THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF TJGNDA AT MENGO

(CORAM: MANYINDO, D.C.J., ODER, J.S.C., PLATT, J.S.C)

CRIMINAL APPEAL NO.28 OF 1989

BETWEEN

SOWEDO NDOSIRE ::APPELLANT

AND

UGANDA::: ::::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from a judgment of the High Court
of Uganda Holden at Mbarara (Mukanza.J)
dated 31st July 1989 in
Criminal Session Case No.23 of 1985)

JUDGMENT OF THE COURT

This is an appeal from a conviction of murder in the High Court of Uganda at Mbarara on 31st July 1989 against both conviction and sentence.

The facts briefly are that on 10/10/1983 at about 7.00 p.m. the deceased, Peter Bakandema, was returning home apparently from a market when he met his son, Sowedo Ndosire, the appellant, at a distance of about 350 feet from the home where they both lived. The appellant was also apparently returning home from his banana garden. As they met, a fight broke out between them, during which the appellant cut the deceased with a panga, inflicting on him injuries from which h died the same night.

There was no dispute that the deceased died at the hands of the appellant. The only issue was whether the appellant caused the death of the deceased with malice aforethought.

The prosecution case depended mainly on the evidence of Kasaho (PW7) and Jova Kakyobonoho (PW8) as eye witnesses to the incident. The former was the son of the

deceased with PW8, the mother of the appellant being another wife of the deceased. The evidence of these two witnesses, which was similar, was that they heard the deceased's alarm, saying that the appellant was killing him. PW7 was by then milking cows in a kraal not far from home and PW8 was at her house in the same homestead. They both responded to the alarm separately and found the appellant cutting the deceased with a panga. They did not intercede on behalf of the deceased, and returned home to hide for fear of their own lives. PW7, in fact, said that the appellant also cut him when he approached the scene**.** The deceased died the same night from cut wounds the appellant had inflicted on him. The evidence of the doctor who had examined the body revealed that the deceased had sustained deep cut wounds on both sides of the neck; deep scalp wound causing fracture of the front bone up to the meninges; deep cut wound on the left arm with fracture of both ulna and radius and other cut wounds involving muscles. Death was caused by haemorrhage from the left carotid artery and left jugular vein.

At his tail, the appellant made an unsworn statement, which suggested defences of accident, self-defenses and provocation as his explanation of what took place. The part of his unsworn statement which is important for the purposes of his appeal was as follows:

> "….. on day I was coming from my banana plantation. In my banana plantation I met my father Bakadema. It was around 7.30 p.m. my father was coming from where I did not know. My father was not coming from the direction of his home. I had gone to prune my banana plantation around 4.00 p.m.
>
> When I met my father the latter had a stick and a bicycle. My father was drunk. When I met him, I greeted him. He asked me why I was greeting him. I do not know whether my father had recognised me as his son. Then I by passed him as I was going. Then he hit me with a stick on the back. It was a hard blow and the stick got broken. Then I dropped the panga down and I held him and I asked him what he wanted from me. He tried to pick the panga from the ground which I held. At that time he was beating me. He managed to pick the panga from the ground and we held it together. In fact each one tried to pull the panga from the hands of the other. The panga cut him

on the hands and it cut me also on the hands.

During the course of the struggle the panga cut him in the palm and it continued and cut him in the neck. I sustained some wound on the palm where the panga cut me. (The accused showed the court a scar on his left palm about an inch long. I do not think one could call it a scar at all it was one of like mark on the palm). When the panga cut my father on the neck I went away with my panga. I left my father lying down after the panga had cut him on the neck. At that time, I did not see anyone come to the scene ....."

In his judgment, the learned trial judge accepted the evidence of the prosecution witnesses and rejected the .appellants' version of the event, concluding that the appellant was guilty of murder. That finding was consistent with the unanimous views of both the assessors. The learned trial Judge considered and rejected the defence of accident and self-defense as not being applicable in the circumstances of this case. Except for some of the learned Judge's reasons for rejecting these defences which we consider called for comment on our part, we agree with him that he appellant did not cause the death of the deceased in circumstances amounting to accident and self—defence. To these we shall return later after consideration of the grounds of the appeal.

Several grounds were listed in the memorandum of appeal, but Mr. Kasirye, the learned counsel for appellant, rightly so in our view, combined them into one group. the learned counsel argued that there was evidence on which the learned trial Judge should have found that the deceased's act of hitting the appellant with a stick and the ensuing struggle for the panga amounted to provocation which caused the appellant to also struggle for the panga and cut the deceased in the heat of passion.

The law on provocation as a defence to murder is found in section 187 of the penal code. The section states that when a person who unlawfully kills another under 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 188 as meaning and including, for purposes of causes such as the present, any wrongful act of 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 act or 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 a nature as would be likely to deprive an ordinary person of the class to which the accused belongs of the power of self control. It is obvious from this that any individual idiosyncrasy, such for instance as that the accused is a person who is more readily provoked to passion than the ordinary person, is of no avail; and

(e) finally, the provocation must be such as to induce the person 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 o induce an assault of any kind, then 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: REX VS HUSSEIN s/o MOHAMED 9 EACA 152; YOVAN VS UGANDA (1970) EA 405; and BENDICTO SIMBA OGWANG (unreported) Criminal Appeal No.14 of 1983 (Supreme Court of Uganda).

In the instant case the learned trial Judge, after finding that only the appellant's unsworn statement was available to indicate who first attacked whom at the scene of the incident, proceeded to reject the defence of provocation in the following words:-

> "There was evidence from PW8 that the accused had attacked the deceased on two previous occasions. She testified that it was the deceased who informed her of all that. That was of course hearsay evidence but she positively informed the court that after the second attack the accused disappeared for a month and only resurfaced when he killed the deceased. It is inconceivable that the deceased on being greeted by the accused his son could just turn round and hit him with his stick without any provocation on the part of the deceased. I am of the view that the accused waylaid he

> deceased person and attacked the latter and the deceased had to use the stick and or stem to ward off the constant and brutal attacks on him by the accused with the panga. In my opinion that was how the 2 pieces of stick were to be found at the scene."

With respect, we think that the passage of his judgment referred to indicates that the trial Judge wrongly rejected provocation as part of the appellant's case, First the learned trial judge appears to have placed undue weight on the appellant's alleged disappearance from the village, and the alleged previous attacks by the appellant on the deceased, which lead to the conclusion that the appellant waylaid the deceased. In any case PW8's evidence regarding the previous attacks was inadmissible as she did not witness such attacks. In her evidence pw8 attributed the appellant's fatal assault on the deceased to the ill-will then existing between the two men and caused by the two previous attacks. As we have pointed out pw8' evidence of the alleged previous attacks should not have been allowed on record, and still less relied on as an explanation of the appellants' subsequent conduct towards the deceased. We think that the learned trial judge erred by doing so.

Secondly the police evidence that two pieces of broken stick were recovered from the scene was consistent with the appellant's statement that the deceased hit him hard, breaking the stick. That consistency, in our view, is material in considering the appellant's claim (the only evidence available on the issue) that it was the deceased who first hit him. If that claim is true, then the learned trial judge had no basin for concluding, as he did, that the appellant waylaid the deceased and attacked him. It is clear that in reaching such a conclusion the learned trial judge did not take into account the police evidence which was admitted under section 64 of the TID, which tended to lend support to the appellant's version of how the incident began. Had he done so he would, in our view, have found that such a blow with a stick as the appellant alleged was meted out on him by the deceased was a wrongful act which must have been likely to deprive him or any person of his class in like circumstances of his power of self-control and cause him to act as he did in the heat of passion with the weapon which he had in his hand.

Thirdly there was no evidence suggesting that the deceased used sticks to ward off attacks on him. The learned trial judge's conclusion to that effect appears to have been substitution of his own conjecture for evidence.

Fourthly, when considering the defence of provocation, the learned trial judge said this in another part of his judgment;

> "Owing to the several cut wounds inflicted on the deceased by the accused person which in my opinion continued on for some time for long time (sic) it cannot he said that the accused was provoked in cutting the deceased to death and that killing was done in the heat of passion before there was time for passion to cool off. See: OFONO VS UGANDA (1977) HCB, P.210. The attack on the deceased was brutal and continued even after the passion if any had cooled off. I am of the opinion that the defence of provocation was not open to the accused person in the circumstances.'

In this passage referred to, the learned trial judge appears to have misdirected himself on the facts by concluding that the appellant's attack on the deceased continued even after he had had time for his passion to cool. We are unable to discern such evidence on record. The evidence of PW7 and pw3 indicates that when they arrived at the scene, the deceased was already being struck by the appellant. They then retreated to their houses, leaving the appellant still doing so. Neither their evidence nor that of the appellant suggests that there was an intervening period of time during which the appellant's passion could have cooled between being hit by the deceased with a stick (as he claims) and the appellant's first blow on the deceased with the panga or between several blows. On the contrary, the appellant's evidence tends to suggest that his assault on the deceased was an immediate reaction to the deceased's blow on him. In the circumstances we are unable, with respect, to agree with the learned trial judge's conclusion that the attack on the deceased continued after the appellant's passion had cooled.

For these reasons we think that the learned trial judge ought to have found, as we are constrained to do, that the appellant was not guilty of murder on grounds of provocation.

We turn now to what the learned trial judge said on other defence which he also considered and rejected. The learned judge concluded his rejection of the defence of accident in the following words:

> "The attack on the deceased by the accused was very savage and brutal was executed according to plan, and therefore the defence by the accused that he caused the death of the deceased by accident was not available to the accused, He cannot claim that the

incident occurred independently of his will."

All that we will say about this remark is that while the attack on the deceased was brutal in view of the medical evidence, there was no evidence to indicate that the appellant had planned the assault on the deceased. This appears to be yet another instance of the learned trial judge stretching his own imagination too far without evidence supporting it.

We hold the same view with regard to the learned trial judges' conclusion by which he rejected the defence of self defence, when he said;

> "My finding here was that if there was any example of a premeditated murder this one was a classical example. The accused disappeared a month. He went and prepared himself and re-emerged and waylaid the deceased. I dismiss his story as lies that he had gone to prune his plantation. The accused was well equipped and did the job very well. He got a panga started cutting his own father as if he was cutting meat in a butchery. H e inflicted several cut wounds on vulnerable parts of the deceased's body using the said lethal weapon a panga. He cut the neck almost severing the head, he also cut off the hand as per evidence on record ..... This mode of cutting was consistent with intention to kill ....."

It is clear from the strong language used by he learned judge that he was outraged by the manner in which the deceased met his death. But from what we have said above we are unable to agree, with respect, that this was a classical case of premeditated murder. It is also important that there was some exaggeration in the description of he wounds suffered by the deceased. His hand was not "cut off". Although the learned judge might have been right to consider that the force used exceeded what was necessary in self defence, nevertheless the mode of cutting did not exclude the defence of provocation.

For the reasons we have given, we do not think it safe to allow the conviction for murder to stand. Giving the appellant the benefit of what we hold to be a reasonable doubt on the evidence we allow the appeal, quash the conviction of murder, and set aside the sentence of death and substitute a conviction for manslaughter, contrary to section 182 of the Penal Code,

and sentence the appellant to 10 years imprisonment.

DATED at MENGO this 26th day of October 1990.

SGD: S.T. NANYINDO
DEPUTY CHIEF JUSTICE

SGD: A.H.O. ODER
JUSTICE OF THE SUPREME COURT

H.G. PLATT
JUSTICE CP THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY

OF THE ORIGINAL

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT