

IN THE COURT OF APPEAL FOR UGANDA
AT KAMPALA

(Coram: Saied, C.J., Lubogo, P.J. & Nyamuchoncho, J.A.)

CRIMINAL APPEAL NO. 7 OF 1978

BETWEEN

FRANCIS KUTOSIAPPELLANT

AND

UGANDA..... RESPONDENT

(Appeal from a conviction & sentence of the
High Court of Uganda at Kampala (Butagira, J.)
dated 30th March, 1978

In

Criminal Session Case No. 21 of 1978)

JUDGMENT OF THE COURT

LUBOGO, P.J.:

The appellant was indicted for murder contrary to section 183 of the Penal Code Act. He was convicted and sentenced to death. He has appealed to this Court against both conviction and sentence on the following grounds:—

(1) That the Honourable trial judge did not properly direct his mind on the ground of Provocation otherwise the Appellant should have been guilty of manslaughter.

(2) That, the Trial Judge misdirected himself when he recorded in his judgment that the accused sent his wife for a knife

(3) The trial judge was wrong to believe the evidence of Andrew Kyeyune which contradicted the Police Statement.

Learned defence counsel conceded that the appellant could have been properly convicted of manslaughter and sentenced accordingly as provocation had been established. Learned State Attorney was of the same view.

The prosecution evidence in the lower court briefly was as follows:—

On 2nd July, 1976 Yosia Ndaula, hereinafter referred to as deceased, was accompanied by Matayo Senyonga (PW7) and George Sebudde (P.W8) to the house of the appellant to demand money from the appellant amounting to 200/— for the services he had rendered in treatment of the appellant's wife who was suffering from asthma. On arrival at the house the appellant was absent, but the wife was present. The wife told them that the appellant would be arriving soon. Shortly afterwards the appellant arrived. He asked the deceased what he was doing there. After some altercation the appellant sent his wife for a knife removed it from her and stabbed the deceased with it. Both (PW7) and (P.W8) ran away.

P.W2 Andrew Kyeyune gave a more detailed account of the conversation between the appellant and the deceased. When the appellant arrived he asked the deceased why he demanded money when his wife had not been cured, but the deceased kept on with his demand. The appellant told the deceased that he would be beaten if he continued with his demand for money. Thea the deceased replied:—

“if you beat me whereas you have refused to pay me I will plant a bean and you will die”.

Whereupon the appellant got hold of the deceased and boxed and kicked him. The deceased then said:—

“You are beating me but I am asking, for money.

At this juncture the appellant asked his wife to collect a knife. As the wife was coming with the knife the appellant went and snatched it from her, came and stabbed the deceased in the chest and at the back with it.

The deceased died immediately. His body was tied up with a wire by the appellant and thrown in a ditch. The matter was then reported to the Muluka Chief and later to Jinja Road Police Station. Briefly that is the prosecution evidence that led to the appellant's arrest and eventual indictment and conviction of murder.

In his sworn statement the appellant gave a similar account of the conversation that took place between them with a slight difference in that P.7, P8 and the deceased caught him and in self—defence pulled out a knife he was carrying and stabbed him. DW1 Jane Namakula, wife of the appellant, gave evidence for the defence. She heard the deceased demanding money but did not hear the appellant's reply. As she was going away she turned and saw the appellant stab the deceased.

It seems to us that the evidence as a whole brings out prominently the question of provocation. This question was dealt with by the learned trial judge in his judgment. Ye said:—

“It could be that he believed in witchcraft himself for he preferred the deceased to treat his wife by means of native medicine rather than take her to hospital. She was in fact there and he withdrew her. He said that he took what the deceased said seriously for he knew people from Tanzania were tough. On these facts I am unable to say he would not be provoked. His reaction was to beat the deceased and start kicking him. If the deceased died as a result of these beatings at this juncture, I would have held that the offence would be reduced to manslaughter by reason of provocation. What he did however subsequent to this leaves me in no doubt that he intended to kill the deceased. He sent his wife to collect a knife. She came with it. He removed it from her and then started stabbing the deceased. He chased the deceased and stabbed him three times. It could not be said that during the whole of this was acting under heat of passion caused by sudden provocation and before the passion thus aroused had had to cool”.

From the foregoing the learned trial judge found as a fact that the appellant was provoked, but had he not sent his wife for the knife and restricted himself to beatings and kicks the offence would have been reduced to manslaughter if the deceased had died as a result of the beatings and kicks, but he inflicted stab wounds from which he died. It seems to us that the learned trial judge

believed the evidence of PW.2 Kyeyune with regard to the production of the knife from the house. With respect, the learned trial judge misdirected himself on evidence regarding the Production of the knife from somewhere else rather than from appellant's person. Had he evaluated the evidence as a whole on this vital aspect of the case he would have reached a different decision. In his evidence in the court below PW.2 said the appellant sent his wife to bring the knife. In his statement to the Police Pw2 had said:—

“The army man, who was holding a knife in his hand, was stabbing the deceased”.

It appears from evidence that P.W.2 was present right from the beginning when the three men arrived at the home of the appellant to the time when the stabbing took place. In his police statement he did not say that the appellant had asked his wife to go for the knife. We see no reason why he did not say so. These two statements from the same person cannot be reconciled, and we doubt the veracity of his evidence in court below .The learned trial judge did not take into account the evidence of Pw7 and Pw8 who stated that the appellant pulled out a knife which he was carrying and stabbed the deceased. Even the defence witness Jane Namakula said that when she turned she saw the appellant stabbing the deceased. The appellant himself said so in his sworn statement that he had a knife with him which he carried on official duty. The appellant was not shaken on cross-examination on this point. Under these circumstances the learned trial judge's belief in PW2's evidence is unjustifiable especially when no reason was put forward for that belief. Had the evidence on this aspect of the case been put in proper perspective the verdict would have been different. His finding that the appellant sent for the knife with the result that the heat of passion would have cooled off during that interlude was erroneous and could not be supported by evidence.

The learned trial judge having found that legal provocation had been established as regards beatings and kicks, we are of the opinion that he would have taken into account the uncontradicted evidence of (PW7) and (PW8) and all other factors that led him act as he did and held that legal provocation covered the entire episode including stabbing and convict the appellant of a minor offence of manslaughter. Once legal provocation has been established the offence of murder is reduced to manslaughter see Hussein e/o Mohamed v. R., (1942) 9 EACA 52.

We agree with both counsel that a conviction of murder cannot be sustained on evidence and we substitute it with a conviction of manslaughter contrary to Section 182 of the Penal Code Act.

As regards sentence it has been submitted on behalf of the appellant that he is a first offender, aged about 30 years and had been on remand for 7 months since trial. State Attorney called for a deterrent punishment.

Having taken into consideration all the submissions the appellant is sentenced to a term of imprisonment of years. The sentence of death is accordingly set aside.

DATED AT KAMPALA this 7th day of November, 1978.

Sgd: (M. Saied)

CHIEF JUSTICE.

Sgd: (D.L.K. Lubogo)

PRINCIPAL JUDGE

Sgd: (P. Nyamuchoncho)

JUSTICE OF APPEAL.

Mr. P.S. Ayigihugu of M/s Ayigihugu & Co. Advocates for the Appellant

Mr. Kabega Senior State Attorney, for the Director of Public Prosecutions.

I certify that this is a
true copy of the original

(M. Ssendegeya)

CHIEF REGISTRAR