THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODER, J.S.C., & TSEKOOKO, J.S.C.) CRIMINAL APPEAL NO.35 OF 1994

BETWEEN

ONZIMA YUNUSU====================================APPELLANT

AND

UGANDA================ ======================== RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Mukono (L.E.M. MUKASA - KIKONYONGO, J.) dated 9th day December, 1994

IN

CRIMINAL SESSION CASE NO.238 OF 1994

REASONS FOR THE DECISION OF THE COURT:

The appellant Onzima Yunusu was charged with murder C/SS. 183 and 184 of the Penal Code Act. He was tried at Mukono and acquitted of the charge of murder but convicted of the minor and cognate offence of manslaughter C/S 182 of the Penal Code and sentenced to imprisonment for 13 years. He appealed against the conviction and sentence.

We dismissed the appeal without hearing the Respondent and promised to give our reasons, which we now give.

The facts of the case are these. The appellant and the deceased Shabani Byaruhanga (aged 13 years) lived in a camp at Nakalesa Tea Estate in Mukono District. The deceased lived with his parents. The appellant who worked as a porter in the estate lived alone in his residence. The prosecution evidence depended essentially on PW6, Betty Adiye, who may have been aged between 6 and 8 years at the time of the incident.

On 22/11/1994 at about 5.00 p.m. the deceased, PW6 and other children were playing near the residence of the appellant. The appellant got out of his residence armed with a small axe which is used for wood curving and announced that he was mad. He then cut the deceased on the forehead with the axe and run away. PW6 raised alarms and reported the matter to her mother (PW7), Rose Atayi Ejak, who was sweeping their own residence which is neighbouring that of the appellant. The deceased was taken to Kawolo hospital by his father, Sulait Nzahabo, (PW4), where he died on 23/11/1994. By then the appellant had been traced and arrested by RC 1 chairman of the estate. At the trial, the appellant denied the offence and claimed he did not know what happened and that people found him in his house and wanted to beat him up alleging he had “killed a person”. He claimed that before the incident he suffered headache. He testified that he had mental break down during 1979 and was detained at Butabika Psychiatric Hospital for I years and that ever since then he used to “hear people talking in my head.” DW2 Dr. Kigozi the Director of Butabika Hospital testified that during 1983 the appellant suffered from mental disturbance and was hospitalised at Butabika hospital not for 1 1/2 years as claimed by the appellant but 3 months from 27/6/85 to 29/9/85 before he was discharged. There was no evidence that he received further medical treatment thereafter in respect of his mental illness. DW2 further testified, inter alia, that a person who suffers from mental disorders of persecutory nature which appeared to be appellant’s illness would not go into hiding immediately after committing an offence.

The learned trial judge and the assessors believed PW6 and DW2 and ruled out the defence of insanity. Although the assessors advised conviction for murder, the learned judge thought that there was a possibility that the appellant who was in the habit of drinking could have been drunk and therefore she convicted the appellant of the offence of manslaughter.

The memorandum of appeal contained 5 grounds of appeal, the fifth one having been added by leave of this Court.

Mr. Yese Mugenyi who prosecuted the appeal abandoned grounds 2 and 3.

Learned counsel then argued ground 5 first. That ground states that –

"The learned trial judge misdirected herself on the evidence when she held that the appellant had admitted having killed the deceased."

Having studied the evidence we think with respect that the learned judge misdirected herself on the evidence.

We agree with Mr. Mugenyi's submissions that apart from the concession by defence counsel during his submissions that -

"The accused did inflict the fatal blow to the deceased on the day of the incident if the appellant in his evidence never admitted the killing of the deceased. With respect, in this regard, we think that the learned judge was not entitled in a criminal trial to conclude that because his counsel said so in submissions the appellant had admitted the killing of the deceased."
This ground succeeds.

Mr. Mugenyi next argued ground 1 which states -

That the learned trial judge erred in law and facts an that she did not consider or direct the assessors and the Court that the uncorroborated evidence of the prosecution witness PW6 Betty Adiye a minor should be accepted with great care and that she should not have accepted the uncorroborated evidence of such witness.

Mr. Mugenyi submitted that PW6, who was the star arid the only eye witness was a minor (actually should be a child of tender years) and should not have been relied on to found a conviction because her evidence was uncorroborated. That the learned judge did not warn herself and the assessors on the danger of convicting on the uncorroborated evidence of this witness of tender years.
Learned Counsel referred us to the cases of ***Oloo S/O Gai V R*** (1960) EA 86 and ***R. Leonard***

Bin Ngubwa (1943) 10 EACA 113.

We agree that PW6 was a child of tender years, being aged as the trial judge found, between 8-10 years at the time she testified in Court. As a general rule of practice, it is desirable for trial judge to warn herself/himself and the assessors of the dangers of acting on the uncorroborated evidence of a child of tender years: **Oloos's** case (supra). But this is a rule of practice and not a rule of law. This rule of practice has acquired the force of law. It is therefore necessary for the trial judge to warn himself and the assessors of the dangers of acting on the uncorroborated evidence of a child of tender years. Failure to do so will normally vitiate the conviction.

The learned judge referred to the conduct of the appellant. She considered his fleeing the scene and hiding himself after he had cut the deceased as evidence of his guilt. This amounts to corroboration even if the learned judge did not say so.

Secondly in his testimony the appellant stated that he ran away from his house because people wanted to beat him up on allegations that he had killed a person. In other words he did not deny being at or near the scene of crime at the time it is alleged that he cut the deceased. In the circumstances of this case this evidence supports the evidence of PW6 and to a certain extent that of PW7 that the appellant was at the scene of crime at the time the offence was committed.

Neither defence counsel nor State Attorney suggested to the learned judge that PW6's evidence required corroboration. The defence counsel was apparently so impressed by the evidence of PW6, that he had to concede the fact that the appellant caused the death of the deceased. After the concession the Defence counsel concentrated his submissions on possible defences of insanity and intoxication, with the result that the learned trial Judge was persuaded to accept that the appellant's conduct was influenced by alcohol even though the assessors appear to have ruled this defence out.
In our opinion ground one must fail.
The last ground is ground 4 which is -

"That the learned trial Judge erred in law and fact when she found that the appellant might not have acted when he was insane."

The evidence on the question of possible defence of insanity was that of PW6, PW7, the appellant himself, DW2 and DW3. PW6 testified that before cutting the deceased, the appellant announced that he was mad. Yet DW2 testified that a mad person would not admit this. PW7 said that the appellant had behaved in a strange way some time earlier before the cutting of the deceased in that "he appeared annoyed and ran about with a panga." The appellant himself stated he was suffering from severe headache similar to the type he suffered before he was taken to Butabika hospital in 1983. DW3 testified about his drinking habits and the fact that when he went past the appellant's house before the incident, he heard the appellant talking to himself. However the defence expert evidence of DW2 upon which the learned judge relied ruled out the probability that the appellant could have been insane at the time he cut the deceased.

We have studied the judgment of the learned judge and are satisfied that just as she directed the assessors she fully directed herself on the defence of insanity and indeed that of intoxication before she excluded the defence of insanity. We find no fault in her judgment on this score. Ground four therefore fails.

We are satisfied that although the trial judge misdirected herself on the evidence by holding that the appellant had admitted the fact of causing death of the deceased, she actually considered all the available evidence and defences and arrived at the correct conclusions on the facts.

For the foregoing reasons we found no merit in the appeal which we accordingly dismissed.

Dated at Mengo this 28th day of July 1995.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT