IN THE COURT OF APPEAL FOR UGANDA
AT KAMPALA

(Coram: Saied, C.J., Nyamuchoncho, J.A., Ssekandi, J.A.)

CRIMINAL APPEAL NO. 24 OF 1977

BETWEEN

FABIANO OLUKUUDO ……..... APPELLANT

AND

UGANDA …….. RESPONDENT

(Appeal from a conviction and sentence
of the High Court of Uganda at Kampala
(Butagira, J.) dated 11th November, 1977
in
Criminal Session Case No. 173 of 1977

JUDGMENT OF THE COURT

SAIED, C.J.:

The appellant was convicted of the murder of Terence Mikemba and sentenced to death.

At the outset we should like to dispose of one point which the appellant's learned counsel, Mr. Kawere, tried to canvass. This referred to the identification of the body, upon which Dr. Kakande performed the post-mortem examination on 22nd December, 1976. The indictment mentioned the deceased as Terence Mikemba but the deceased's brother, Ignatio Mukasa, whose evidence was admitted at the preliminary hearing as well as that of the post-mortem examination, identified the body to the doctor as that of Teri Mikemba. Mr. Kawere argued that nowhere in the record did such name appear. We thought that this submission was most tenuous and in contradiction of the admitted facts as set out in the memorandum which forms part of the record of the trial. That memorandum was read over to the appellant and signed both by him and

counsel who represented him at the trial. We still hold the same opinion that the admissions made during the preliminary hearing concerning the body on which Dr. Kakande performed post-mortem examination left no doubt at all about its identity as being Terence Mikemba, a fact which, moreover, was never in issue during the trial.

The deceased was a mutongole chief, aged about 40. The doctor saw two external wounds on his body - a stitched cut wound on the right side of the head, and another incised wound on the left hand. Internally, the doctor found the right parietal and temporal bones of the head fractured and bleeding from the brain. The cause of death was the brain haemorrhage which, according to the doctor, was ‘consistent with beating with a sharp cutting weapon.”

The prosecution alleged that these injuries were inflicted by the appellant and by way of Proof relied on the evidence of a single identifying witness, Monday Ludubiko (P.W.4), and the dying declaration made by the deceased immediately after the assault on him.

In his unsworn statement the appellant said that he was arrested at his home on 31st December, on the allegation that he had killed someone on 20th December. We should point out that the prosecution did not adduce any evidence concerning his arrest as they ought to have done (See Kasaja s/o Tibagwa v. R. (1952) 19 E.A.C.A. 268), and appear to have been content with admitting the evidence of detective station sergeant Simiyu who visited the scene on the day the appellant was arrested. We consider this omission as an infirmity in the circumstances of this case. The appellant went on to say that he was drinking in Kawolo on 21st December, Regarding the main witness, P.W.4; he mentioned a grudge, the basis of which was that he had testified against the witness in the recent pact.

The learned trial Judge directed himself and the assessors carefully and, in our opinion, correctly on both props of the prosecution case. Concerning the sole identifying, witness, bearing in mind the principles laid down in Roria v Rep., (1967) E.A.583, regarding identification by a single witness especially when it is known that the conditions favouring a correct identification were difficult and taking into account everything that entered into consideration, the learned trial judge accepted the unanimous verdict of the assessors by finding that not only were the circumstances conducive to correct identification but were such that they negatived the possibility of any error

in that respect. Like the assessors he held that the dying declaration was truthful and amply corroborated by P.W.4.

Mr. Kawere has attacked both these finding. He sought to discredit the main eye witness whose testimony he said was “decorated with loopholes and gaps”. On being asked to be more specific and to identify the different types of decoration he said that he would concern himself with “gaps” only. We understood him as challenging the credibility of P.W.4 generally. We shall set out briefly the testimony of this witness. He said that he had known the appellant well as they had lived in the same village, Namagunga, till September, 1976 when the appellant moved to Lugazi village. On 20th December, 1976 he was taking his cattle home from grazing at about 7.00 p.m. when he heard a cry, ‘Maama nyabo, am dying, help me.’ He dashed to the scene, some 30 yards away in a sorghum field, where he saw two people, one with a panga, standing ever the deceased who was on the ground. He saw the man with the panga hacking the deceased on the head, the back and the hands. He recognised the assailant as the appellant. He gave the alarm. The appellant’s companion, whom he had not been able to recognise, immediately fled the scene. The appellant turned towards the witness, who was then about 6 yards from him, and also run away. The deceased told the witness that one of his assailants was Fabiano Olukuudo, the present appellant. Under cross-examination he was asked about a man called Seviri. He admitted he knew this man but maintained that he had included him in his police statement as the appellant’s companions because the deceased had mentioned Seviri to him. Nevertheless he stated emphatically that he had not been able to identify the other man. Mr. Kawere submitted that because P.W.4 was unable to say what this other man was doing at the material time his entire evidence became suspect. The learned trial judge dealt with this issue as follows:

> “I have come to the conclusion that P.W.4 is a truthful witness. It is to be recalled that he said when cross-examined that the accused was with another man called Seviri. In his evidence-in-chief he never mentioned Seviri. But he has explained that he mentioned Seviri because the deceased mentioned him. He has categorically maintained that he did not recognise the other man who was with the accused because he ran away fast.”

It is obvious that P.W.4 who knew Seviri nowhere implicated him in his direct examination earl “as consistent throughout that he had not been able to recognise the other man with the appellant.

We are not persuaded that this so called gap renders him unreliable; on the other hand we think it as a pointer to his integrity and truthfulness. His explanation of how he came to include Seviri in his police statement was accepted by the learned trial judge, and we do not think he was wrong in doing so.

The second criticism made of is based on slight discrepancy concerning the apparel which the appellant was wearing at the material time, particularly the colour of his sweater. In his direct testimony P.W.4 described it as “like black”. He admitted telling the police that it was striped green and black. We think that this was a minor inconsistency of no significance and could possibly be explained due to the time of eleven months that had elapsed since the incident. The fact however remained that there was no other conflict about the creator.

Although learned counsel did not raise the matter of the injuries sustained by the deceased we think that this was perhaps implied in his general comment about the opportunity which P.W.4 had of identifying the appellant. The post-mortem report makes no mention of any injury on the back. The only other witness to mention a back injury was the deceased’s mother, P.W.5. We have given this matter anxious consideration. There is no doubt that the deceased was able to walk to his mother’s home and was then escorted, obviously still walking, to the nearby mission of Mt. St. Mary, Namagunga. He was then transported to Kawolo Hospital. The learned trial judge says in his judgment that he was later transferred to Mulago where he died the following day. With respect, we are unable to find any such evidence of his transfer to Mulago. The post-mortem report also mentioned a stitched head wound. We unable to say at which of these hospitals this was done. It was held in Yowanna_Lubowa v Reg., (1953) 20 E.A.C.A. 274, that in cases of homicide, where a person dies in hospital following an attack upon him causing his death, evidence should always be given as to the deceased’s admission to hospital, the treatment given him therein and the date and time of his death. We should stress the obvious importance of such evidence and, where the investigating officer overlooks such evidence. We should expect the office of the Director of Public Prosecutions to whom the police file is submitted after completion of investigations to insist upon the availability of such evidence. Had this been done the evidence of admission of the deceased to the two hospitals and the treatment given to him would have cleared this contradiction. The other difficulty is that Dr. Kakande was not called. It has been said in Juma Tabani alias Lokora and Another v. Uganda, E.A.C.A. Criminal Appeal

No.100/74, that s.64 of the Trial on Indictments Decree should only be used as a means for putting on record formal evidence, and only in exceptional cases medical evidence. With respect, we should take this opportunity of reiterating emphatically what was said in that case. It cannot be said that evidence of post-mortem examination is of a formal nature; it is of vital importance and we should urge that such medical evidence be always given in court. The importance of so doing is apparent also from Batala v Uganda, (1974) E.A. where the court expressed in clear terms what is expected of post-mortem reports. At p.403 appears the following,

> "What a court wants from a post-mortem report is a statement of everything abnormal about the corpse, not merely the pathologist's opinion as to the immediate cause of death. For example, details of non fatal injuries may be of great value in corroborating or contradicting the evidence of witnesses about the events preceding the death, and so be highly relevant to the question whether a killing constituted murder or manslaughter."

However, it is clear from Dr. Kakande's evidence that the cause of death was the head injury which was noticed by all prosecution witnesses. We cannot rule out the possibility that the back injury, if it existed, was overlooked during the post—mortem examination as has happened in numerous other cases. To mention just one such recent case, in John Emitu v. Uganda, E.A.C.A. Criminal Appeal No. 163 of 1972 were witnesses spoke of many injuries and swellings on the body but the post-mortem evidence did not, the court said,

> "The learned judge said 'In my view, the post-mortem report must prevail.' With respect, we cannot agree. There is an abundance of evidence that the deceased was severely beaten. We have all too often seen post-mortem reports which concentrate or what the doctor believed to be the cause of death and fail to mention other, often grave injuries. Such reports are of little value."

In the circumstances, we are unable to infer from the omission of any back injury from the post-mortem evidence vis-a-vis the evidence of at least two prosecution witnesses that such an injury did not exist.

Learned counsel submitted also that the use of the word in the evidence of Dr. Kakande meant that the deceased had not been assaulted with the sharp edge of a panga as maintained by P.W.4.

In view of the clear description of the wounds which the doctor found we have not the slightest doubt that they were inflicted by a sharp edged weapon.

We come now to learned counsels' submission that P.W.4 was unable to identify the assailant. The learned trial judge appreciated that there was only one identifying witness and was fully alive to the dangers of acting upon such evidence. He directed the assessors accordingly. We have already referred to the circumstances in which P.W.4 identified the appellant. It was not disputed that at the material time there was sufficient day light. The appellant was well known to the witnesses. The fact that the attack took place in a sorghum field is of no consequence as the witness stopped some 6 yards from the appellant who turned round in his direction before fleeing. Mr. Kawere submitted that the attack must have so unnerved the witness that it must have blurred his vision. We think this in too farfetched. The witness insisted that he saw the appellant with his own eyes. The learned trial judge and the assessors were of the opinion that the conditions and circumstances were favourable for correct identification and we see no reason to differ from those conclusions. The appellant referred to some grudge with P.W.4. But it was not put to P.W.4 during cross-examination. In his unsworn statement the appellant admitted that he was given the reason for his arrest and he mentioned also the date on which he was alleged to have killed someone. It is significant that he did not say anything about his movements on the day of the alleged crime, but mentioned where he was and what he was doing, the following day. If this was an alibi as everyone during the trial seems to have taken it to be but which we doubt then it was rightly rejected in our view. The learned trial judge accepted P.W.4 as a truthful witness and found that in the circumstances could not have been mistaken about the appellant. We are of the same opinion. The conditions and circumstances were such that they negatived the possibility of any error in the identification of the assailant of the deceased as the appellant.

The second limb of Mr. Kawere's argument concerns the dying declaration. Besides mentioning the appellant to P.W.4 the deceased repeated his name to his mother (P.W.5), his other brother Wassaja (P.W.6) and to sister Veronica (P.W.7) of Mt St Mary, Namagunga. His statement to P.W.5 was slightly more detailed. This is what she said.

> "Then I saw my son, the deceased coming. He told me that he had been assaulted. He was crying. He told me that Olukuudo assaulted him. He told me that he struggled with the accused and knocked him down. He recognised him. He said there were two people."

Under cross-examination she said that the deceased did not tell her the identity of the other man. Mr. Kawere submitted that the identification of the appellant by the deceased was doubtful in view of some previous enmity between them. We should point out that the appellant himself did not mention any such enmity. When P.W.4 was cross-examined he explained possibly as a reason for the migration of the appellant from Namagunga village that he left "after he had stolen from the Parish". He denied knowing if the deceased had any enemies and ended by saying;

> "I am not saying that I saw him because of grudge between him and the deceased."

If there was any such grudge we would have expected the details of it to be brought out from someone who knew of it and the appellant to have mentioned it in his defence. We do not think that the mere fact that a chief, whose duties include maintenance of law and order would ipso facto be an unreliable witness against people living within his area of jurisdiction. We are not persuaded by Mr. Kawere's argument. The assessors and the learned trial judge held the dying declaration to be truthful, and we see no valid reason to depart from that conclusion. The deceased had the same conditions and circumstances as P.W.4 for identifying his assailant. It seems to us that he was in a better position than P.W.4 as he grappled with his assailant before being cut with the panga. We thus had ample opportunity of clearly identifying the appellant.

Had the matter stopped here we would have dismissed this appeal. But the issue of malice aforethought has caused us concern. This concern arises from the deceased's statement to his mother (P.W.5) about a struggle with the appellant during which he knocked down the appellant. The learned trial judge said at the opening of his judgment:

> "There is no doubt that whoever inflicted the fatal blow did so with malice aforethought. The question is who did it."

Because he had earlier addressed the assessors on the possible defences of provocation and self-defence we are inclined to take the view that the learned trial judge's comment about malice

aforethought was subject to those possible defences. He did refer to these defences in the last paragraph of his judgment where he said,

> "I agree, for the reasons above, with the opinion of both assessors that the deceased person was killed by the accused. I have considered possible defences of provocation and self-defence but I do not think on the evidence they are available to the accused."

We have no quarrel with the identity of the assailant but, with respect to the learned judge, we are of the opinion that he erred in dismissing those possible defences in such a summary manner. We take the view that he should have considered the weight to he placed on the dying declaration which the deceased made to his mother which was, as we have said, a little more detailed. He seems to have referred to the struggle with the appellant but only to infer that the identification made by the deceased was beyond reproach. He said,

> "As to the dying declaration. I think this was truthful. The deceased related to P.W.5 how he had struggled with the accused and threw him down. They were living on the same village. It was not yet dark. There was in my opinion ample time to recognise Him."

We would agree as far as the issue of identification is concerned. In our view the learned judge should have dealt with the points raised by the struggle in greater detail and made his findings on their effect on the issue of malice aforethought.

Just as the prosecution failed to adduce evidence of the appellant's arrest, so also no evidence was adduced concerning his examination by a doctor. We should stress that such evidence should be called as stated in R v Juma Mafabi, (1945) 12 E.A.C.A 45.

It may well be that the appellant sustained some injuries during the struggle, which would be an extremely relevant and pertinent evidence on the issue of malice aforethought. We know that the deceased was done to death by the appellant. What we know nothing about is the cause of the initial confrontation between the two which led to the struggle, the knocking down of the appellant followed by retaliation of the appellant with the panga. We do not know the circumstances of their meeting. P.w.4 arrived at the scene obviously after the grappling and only witnessed the actual assault by the appellant. We think, on average the evidence, that there must

have been a quarrel leading to the struggle in which the appellant was knocked down. We invited the learned Senor State Attorney to address is on this issue. He conceded that in the circumstances the learned trial judge should have considered provocation and that the correct verdict should have been manslaughter. If there was a mutual fight and we find it impossible to exclude this possibility then it gave rise to mutual provocation Francis Byruhanga v. Uganda, E.A.C.A. Criminal Appeal No.17 of 1976. In the absence of this pertinent evidence as well us any evidence concerning the ownership of the panga and the steps taken to recover the alleged murder weapon or who of the two was armed with it, it is virtually impossible to say anything about the degree of retaliation by the appellant in relation to the provocation. We appreciate that P.W.4 did not find any panga at the scene after the appellant had absconded, the inference being that he must have taken it with him but we do not believe that this fact by itself is capable of supplying any conclusive answer to the various factors which are clouded in mystery and are unknown. The burden was on the prosecution to prove malice aforethought and that burden had not been discharged.

As that burden has not been discharged the conviction of murder cannot stand. On the other hand we are in no doubt that the killing was unlawful. We therefore allow the appeal to this extent - we quash the conviction for murder, set aside the sentence of death passed on the appellant, and we substitute a conviction of manslaughter contrary to section 182 of the Penal Code, and impose a sentence of 5 years imprisonment.

DATED AT KAMPALA this 24th day of July, 1978.

(M. Saied)

CHIEF JUSTICE.

(P. Nyamuchoncho)

JUSTICE OF APPEAL.

(F. M. Ssekandi)

JUSTICE OF APPEAL.

I certify that this is a
true copy of the original

(M. Ssendegeya)
CHIEF REGISTRAR