

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA**

Coram: Katureebe, C.J., Tumwesigye; Arach-Amoko; Nshimye; Mwangusya; JJ.S.C.

CRIMINAL APPEAL NO. 12 OF 2014

Between

OBOTE WILLIAM APPELLANT

And

UGANDA RESPONDENT

(Appeal from the decision of Kasule, Buteera, and Tibatemwa, JJA dated 22nd May 2014)

JUDGEMENT OF THE COURT

The Appellant, Obote William was convicted by the High Court sitting at Lira of murder contrary to Sections 188 and 198 of the Penal Code Act and sentenced to life imprisonment. His appeal to the Court of Appeal was dismissed, hence this appeal.

The facts of the case upon which the conviction of the appellant was based were well laid out by the trial and appellate Courts and are fairly straightforward. These are that the appellant and the deceased, Acan Catherine, lived as husband and wife and were blessed with two children. Their marriage was not a happy one, and by the time the deceased met her death she had run away from the appellant's home and was living with her mother, Santo Okello (PW1). On the 5th March 2005 the deceased made a telephone call to the appellant informing him that she had sent for his mother to come and talk to her mother to allow her to return to matrimonial home. The meeting between the two parents was to take place on 6th March 2005 and she asked him to be present.

On 6th March 2005 the deceased was at home with her mother and younger sister, APIO GENEVIVE (PW2). They were joined by the appellant's mother who was accompanied by a young boy at 6:00p.m. The hosts and their visitors were seated on the verandah in front of the house. The deceased was peeling matooke.

A few minutes after the arrival of the appellant's mother, the appellant arrived in his motor vehicle Reg. No. 474 UCC, Toyota Corolla, white in colour. According to PW1 the appellant demanded for the deceased in the following words. 'Mum I want Grace now.' On receiving no reply, the appellant rushed back to his motor vehicle from where he picked a gun, cocked it, took aim at the deceased whom he shot at several times. He then dropped the gun, picked the peeling knife and attacked (PW1) with whom they struggled for the knife. In the meantime the appellant's mother picked the gun and tried to flee the scene with it. She was intercepted by OKELLO ACUP (PW6), a security guard who was on duty at a neighbouring building. He removed the gun from her and later handed it in at Lira Police Station. The appellant reported himself at Lira Police Station where he tried to explain the circumstances under which the deceased had been shot. A charge and caution statement was recorded from him.

After the shooting, the deceased was rushed to Lira Hospital where she died. A post mortem examination of the body performed by Dr. Yine Henry (PW4) revealed that externally there were three entry bullet wounds on the mons pubic, left pelvis and left thigh exiting on the right loin and left loin. There was severe destruction of the pelvic organs, bone, right kidney, blood vessels and nerves. The cause of death was cardiac failure caused by severe internal haemorrhage as a result of gunshot wounds through the pelvis.

The scene of crime was visited by No. 18708 D/SGT Obua Sam who observed eight bullet marks on the front wall, near where the deceased had been seated. There were two bullet marks on the floor of the front veranda.

At his trial the appellant made a sworn statement in which he admitted having gone to the home of the deceased's mother on her invitation. He testified that his mother in law was responsible for the problems in their marriage with the deceased. On arrival at the home of PW1 she verbally attacked him calling him a thief and a gambler who she never wanted to stay with her daughter. He tried to plead with her but she attacked him with a knife with which she stabbed him on his right arm. He tried to retreat but she followed him and stabbed him twice on the left wrist. He reached for his gun and wanted to scare her by firing in the air but because his hand had been injured he could not cock the gun. He tossed the gun up with his left hand but PW1 who had dropped the knife grabbed the gun, and a struggle ensued. During the scuffle he accidentally touched the trigger and there was rapid gunfire. The

deceased came running from behind the house and was hit by stray bullets. On realising that his wife was wounded he turned the gun onto himself by placing the muzzle on his chin and fired. He fell down unconscious. When he regained his consciousness, he realised that the bullet had grazed his lower and upper lips, he tried to assist the deceased but she could not move. He got assistance to take the deceased to hospital and got a blood donor to give her blood. He then proceeded to Lira Police Station where he reported that he had shot his wife accidentally.

ALBETINA ETUK (DW2), the mother of the appellant, gave evidence to support the appellant's version as to what happened at the scene. She testified that the mother of the deceased had verbally and physically attacked the appellant whom she called a vagabond and an Amuka Militia deceiving people that he was a soldier. The appellant struggled with PW1 for a knife and she heard the appellant crying that he had been stabbed. She saw the two struggling over a gun and heard gunshots which hit the deceased as she emerged from a corner of the house. She then left the scene carrying nothing.

The Court of Appeal in full agreement with the trial Court found that none of the defences raised by the appellant were available to him. The High Court had admitted a charge and caution statement without holding a trial within a trial and the Court of Appeal found that the trial Judge had followed the proper procedure in admitting the statement which had not been contested by the defence.

The appellant chose to represent himself in this appeal. In his memorandum of appeal he raised the following grounds:-

- (1) The learned Justices of Appeal erred in law and mixed facts to uphold the trial Court's decision to admit the charge and caution statement without appraising the evidence on which the findings were supposedly based.
- (2) The learned Justices of Appeal erred in law when they misdirected themselves to uphold the trial Court's refusals to avail the appellant the defence of provocation/self defence that appeared in evidence on record.
- (3) The Learned Justices of the Court of Appeal erred in law to uphold the trial Court's manifestly excessive sentence which was based on wrong principles and overlooked material factors.

The appellant filed written submissions in which he explained each of the above grounds.

On the first ground, he submitted that it was erroneous for the trial Judge to prompt the appellant to acknowledge

having made the charge and caution statement without first disclosing the contents for the appellant to admit, own, retract, or repudiate part or the whole confession to justify the veracity of the said statement. He also faulted the trial judge for admitting the statement whose voluntariness he argued was vitiated by the failure to consider his mental state at the time he recorded the statement and the fact that the statement was recorded by the investigating officer who knew the background of the case.

In conclusion, he faulted the Court of Appeal for failure to re-evaluate the evidence before determining that the statement was voluntarily made and in accordance with the Law.

In reply the Respondent submitted that before holding that the charge and caution statement was admissible the Court of Appeal had examined the Court record and established that before admitting the statement that the trial judge had established that the appellant was not disputing the voluntariness of the statement. He submitted further that even without the statement there was other credible evidence on which to convict the appellant and therefore, the admission of the statement was not prejudicial to him.

The appellant raises two issues which Court needs to resolve before determining whether or not the trial Judge rightly admitted the charge and caution statement without holding a trial within a trial and at what stage the Courts should disclose the contents of a charge and caution statement before admitting it in evidence.

On the first issue, when the prosecution wishes to tender in evidence a confession made by the accused, the accused is free to object to its production in evidence. In the present case no objection was raised to the admission of the charge and caution statement but the record shows clearly that before the trial Judge admitted the statement in evidence he followed the procedure laid down by this Court in the case of **SEWANKAMBO FRANCIS AND TWO OTHERS VERSUS UGANDA (CRIMINAL APPEAL NO 33 OF 2001)** where the statements of the appellants had been admitted without holding a trial within a trial and the

Court of Appeal had held that where the appellants were represented by a Lawyer and he did not object to the admissibility of the statements, the trial Judge was justified in admitting them and he did not have to inquire of the appellants if they had any objection to their admissibility. This Court stated as follows:-

“The issue of whether a confession the admissibility of which has not been objected to by the defence can be admitted in evidence, without a trial within a trial to determine its admissibility can be used to convict an accused person has been considered by this Court in recent cases. The clearest and most relevant decision of this Court was in the case of OMARIA CHANDIA VS UGANDA, CRIMINAL APPEAL NO. 23 OF 2001 (SCU) (Unreported). In that case the appellant was convicted by the High Court of the Murder of his wife in Owino Market in Kampala where the deceased was a trader in a stall. Several eyewitnesses saw the appellant stab the deceased to death with a knife.

A confession statement allegedly made by the appellant was admitted in evidence without objection from Counsel for the Appellant. His appeal to the Court of Appeal failed, because, apart from his alleged confession, there was ample evidence from eye witnesses to support the conviction.

In his appeal to this Court one of the grounds of appeal was that the learned Justices of Appeal erred in fact and in Law when they admitted the charge and caution statement, extracted from the appellant.

Regarding that ground of appeal this Court said:-

“Firstly, we would like to reiterate what we have stated in our recent decisions that because of the doctrine of the presumption of innocence enshrined in Article 28 (3) (a) of the Constitution where, in a Criminal trial, an accused person has pleaded not guilty, the trial Court must be cautious before admitting in evidence a confession statement allegedly made by an accused person prior to his trial.

We say this because an unchallenged admission of such a statement is bound to be prejudicial to the accused and to put the plea of guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that Counsel for the accused person has not challenged or has conceded to its admissibility. Unless

the trial Judge ascertains from the accused person that he or she admits having made the confession statement voluntarily, the Court ought to hold a trial within a trial to determine its admissibility. See KAWOOYA JOSEPH VS UGANDA, CRIMINAL APPEAL NO 2 OF 2000 (SCU) (unreported)

Therefore and with respect, we think that it was important for the trial learned Judge to admit in evidence the confession statement (exhibit P3) for the accused on the basis that his Counsel did not object.”

Applying the above decision to the instant case, we observe that the trial Judge took precautions to ensure that before he admitted the appellant’s statement he ascertained from his Counsel and the appellant himself that the voluntariness of the statement was not being disputed.

This is what the appellant’s Counsel submitted when asked by the trial Judge as to what his instructions were regarding the statement:-

“Mr. Twontoo:-

We are not contesting the statement. My client informs me that after the incident he reported himself to Police and informed them he had shot his wife, but that it was a result of gross interference by his mother in law. Even now he says he is still sticking to that position.”

Court then asked the accused whether what his Counsel is stating is correct.

Accused:-

“I am not disputing the making of the said statement. When I made the statement nobody harassed or intimidated me. I went personally to the Police and explained to them what happened.”

Court:-

“The accused and his Counsel have stated they are not disputing the charge and caution statement. Accused says he personally reported to Police and told them what happened as contained in the statement.

In the circumstances Court find it is not useful to conduct a trial within a trial.”

After the Court had pronounced itself on the voluntariness of the statement the Police Officer who had recorded it produced it and read its contents in open Court. Counsel for the appellant again indicated that they were not contesting the statement. It was tendered and marked as an exhibit. The procedure followed by the trial Court was in full compliance with the direction of this Court in the case of **Francis Sewankambo Vs Uganda** (supra) and the Court of Appeal rightly found that the statement had been properly tendered.

The appellant complained that the trial Judge did not disclose the contents of the statement before asking him as to whether he had an objection to its admissibility. The trial Judge followed the correct procedure because the contents of the statement could only be disclosed after its admissibility had been resolved. After the trial Judge had established that the appellant had no objection to the admissibility of the statement it was read in open court and the appellant's Counsel reiterated that the defence was not contesting the statement and it was at that point that the statement was tendered as an exhibit by D/AIP ABONGO ACUTI ROBERT (PW8).

The appellant also raised an issue as to whether PW8 was the proper person to record the statement because he was the investigating officer but the person who investigated the case was D/Sgt Obua who visited the scene and recovered all the exhibits relevant to the killing of the deceased. PW8 was not the investigating officer.

The appellant also submitted that if the trial Judge had conducted a trial within a trial he would have established that the appellants was not in his proper state of mind when he recorded his statement. It should be observed that the shooting of the deceased took place on 6.03.2005 and the appellant reported himself to the Police on the same day. His statement was recorded on 7.03.2005 at 10:15 a.m. During cross examination of D/DIP ABONGO ACUN ROBERT he testified that the appellant appeared normal to him and on examination by Court the witness testified that the appellant was very fluent and coordinated. All this was after both the appellant and his Counsel had informed Court that the statement had been made voluntarily which is consistent with what the officer who recorded the statement testified. So the mental state of the appellant did not arise. This is after thought.

In his charge and caution statement the appellant admitted having shot the deceased six or seven times. He then shot himself. He explained that he shot her "***because of constant annoyance I have on her and the mother who had entered deep into my house affairs. On***

the 5/3/2005 she really abused me that I had removed my children from her home knowing that I can keep them well. In addition this woman had removed my manhood (made me impotent). That is all I have to state. This statement was read over to me and was recorded without any threat or intimidation.”

Apart from the fact that the statement was made voluntarily the contents are significant in consideration of the defence of provocation, self defence and accident raised by the appellant in his second ground of appeal.

On ground 2 the appellant submitted that the finding by the Court of Appeal that there was no scuffle between him and his mother in law and that he deliberately shot the deceased without any provocation was erroneous. He submitted that there was a scuffle which was preceded by insults hurled at him by his mother in law as soon as he arrived at her home. He further submitted that he did not aim to shoot at the deceased but rather that the bullets went off accidentally. According to him the defences of provocation, self defence and accident should have been availed to him.

In his reply the respondent contended that the Court of Appeal had after a re-evaluation of the evidence rightly concurred with the trial Judge that none of the possible defences which the trial Judge had carefully considered was available to the appellant.

There were four people at the home of the deceased that claimed to have witnessed the incident. On one hand PW1 supported by her daughter, APIO GENEVIVE (PW2) testified that when the appellant arrived at the scene he asked for the deceased and when he received no reply he rushed to his car where he picked the gun with which he shot the deceased who had done nothing or said anything to him. It was after he had shot the deceased that he attacked PW1 with a knife for which they struggled. The appellant went with the knife to his car from where it was recovered by the investigating officer, D/Sgt Obua Sam ((PW3). The appellant had dropped the gun which was picked by his mother. It was recovered from her by Okello Acup (PW6) a security guard who testified that he witnessed the shooting of the deceased by the appellant who also shot himself.

On the other had the appellant supported by his mother testified that when he arrived at the scene PW1 hurled insults at him and attacked him with a knife for which they struggled. In

the process he got injured. The appellant testified that he reached for his gun after he had gotten injured by PW1 and the gun went off accidentally.

The Court of Appeal concurred with the High Court that the deceased is not the one who hurled insults at the deceased or attacked him with a knife. We shall deal with the two defences together.

The Law on provocation as a defence to murder is found in Section 189 of the Penal Code Act. The Section states that when a person who kills another in circumstances which but for the provision of the section, would constitute murder, does an act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool is guilty of manslaughter only. The term “provocation” is defined in section 190 as meaning and including, for purposes of cases such as the present, any wrongful act or insult of such a nature as to be likely when done or offered to an ordinary person to deprive him of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the insult is done or offered. A lawful act is not provocation for an assault. This Court has interpreted the two sections as meaning that before a charge of murder can be reduced to manslaughter on the ground of provocation the following conditions must be satisfied;

- (a) the death must have been caused in the heat of passion before there is time to cool;
- (b) the provocation must be sudden;
- (c) the provocation must be caused by a wrongful act or insult.
- (d) The wrongful act or insult must be of such nature as would be likely to deprive an ordinary person of the power of self control. It is obvious from this that any individual idiosyncrasy, such as for instance that the accused is a person who is more readily provoked to passion than an ordinary person, is of no avail; and
- (e) Finally, the provocation must be such as to induce the person (by whom) provoked to assault the person by whom the act or insult was done or offered. This last provision in our opinion means (provided, of course, that all the other conditions referred to are present) that if the provocation is such as to be likely to induce an assault of any kind, the accused should be found guilty of manslaughter and not murder irrespective of whether the assault was carried out with a deadly weapon, such as was done in the

present case, or by other means calculated to kill. (see **Sowedi Ndosire versus Uganda, Supreme Court Criminal Appeal No. 28 of 1989**) (unreported)

On self defence, Section 17 of the Penal Code Act provides that the use of force in self-defence is determined in accordance with the principle of English Law. Both the High Court and The Court of Appeal correctly directed themselves on the Law. The onus is on the prosecution to establish that the killing was not done in self defence. In this connection we should set out a short quotation from the judgment of the Privy Council in **PALMER V. REGINAM (1971) A.E.L.R 1087 AT 108.**

“If there has been no attack then clearly there would have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that 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. A jury will be told that the defence of self defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self defence. But their Lordships consider in agreement with the approach in *De Freitas v. R.* That if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case.”

In the instant case the deceased did not attack the appellant in any way. The claim by the deceased that he was defending himself from his mother in law who had first insulted him is not supported by any evidence including that of his mother. P.W 2 and PW.6 testified that the appellant picked the gun from his car and shot the deceased. He threw the gun down. His mother picked it and tried to flee the scene with it but it was removed from her by P.W.6. Then the appellant reached for the knife which the deceased had been using to peel Matooke and attacked P.W.1 with it. This knife was recovered from his car by No. 1870 D/Sgt 0BUA SAM (PW.3). So even if it was to be believed that his mother in law had attacked him with the knife, he had overpowered her, removed the knife from her and went to his car with it. There was no need to pick the gun because he had removed the danger of the knife and more significantly the deceased was not the one who had attacked him, and unless the shooting was

accidental as he claims, the appellant cannot be said to have shot the deceased in self defence. His charge and caution statement, already referred to, also rules out the two defences.

As to the defence of accident both the High Court and Court of Appeal rejected the appellant's claim that the shooting occurred as he was struggling for the gun with the mother in law. The evidence of PW1 and PW2 was that the appellant took aim at the deceased who was seated. The post mortem examination revealed three entry wounds on mons pubic, left pelvis and left thigh exiting on the right and left loin. There was severe destruction of pelvic organs, bone, right kidney blood vessels and nerves. These injuries are consistent with the prosecution case that the appellant took aim at the deceased and deliberately shot her. P.W.3 who visited the scene found eight bullet holes on the wall and two on the floor all in the same direction. It is unlikely that a gun for which the appellant and P.W.1 were allegedly struggling went off accidentally and all the bullets were fired in the same direction. Both the High Court and Court of Appeal cannot be faulted for rejecting the appellant's explanation of how the deceased was shot because there was sufficient evidence that the appellant took aim and shot at her. Again the appellant's charge and caution statement which explains the reasons why he shot the deceased rule out accident.

In conclusion we agree with the concurrent findings of the Court below that none of the defences raised by the appellant is available to him. The Court of Appeal rightly upheld his conviction for the offence of murder and his appeal against conviction is accordingly dismissed.

On sentence the appellant submitted that the trial Judge applied the wrong principles when he sentenced him to life imprisonment. He stated that the Judges' comments that he was still young, sharp, intelligent and could still be useful to society should not have attracted a life sentence. He wondered how he could be useful to society when he is condemned to spend the rest of his useful life in prison. He also faulted the trial Judge for his remark that the appellant suffers from uncontrollable anger when he had no previous record of violence and was a first offender and had gone to the home of the deceased's mother for a peaceful resolution of his domestic issues with the deceased. In his view the sentence was manifestly excessive and harsh in the circumstances.

On his part Counsel for the respondent submitted that the Court of Appeal after evaluation of the sentence imposed by the trial court rightly found no reason to interfere with it. The Court

of Appeal cited the decision of this Court in the Case of **KIWALABYE BERNARD VS UGANDA (CRIMINAL APPEAL NO. 143 OF 2001)** where the following principle was established:-

“The appellant Court is not to interfere with the sentence imposed by a trial Court where that trial Court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as amount to a miscarriage of justice, or where the trial 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.”

Applying the above principle to the circumstances of this case we are unable to find that the trial Court in exercising its discretion came to a wrong sentence that would warrant interference by this court. The Court of Appeal was right to confirm the same. The appellant ended the life of the mother of his children with reckless abandon for which he could have suffered a death penalty and we see no reason for interfering with the sentence.

The appeal against both the conviction and sentence is accordingly dismissed

Dated at Kampala this.....01stof.....February.....2017.

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Hon. Justice Bart Katureebe, CJ

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Hon. Justice Tumwesigye, JSC

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Hon. Lady Justice Stella Arch-Amoko, JSC

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Hon. Justice Nshimye, JSC

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Hon. Justice Mwangusya, JSC