed from the pit by Police Corporal Clement Okoya (P.W.7) who took it to Masaka Hospital Mortuary for post—mortem examination purposes.

The doctor who carried out the post—mortem examination did not testify, apparently; because he had left the country for good. It seems clears to us that the prosecution did not bother to obtain the post-mortem report which could have been tendered in evidence under the provisions of section 30(b) of the Evidence Act. Corporal Okoya simply stated that he did not receive the post —mortem report.

Surprisingly, the learned trial judge made no mention of the absence of the medical evidence as to the injuries sustained by the deceased or to the cause of his death either in his summing—up to the assessors or in his judgment, This was rather odd since counsel who represented the appellant then had contested the issue. He had submitted that failure by the prosecution to produce medical evidence was available was not favourable to the prosecution's case.

The matter' was not raised on appeal by the appellant's new counsel. In our opinion the prosecution ought, whenever it is possible to do so, to lead the medical evidence as to the cause of death of the deceased person. Such evidence will certainly be vital in a case where death by natural causes cannot be ruled out or where there are other possible violent and or unnatural causes of death.

The case before us is not such one. The deceased was alive and in good health on the day he died. He went to bed, for the night. On the following morning he was found dead with a Serious heed injury (below the left ear) and at least six big stab wounds on the neck, head and back. Some prosecution witnesses saw a pool of blood near his bed, indicating that he had most

probably been attacked and killed in his residence. There can be no doubt, therefore, that he had been brutally assaulted and that he had died from the said injuries.

The prosecution case rested wholly on circumstantial evidence. It was the defence contention both at the trial and on appeal, that that evidence was not sufficient to warrant the conviction. Before us learned counsel for the appellant attacked the trial judge's approach to that evidence. He argued that the trial judge had not properly directed himself or the assessors on the law governing circumstantial evidence and that had he done so, the appellant would not have been convicted.

Now, the summing-up notes show that the trial judge summed up thirteen different items to the assessors. The seventh item dealt exclusively with the circumstantial evidence.

This is what he told them,

> "There was no direct evidence. Evidence is circumstantial. Accused hated the deceased. Threatened to kill the deceased; the night before the deceased died told P.W.4 he was leaving the area and would never write to anyone of them, next day, deceased with whom he shared a house, whom he hated, was found stabbed many times, dead, missing from the house, accused absent from entire area, most of his property gone and four months later found, as far away as Kampala. To whom else does the evidence point an accusing finger?"

With respect we think that the summing up fell short of what is required. A proper summing up should include a statement that a conviction based solely on circumstantial evidence can only be justified where the inculpatory facts are not compatible with the innocence of the accused person,' and are incapable of explanation upon any other reasonable hypothesis than that of his guilt.'. See: (1) Ilanda s/o Kisongoro v R l960 E.A. 780, (2) - Mc, Greevy v. D.P.P. (1973)73 Cr. App. P. 424 and Musoke v. R. (1958) EA 715.

The trial judge carefully considered all the circumstantial evidence and came to the conclusion that the appellant was responsible for the death of the deceased. This court is of course entitled to

re—examine that evidence exhaustively in order to determine the question whether it was enough to sustain the conviction. Seer Okeno v. (1972) E.A.32 at p.36.

The circumstantial evidence was (1) that the .deceased and the appellant lived together, (2) that they were on bad terms, (3) that the appellant had, only four days before the incident, threatened to kill the deceased "by all means," (4) that the appellant had last been seen (by P,w4 and P.w.5) at about 9 p.m. at the scene of crime on the night of the murder, (5) that when the body of the deceased was discovered on the following morning the appellant was nowhere to be seen, (6) that all the appellant's property (except a bed) were missing, although that of the deceased was intact, and (7) that the appellant disappeared from the Farm on the night of incident and was not seen until about four months later in Kampala where he was arrested.

The trial judge and the assessors reject the appellant's alibi which was that he had left the Farm immediately after work on the material day and had gone to his girlfriend's place where he had spent the night. On the following day he was on his way to the Farm when he learnt of the deceased's death and of the allegation that he was suspected of having killed him. He decided to disappear which he promptly did. He did not say at what time he left work or where his girlfriend's place was, he trial judge found that the appellant was not a witness of truth and that in any case his alibi had been completely disproved by the evidence of P.w.4 and P.w.5 whose testimony clearly showed that he was at the scene of crime on the night of the murder.

In our view, the circumstantial evidence amply justified the trial judge's conclusion that the deceased had met his death at the hands of the appellant. The appellant's alibi was quite rightly rejected.

There were only two possible defences open to the appellant — drunkenness, and provocation (by witchcraft). The trial judge considered them. Counsel for the appellant submitted that the trial judge did not direct the assessors adequately on drunkenness and did not do full justice to it in his judgment with the result that that defence was wrongly ruled out. In support of that proposition he relied on Ilanda v. R (1960) E.A. 780. (Supra)

This is how the trial judge summed up to the assessors on the subject of drunkenness:

> "Drunkenness — Is this ruled out? P.W.4 said the night in question when the accused spoke to him between 8.30 and 9 p.m. and left him he did not appear drunk. P.W.5 said he found the accused finishing a small bottle of Enguli at the home of Bena between 8.30 and 9 p.m. and did not appear drunk. If witnesses believed, defence of drunkenness does not arise."

And in his judgment he had this to, say:

> "Another, possible defence was that of drunkenness. It is true the accused did not use to drink. On the night in question, however, he was seen finishing a little bottle of 'enguli'. There could be a possibility that he was so drunk that he could not form the necessary intention to kill.
>
> This possibility vanishes as soon as the evidence of the old man, Silvesti Mukiga (p.w.4), and of Vincensioi Sebutawa (P.w.5) both of whom testified that the accused that night did not appear drunk, is believed, If I believe the evidence of these two witness on this point, then I do not entertain any doubt whatsoever in my mind that the accused was not so drunk as to be incapable of forming the necessary intent kill. In fact, I believe he was not drunk at all."

With respect, we think that the trial judge directed, himself correctly in his judgment on the law on drunkenness, although he did not do so well in his summing—up to the assessors. Ilanda (supra) does not Support the statement by the counsel for the appellant that the trial judge should have considered the question whether the appellant was so drunk that he did not know that his act would result in the death of the deceased.

As we understand it, Ilanda, (supra) decided, inter alia, that the onus is on the prosecution to prove that an accused person was not s drunk as to be capable of forming an intent to kill. That is correct and the trial judge in the instant case considered the matter on that basis. The evidence clearly showed that the little drink that the appellant had consumed had not impaired his judgment in any way. The defence of intoxication was therefore not available to him. We, therefore think that the attack on the trial judge's handling of this defence was unjustified.

Regarding provocation by witchcraft, there was no evidence, whatsoever, to show that the deceased believed in witchcraft let alone that he practiced it. The trial judge correctly directed the assessors on the law regarding provocation generally and on provocation resulting from witchcraft in particular. He ruled that defence out; quite rightly we think. In View of the very serious injuries the appellant had inflicted on the deceased, the trial judge concluded that the killing was done with malice aforethought. After full consideration of all the circumstances we are of the view that the learned judge came to a correct decision. We are satisfied that the circumstantial evidence was inconsistent with the innocence of the appellant and could not be explained on any other reasonable hypothesis than that of his guilt. We, accordingly dismiss the appeal.

Before we leave this case we wish to comment on the manner in which the trial judge conducted the preliminary hearing under section 64 of the Trial on Indictments Decree. Only evidence of one witness was admitted. The record of the preliminary hearing reads thus:

"PRELIMINARY HEARING

MULINDWA: We are admitting the summary of Evidence of No.2599 D/CPL — read to the accused translated in Luganda, a language he understands.

COURT: Memorandum of the matters agreed is prepared and signed by (1) the accused; (2) advocate for the accused and (3) advocate for the prosecution."

The Memorandum of admitted facts is very brief and states as follows:

"MATTERS AGREED

The Summary of the evidence of No.2599 D/C OCHOM in the S/E P.W.8.

Signed by (1)………………………………

Accused

(2) …………………….……………………

Advocate for accused

(3)…………………..………………..

Advocate for prosecution

In his summing up to the assessors the trial judge read out to them the evidence of Detective Corporal Ochom as it appeared on the Summary of Evidence. With respect, we feel this was a classic case of how not to conduct a Preliminary hearing. The matters agreed ought to be set out clearly and must be read, out to the assessors in summing up as they and not what appears in the Summary of Evidence, form part of the evidence in the trial. As it is, the Memorandum is useless as it does not set out the agreed facts. We note that guidelines to be followed by the judges in Preparing Memoranda of' admitted facts have been ably set out by this court in Tenga v Uganda, Cr. Ap. No.5 of 1982 and by the defunct Court of Appeal for East Africa in Kanyankole v. Republic (1972) E.A.308.

DATED at Mengo this 4th day of December, 1986.

SIGNED:

S. W. Wambuzi,
CHIEF JUSTICE

S. T. Manyindo,
VICE PRESIDENT.

D. K. L. Lubogo,
AG. JUSTICE OF APPEAL.

Mr. Kabega for the State.
Mr. Rugumayo for the appellant - Absent.

I certify that this is
true copy of the original.

M. K. Kalanda,
REGISTRAR COURT OF APPEAL.