IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CRIMINAL APPEAL NO. 29 OF 1989

BETWEEN

YEFUSA KHAMALI::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT

AND

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

(Appeal from the conviction and sentence of
the High Court of Uganda at Mbale (Mr. Justice
A.N. Karokora) dated 28/6/88)

IN

H.C. CR. SS. CASE NO. 64 OF 1987

JUDGMENT OF THE COURT

On 3rd day of September 1985, the deceased, Mutinye s/o Khatondi, was returning home from the Market when he was attacked and assaulted very badly. He died later that night. The appellant, Khamali, was arrested and charged with the murder of the deceased. He was tried by the high Court and convicted as charged. He was sentenced to death hence this appeal against the conviction. There are four grounds of appeal.

The prosecution's case was grounded mainly on three pieces of evidence, namely, that of a witness who saw the appellant running from the scene of crime, the deceased's dying declaration and the appellant's own alleged admission that he had cut someone.

Briefly, the evidence was as follows: on the day of incident, at about 7.30 p.m., Eduard Shimali (PW1) a neighbour of the appellant was at his house when he heard two parsons raising alarms from the direction of the appellant's house. The first alarm was raised by the appellant. He was saying that he had killed the deceased because of his (appellant's) bananas. The second alarm was raised by the deceased. He was saying: "Yefusa Khamali has killed me for nothing."

The witness then rushed to the nearby house of his father, Wandera (PW2) who accompanied him to the scene of crime. PW1 was holding a lamp. It was his evidence that on the way to the scene of crime and as he walked ahead of PW2, he saw the appellant running in the Opposite direction — away from the scene of crime. They found the deceased lying on a path in the banana plantation of one Wamunyerere. He had cut wounds on the head, right

hand and back. He was bleeding profusely. He told PWI and PW2 that he had just been cut by the appellant, for no reason.

Abiasali Wamboka (PW3) was the Sub-County Chief of the area at the time. On 4-9-85, at about 9.00 a.m. he was in his office when the appellant went to him and reported that during the previous night he had chased a thief from his banana plantation and cut him but that the thief had got away. The appellant was trembling and his shirt was blood stained. PW3 then arrested him and sent him to Mbale Police Station where he was received re-arrested by Police Constable Watosi (PW4). The latter confirmed in his testimony that the appellant's white shirt had blood stains. Finally, there was the evidence of James Wabuteya (Pw7). He too answered the deceased's alarm. At the Scene he found several people including PW1 and PW2.

The deceased told this witness that as he was going in home from the market the appellant chased him and cut him. According to PW2 the appellant was nowhere to be seen.

At his trial the appellant gave his defence on oath. It was that on the day in question he was at his home at about 8.00 p.m. when he heard someone cutting down a banana in one of his seven banana plantations. This was about 300 metres from his house. He went into the plantation unarmed and saw a person carrying away a bunch of banana on the head. Then he challenged the thief the latter threw the bunch of bananas trio ground and then charged at the appellant. He threw the appellant down and tried to strangle him. The appellant raised an alarm whereupon the thief left him and ran away. The alarm was answered by PWI, PW2 and others. He showed them the banana which the thief was about to steal. They then advised him to go and report the matter to the area Sub-County Chief.

He was surprised when later on PW2 and other persons went to his house and cut down his banana plantation. It was then that he escaped from his house and took the report to the Chief (PW3). He denied that he cut the thief or anyone else for that matter. He claimed that the deceased was a notorious thief. He denied having told PW3 that he had cut someone.

After carefully considering the evidence of both sides the Learned trial judge rejected the defence and found that the deceased had he died at the hands of the appellant, that the deceased had not attempted to steal the appellant's bananas as claimed by the appellant and that the deceased had not attacked the appellant or provoked him at all. The defences of self —defence and provocation were therefore not available to the appellant.

We are satisfied that the evidence against the appellant was overwhelming. The deceased and the appellant lived in the same village and they knew each other well so that there was no question of mistaken identity by the deceased. His declaration that he had been

attacked by the appellant was corroborated by PW1 who knew and saw the appellant running away from the scene of crime as well as the appellant's own evidence that he had struggled with someone at the scene, and his report to PW3 that he had cut a person. Also there was his blood stained shirt.

It would have been useful if the prosecution had had the blood stains examined to establish whose blood it was. In the light of the evidence referred to above the appellant's defence was in our view rightly rejected as false. Accordingly his first two grounds of apogeal the gist of which is that had the trial court properly evaluated the evidence, it would not have come to the conclusion that the deceased had been killed by him must fail.

The third ground of appeal is that the trial court erred to hold that the killing was done with malice aforethought. Mr. Dagira Suza who represented the appellant on appeal contended that the defences of provocation and defence to person and property were open to the appellant. We will deal with provocation first. The defence was of a fight with an actual thief who had cut appellant's banana and attempted to carry it home but which he had to abandon on being discovered. This was denied by the deceased in his dying declarations. Counsel for the appellant asked this Court to reject those declarations on the ground that they were riddled with contradictions. We see no real discrepancy between those dying declarations. The whole story is that the deceased was coming back from the market, along a path passing through the bananas which were young, when he was attacked by the appellant. The deceased said that the attack was without reason, although the appellant had told him that it was because of the appellant's bananas. But the appellant's claim that his banana had been stolen was destroyed by the prosecution witnesses who investigated it and found no banana fruit cut there were no fruits to cut as the plantation was young and there were no bananas on the ground. Hence the appellant's excuse (of provocation) for attacking the deceased failed on the facts. The trial judge was right in rejecting the defence claim as false.

Counsel for the appellant argued, in support of the defence of property, that the appellant might have acted under the mistaken belief that the deceased was actually stealing the bananas. Here he had in mind the provisions of Section 10(1) of the Penal Code which states: -

"A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist."

This defence of mistake was not raised in the High Court. The defence was of actual theft. Clearly, this Court cannot manufacture a defence of mistake out of nothing. If the defence of mistake is to be relied on, it should either be put forward by the accused or reasonably arise from the facts.

In Our opinion it cannot arise in the case. If as we were asked to do, we were to stretch the point and hold that the appellant thought that the deceased was stealing his bananas, then we must hold that the circumstances must be taken as he believed them to be so long as, according to Section 10(I) of the Penal Code quoted above, the mistake was honest and reasonable. But there is nothing to show that the mistake was reasonable. This of course affects honesty. In any case we cannot see how honesty can be supported on the defence put forward.

With regard to defence of person, it is clear from the appellant's own evidence that his life was never in danger. The deceased was not armed. Assuming for the sake of arguement that he did charge at the appellant and put him down, he ran away as soon as the appellant raised an alarm. At that stage the appellant was not entitled to chose him and cut him so brutally with a panga. In any case for the defence of property or person to succeed it must be shown that reasonable force was used. This is the Law of England which the Courts of this Country are enjoined to follow by Section 17 of the Penal Code of Uganda. As Smith and Hogan point out in their bock entitled "Criminal Law, 6th Edition (1988) at page 246, it can rarely, if ever, be reasonable to use deadly force merely for the protection of property. And as was pointed cut by the then Court of appeal for Eastern Africa in Manzi Mengi v R. 1964 EA 289 at p.292:—

"Under English law there is a broad distinction made where questions of self defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing. In other cases of self defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise break off the fight or ovoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the

force used is excessive, but if the other elements of self-defence are present there may be a conviction of manslaughter: R. V. Biggin (2), R. V. Howe (3), Robi v R. (4) (in relation to defence of property). Also see Stenhouse v Uganda, Criminal Appeal No. 1 of 1972, Court of Appeal for East Africa (unreported).

In the instant case the action would not have been necessary as the deceased had no weapon, had no bananas and was merely passing by on a public path.

It follows in our opinion that since the appellant, being under no attack and being under no mistake of fact, used massive force of a deadly weapon to cut the deceased almost to pieces he committed murder. The killing was clearly done with malice afore-thought for which there was no possible defence. The third ground of appeal fails. We see no merit in the fourth ground which was that the convictions caused a miscarriage of justice, in view of our findings on the other grounds.

In the result the appeal is dismissed.

DATED at Mengo this 19th day of June, 1991.

Signed:
S.T. MANYINDO
DEPUTY CHIEF JUSTICE

H.G. PLATT
JUSTICE OF THE SUPREME COURT

E.E. SEATON
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL.

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT