THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: MANYINDO D.C.J., ODER. J.S.C, & PLATT. J.S.C.)

CRIMINAL APPEAL 19 OF 1989

BETWEEN

QUININTO ETUM :::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

AND

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from a Judgement of the High
Court of Ugandan at Masindi (Kato, J.)
dated 18th May, 1989)
IN
CRIMINAL SESSION CASE NO. 110 OF 1989

REASONS FOR ORDER OF THE COURT

On 6.2.1989, the appellant Quininto Etum was indicted for murder of Ojok s/o Dwogo (deceased) at Kabutu Kuru village in Masindi district on 1.4.1987, contrary to section 183 of the Penal Code. He was tried in the High Court and convicted of manslaughter contrary to section 132 of the penal Code, and sentenced to eight years imprisonment. He appealed against conviction only. We heard and dismissed his appeal on 21.6.1990 and now give our reasons.

The prosecution case way that on 1.4.1987 the appellant and the deceased had a quarrel and a fight at their home where they were both living. After they had been separated, the appellant entered into the house, followed by the deceased who wanted to remove his the bed sheets and move elsewhere because, their relationship was by then estranged. As the deceased entered the house the appellant speared him once on he left pectoral region. The deceased run out of the house and the appellant chased him; beating him the handle of the spear until he (the deceased) collapsed on the wit the ground about the seventy yards from the house and died almost immediately. The appellant went away and hid the spear and returned to the scene when the deceased was already dead.

In the defence the appellant made an unsworn statement, in which he omitted having speared the deceased but that it was an accident. He said that after returning home from work a fight broke out between him and the other two men. During the fight the

deceased run into the house to pick his property. He followed the deceased inside the house where his (appellant) mother and sister were. He feared that the deceased might spear them because the mother of the mother had shouted out that the deceased had picked the spear. He found the deceased in the door way and they both struggled for control, of the spear. The handle of the spear broke and the deceased was speared accidentally. It was sheer accident. He did not spear the deceased intentionally.

Two prosecutions Fred Ocal (pw3) and Moses Etum (pw9) testified as eye-witnesses to the incident but it was evident from their self contradiction and admission that they witnessed only the earlier fight between the appellant and deceased got speared outside the house. They did not see how the deceased got speared inside the house. The appellants' mother and sister who the appellant alleged were in the house at the material time did not give evidence. Consequently only the appellant's version was accepted by the learned trial judge regarding what happened at the critical moment.

At the trial of the appellant, the learned trial judge considered and rejected the defence of accident and self—defence. With regards to accident he said this:—

"starting with the defence of accident it is the law of this land that a person cannot be held criminally liable for an act of omission carried out accidentally; R V Gusambuzi Wesonga ( 1948) 15: E.A.C.A. 65. It is trite law that where an accused sets up any defence the duty is upon prosecution to negative that defence: Introduction to Criminal Law by Cross and Jones 6th edition page 65; Chan Kom v R. (1955) A.C 2O5. In the present case, there is the evidence Ocol (pW8) and Etum (Pw9) and the accused's statement to the effect that the spearing of the deceased took place immediately after the accused had been fighting with the deceased. I accept that piece of evidence and the accused statement to be truthful. It is, therefore, not easy for me to believe the accused's story that death of the deceased was an accidental death. The circumstance surrounding this case point only to one thing which is that the fight which took place in the house was a continuation of the fight which had been going on between the two young men outside which means the struggle in the house was not an accidental event because when the accused went into the house, he was already in a fighting mood. I held that the death of Ojok s/o Dwogo was no accidental and that it was caused by an unlawful act."

The learned trial judge then proceeded to consider the defence of self defence and provocation. He concluded that even if the appellant had speared the deceased in defence of his mother and sister, in doing so he used excessive force in the circumstance and, so would be guilty of manslaughter. He then made a finding the appellant had speared the deceased during the continuation of the fight which had amounted provocation, reducing the offence charge to one of manslaughter. He accordingly convicted the appellant of manslaughter.

Two grounds were stated in the memorandum of appeal, but Mr. Zaabwe learned counsel for the appellant , rightly as in our view, abandoned the one concerning intoxication after realizing rather belatedly that there was no basis intoxication as a defence in this case. The only ground then was that:

The learned trial judge erred in law in that he rejected the defence of accident when the circumstances were such that this defence was available to the appellant."

Mr. Zaabwe argued that the appellants' statement at the trial that the deceased was an accident was not negative by the prosecution as it was their duty to do. With respect we are unable to accept this argument.

Indeed the Court of Appeal for Eastern Africa started in the case of Gusambizi Wesonga (supra) that homicide accidentally caused is not unlawful. In the instant case despite evidence of pw9 about events after the deceased had his statement, he said:-

"I was eventually arrested and taken to the police where I admitted having speared Ojok once."

Secondly according to pw8 and pw9 after the deceased had been speared the appellant continued to chase him while beating him with the handle of the spear until the deceased fell down. The appellant then hid he spear although he denied having done so. Such conduct by the appellant was true, was incompatible with innocence. The learned trial judge did not allude to this aspect of the evidence of pw8 and pw9 since it appears he only concerned himself with what took place inside the house. As the two prosecution witnesses were referring to what happened outside the house there was no reason to believe that they told lies in that respect. After all they had just separated the appellant and the deceased from the fight outside, where they remained while the decease and the appellant entered the house. There is

no reason to believe that they talked about what they did not see outside the house. In the circumstances we are inclined to accept after the injury and that he also hid the spear.

Thirdly, the fact that the appellant chased the deceased with the spear in his hand would suggest that he speared the deceased, which he would not normally have done if the deceased had been speared accidentally.

Then finally, there is the dying declaration of the deceased which, according to pw8 was made inside the house soon after the deceased, apparently was injured. This witness said that as he was standing outside he heard the deceased cry out'

"He has speared me, has speared me"

The deceased was referring to the appellant as having speared him. The learned trial judge did not consider the evidential value of the alleged dying declaration because, it appears, it was not necessary for him to do so.

Dying declarations however, must always be received with caution, because the test of cross examination may be wanting and particulars of violence may have occurred circumstances of confusion and surprise.

Further as a matter of practice, corroboration must always be sought for though corroboration is not necessary as a rule of law. See: Okale v Republic (1965) E.A 555 and Tuwamoi vs. Uganda (1967) E.A. 84.

In the instant case the deceased knew the appellant he was speared in the course of a fight involving only the two of them inside the house, though the mother and sister of the appellant were also inside the house. It would appear that the deceased was not mistaken as to the identity of the appellant as the person who had speared him.

In the circumstances we consider that it would have been safe for the learned trial judge to have accepted and acted on the deceased's dying declaration had he been mindful of doing so. Ample corroboration of the dying declaration was available in the conduct of the appellant of chasing and beating the deceased with the handle of the spear, and of hiding the weapons.

In the circumstances we are satisfied that the deceased's dying declaration was truthful. If the appellant speared the deceased as, according to the dying declaration, he did, then the deceased was not speared accidentally, contrary to the appellants' claims.

In the circumstances, it is evident that there was overwhelming evidence which negatives the defence of accident. It was not therefore available to the appellant.

For the reason above we had no hesitation to dismiss the appeal as we did.

Dated at Mengo this 26th day of October, 1990

S.T.MANYINDO
DEPUTY CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

H.G. PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THT THIS IS
TRUE COPY OF THE ORIGINAL

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT