THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: HON. MR. JUSTICE C.M. KATO, J.A.

HON. MR. JUSTICE G.M. OKELLO, J.A.;

HON. MR. JUSTICE J.P. BERKO, J.A.

CRIMINAL APPEAL NO.37 OF 1998

BETWEEN

JOHN WANDA::APPELLANT

AND

UGANDA::RESPONDENT

Appea1 from judgment of the High court
(Kania J.) in Criminal Case No. 63 of
1995 at Mbale)

JUDGMENT OF THE COURT

The appellant was on 30th March, 1998 convicted of murder by High Court (Kania J.) sitting at Mbale in Criminal Session case No. 63 of 1995 and was sentenced to death. He now appeals to this court against conviction and sentence.

The appellant, a Local Defence Unit (LDU) askari, was on the night of 11/9/93 on patrol duty at Nampanga 'A' village in Mbale with two of his colleagues and a Local Council Secretary for defence for the area. They arrested a suspect who claimed to have been staying at the deceased's home. When they reached the deceased's home, they called him out of his house. Upon ascertaining the identity of the appellant, the deceased came out followed by his wife. The wife, Constance Masumba, (PW1) carried with her a lit hurrican lamp. From outside, the appellant held the deceased by the hand and led him a few meters away from the doorway towards the

kitchen and there without any exchange of words between them, shot the deceased shattering his both legs. On seeing that the appellant had shot her husband, Masumba picked a stick and struck appellant with it on the hands. In pain, the appellant dropped down the gun and fled. Masumba picked the gun and took it into her house. Thereafter, she returned and carried her husband also into the house. Shortly later, the village Council Secretary for defence came and threatened Masumba to hand over the gun to him. She did and he went away with it. The deceased died later that night from the injuries he sustained from the gunshot.

The following day, the appellant and his two colleagues were arrested and jointly charged with the murder of the deceased. The village Council Secretary for defence was meanwhile lynched by the angry mob.

At the trial, the appellant's two colleagues pleaded alibi which the trial Judge believed and acquitted them. The appellant who admitted causing the death of the 'deceased, set up self-defence, provocation and accident as his defences. The trial Judge rejected all his defences and convicted him.

There are three grounds of appeal, namely:-

1. The learned trial Judge erred in law and in fact when he disregarded the charge and caution statements tendered in evidence by the prosecution in determining whether malice aforethought had been proved.
2. The learned trial judge was not justified in disbelieving the appellant's version of the events leading to the death of the deceased and in choosing to believe the complainant's version instead.
3. The learned trial judge in evaluating the evidence misdirected himself on the fact of this case and therefore came to the wrong conclusion that neither self-defence

nor provocation were available as a defence for the appellant.

Mr. Stephen Mubiru, learned Counsel for the appellant on state brief, argued ground 1 separately and grounds 2 and 3 together. The thrust of the complaint in all the three grounds come to one point that malice aforethought was not proved beyond reasonable doubt.

Mr. Mubiru criticised the trial judge for failure to consider, in his judgment, the charge and caution statements tendered in evidence by the prosecution. In Counsel's view, had he done so, the trial judge would have found that the appellant's defences of self-defence and provocation were strengthened.

We agree. The trial judge never made any reference in his judgment to the charge and caution statements that formed part of the evidence before him. He ought to have demonstrated in his judgment that he considered them. The effect of the charge and caution statements is that there was an attack on the appellant by the deceased with a panga which prompted the appellant to shoot the deceased on the legs. This was basically the same with the appellant's unsworn statement before court where he repeated that there was an attack on him by the deceased with a panga though that the panga missed him and landed on the butt of his gun. The deceased then grabbed the muzzle side of the gun with a view of removing it from the appellant. lii the ensuing struggle, bullets went off accidentally shooting the deceased.

We think that the appellant's unsworn statement before court together with the charge and caution statements should have been considered together with the testimony of Masumba to determine whether or not there was malice aforethought. It is a settled principle of law that a trial judge must look at the evidence as a whole before deciding a case. As was stated by the defunct Court of Appeal for East Africa, in ***OKETHI OKALE & OTHERS VS REPUBLIC [1965] EA. 555 AT 559,*** it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it.

The evidence of Masumba as to the circumstances which led to the shooting of the deceased read as follows:

> "Some people came at 10.00 p.m and called my husband. He responded, rose up. I asked him if he knew the people who had called him. He said he knew them. I went with him and he opened the door. He went out and the person who had called him took him by the hand and led him toward the kitchen. I saw the man but it was night I could not identifSr him. I followed them to the place where they had gone to with a hurrican lamp and I heard somebody by the road say "wuwa" in Kiswahili, meaning kill.
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> Immediately 1 heard a gunshot. It is the man who had taken my husband toward the kitchen who shot. My husband fell. Then a person from the road side said "Wanda come and we go." I got a stick and hit the hands of the assailant and the gun dropped to the ground. Before my husband died, he told me to take the gun into the house and to return to assist him."

Then in cross-examination Masumba said: -

> "When my husband told me he knew the persons who were calling him in the night he did not disclose to me their names. When my husband went out he had a pair of trousers on and was bare chestHe had a panga in his hand There was no argument between my husband and the man who led him toward the kitchen. I did not hear him say anything to my husband nor did my husband say
> anything to him."

The trial judge believed that piece of evidence.

We think, with respect, that Masumba did not tell the court the whole story regarding the circumstances which led to the shooting as there appears to be no reason for the killing. She did not want to talk about the fact that her husband came out anned with a panga. That fact came out only in cross- examination. The reluctance of Masumba to talk about the panga lent credence to the appellant's claim that he was attacked by the deceased with a panga which prompted him to shoot the deceased on the legs. Besides, Masumba did not even raise an alarm for help when her husband was shot. Instead she kept him in the house until he bled and died before she started wailing. Her conduct after the shooting appears to us that there is more to the shooting than t meets the eyes. Indeed if the appellant had intended to kill the deceased as Masumba portrayed, there would have been no reason why he did not shoot him at the vulnerable part like the chest or the head.

Though motive is irrelevant in law, in a criminal prosecution except in some special exceptional cases such as, prosecution for Libel if a defence of Fair Comment or qualified privilege is raised, but motive is always useful since a person in his normal faculty would not commit a crime without a reason or motive. See: ***Godfrey Tinkarnalirwe and another Vs Uganda, Cr. Appeal No. 5 of 1998 (SC) unreported.***

In our view, the existence of a motive make it more likely that an accused person did infact commit the offence charged. In the instant case, there was no motive or reason for the murder. That has created a doubt in our minds regarding the intention of the appellant to kill the deceased.

On a full consideration of the evidence, we have come to the conclusion that malice aforethought was not proved against the appellant beyond reasonable doubt. Accordingly, we find merit in the appeal.

In the result, we allow the appeal, quash the conviction for murder and set aside the sentence of death. Conviction for manslaughter is substituted. Sentence is reserved pending address from

Counsel for both parties.

Dated at Kampala this day 2nd day of August 1999.

C.M. KATO

JUSTICE **OF APPEAL**

G.M. OKELLO

JUSTICE OF APPEAL

J.P. BERKO

JUSTICE OF APPEAL.