THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CRIMINAL APPEAL NO.6/93

BETWEEN

CHARLES RWAMUNDA ============================ **APPELLANT**

AND

UGANDA=== **RESPONDENT**

(Appeal against conviction and sentence of the High Court decision holden at Masaka by (Mrs. Justice Kireju) dated 16th March 1993).

HIGH COURT CRIMINAL CASE NO. 157/91

JUDGMENT OF THE COURT

The Appellant was convicted of Manslaughter contrary to section 182 of the Penal Code and sentenced to twelve years imprisonment. The Appellant had been indicted for murder on two counts, but due to his drunkenness, a conviction of the lesser offence of Manslaughter was substituted, with the result that the Appellant was sentenced to concurrent terms of twelve years imprisonment. The Appellant appeals against his conviction on each count and leave was granted for the Appellant to appeal against sentence.

The brief facts of the case as found by the trial court, were that the Appellant's wife Gertrude Nanyanzi (PW1) was at home around 10.00 p.m. on the night in question, namely 13th March, 1990, when the Appellant arrived home drunk. The Appellant "barked" at her out of annoyance because he had found his wife outside the house. Apparently the Appellant suspected his wife of carrying on an illicit affair with some other man. The Appellant was also annoyed with his aunt Matilda who lived nearby. When the Appellant asked for his panga, the Appellant's wife became frightened, and leaving him to look for the panga she decided that as her husbands' mind seemed to have been disturbed, she should report the matter to her father-in-law who also lived nearby. The Appellant's wife ran to her father-in-law's house, and having awakened her parents in-law, she explained to her mother-in-law that

her husband had been annoyed with Matilda and that his mind was disturbed. The father-in-law having been told, he went straight away to the house of Kiwulide and Matilda. The father-in-law, Benedicto Ddungu (PW2) was followed by Gertrude, and to their dismay, they found that Kiwulide had been killed, and that his wife Matilda had been seriously cut, but was still alive. The alarm was raised, and the next day Matilda was taken to the hospital at Masaka. Although Matilda was treated there for about a month, she then died. So it is, that count one refers to the death of Matayo Kiwulide, and count two, to the death of Matilda.

The following day after the incident, the police and Doctor Ssekitoleko (PW6) cane to examine the body of Matayo Kiwulide. The post-mortem was carried out in Matayo's house, in the presence of Ddungu and Erikan Kasule (PW9). It was acknowledged that Mr. Kasule identified the body. The Doctor's postmortem report explains that Matayo Kiwulide died from loss of blood from his wounds. After Matilda had died, a post-mortem was carried out by Doctor Musitwa. Mr. Kasule testified that he had identified the body. The Doctor bad however been treating Matilda in the hospital. It was unfortunate, that no clinical report for the treatment given to Matilda was produced.

Mr. Ddungu explained that the Appellant was not found for about three or four days. However after the fourth day, he was found in the bush behind his house, with a panga, which is said to have been taken in for custody. He was found by Bisagala John (PW4) who found the Appellant hiding, and when the Appellant saw that people were looking for him, he was angry and asked what they were looking for. Bisagala asked him to come home, which the Appellant refused because he was afraid, he would be killed. Bisagala however, informed him that he would be taken to the police. The Appellant was some distance away holding a panga. The Appellant told Bisagala that he had no hope in living, and he, the Appellant, may as well die. The Appellant then threw the panga away and straight away Bisagala picked it up. It was arranged that food would be taken to the appellant by his children, and then a group of people were collected together by Bisagala, who arrested the appellant. It may be that the witness Kakooza (PW3) was in the same group of people, because he acknowledged that the panga had been taken by Bisagala. The panga was exhibited in court, and although of the right shape, namely, pointed, it was not clearly identified either by Gertrude or Ddungu.

The Appellant's defence, apparently given on Oath (although his religion and the type of Oath is not recorded) was to the effect that the Appellant, having got home drunk, sent his wife away, and then went to bed and slept without knowing what was happening, until he woke-up. He decided to check if his wife was in the sitting room. But then he found his grandfather there, who informed him that Kiwulide and his wife had been attacked and cut. The Appellant was also informed that people were looking for him. The Appellant alleged that he went out of the house. He heard people with pangas and spears saying "there he comes". So he went away. The following morning he went to his father and mother, and their opinion was that he should go far away from home. At length he was arrested, and Mr. Bisagala had taken him safely to the police station. The burden of the defence was, that the Appellant did not know why those who were mourning for Kiwulide wanted to kill the Appellant, as he had done nothing wrong. There had been some quarrels in the past between Kiwulide and other members of the community over fishing; but as far as the Appellant is concerned he had no grudge with his uncle and aunt; he had helped when Kiwulide was sick; and altogether they had shared things as a family. As far as his father Ddungu was concerned and also Bisagala, there was no question of any grudge.

It is clear that Kiwulide and his wife Matilda were attacked on the 13th May 1990, and indeed that Kiwulide died at once, but there was no evidence who had attacked them, and therefore, it is of interest to note what the learned Judge made of this circumstantial evidence. She directed herself correctly on circumstantial evidence. The prosecution, she noted, had to prove the case beyond reasonable doubt, and satisfy the court that the inculpatory facts pointed to the Appellant as having been the only person who could have committed the crime, and must not be capable of explanation on any other hypothesis , other than the guilt of the Appellant. The learned Judge compared the evidence for the prosecution with that of the defence, and she correctly addressed her mind to the burden of proof in the case of an alibi defence. However, she accepted the evidence of Gertrude and Ddungu in preference to the defence. From that evidence she deduced that the Appellant had come home very drunk at 10.00 p.m; that he called for his panga; that he seemed mentally disturbed, and that he seemed to have a grudge against Matilda. After the attack the Appellant was missing from his home. The Judge found that the Appellant went into hiding, rather than attend the funeral of his close relative. The learned Judge concluded that it was the Appellant who had attacked Kiwulide and Matilda. But as already related, it was found that the Appellant had been unable

to form the necessary intent to murder, because he had been drinking the whole day and evening.

The Appellant appealed. The first ground of the appeal was that the cause of the death of Matilda had not been proved beyond reasonable doubt, in view of the contradictions in the evidence of Dr. Musitwa.

Mr. Matovu, learned Counsel for the Appellant pointed out that the injuries described by the doctor, as having been sustained by Matilda, did not include an important fact, that one of her fingers had been amputated. Although Matilda might be dead, the cause of her death was not clear, since she had died almost a month after the incident. Altogether, the evidence did not show that the post-mortem examination related to the body of Matilda.

The learned Judge accepted the evidence of Erikan Kasule (PW9) that he had known both Kiwulide and his wife Matilda before the incident, and had identified their bodies to Dr. Ssekitoleko (PW6) and Dr. Musitwa (PW8) respectively. In the case of Matilda, Mr. Kasule had visited her in hospital twice before she died. Hence, the fact that Dr. Musitwa was careless and did not report the amputation of the fore-finger, (or perhaps two fingers) did not interfere with the identification of the body.

Mr. Matovu tended to argue a more subtle ground, when he suggested that the cause of death was not certainly known. First, then was the lapse of time from the incident to the death of Matilda. There was no evidence which explained what had happened during this interval. Secondly there were differences of opinion in the description of the wounds as being “lacerations”.

It was said that there were five “lacerations on the scalp” with healing scars, and “laceration” on the right cheek Sgt. Onen (PW5) thought that they were “cut wounds”. The alleged weapon was a panga, which would normally result in cut wounds. The panga was not put to the Doctor.

Indeed, the Doctor testified that Matilda’s wound could have been caused by a blunt weapon or a sharp one. Thirdly, there was a careless statement as to the date of the post-mortem. The figures had become transposed; instead of “18/6/90”, the Doctor had written “16/8/90”. Fourthly, there was no mention of the severed finger or fingers. Altogether it was said that the post-mortem report was too uncertain to be relied upon.

None of these matters any way weakens the finding, that the cause of death was duo to raised intracrancal haemorrhage, caused by an abscess formation in the sagittal sinus. Whatever weapon had been used, the wounds on Matilda’s head had become infected, and the infection had affected the brain, and so caused death. It was said to be a direct result of the wounds.

We may, at this stage, deal with ground 4. We agree with Mr. Matovu that the panga exhibited had not been identified beyond reasonable doubt by Gertrude or Ddungu. It was not tested by the Government Chemist so as to confirm that it had blood stains upon it, being either consistent or inconsistent with the blood grouping of Kiwulide or Matilda. Hence, the Doctor’s description of the wounds as lacerations, or the Sergeant’s evidence of cut wounds was of no real importance. It is not known what weapon was used.

Returning to ground 1 we find that the errors in the post-mortem report were caused by carelessness, and there is no real doubt but that the body of Matilda was examined and that the cause of death was as stated in the report. However, we are obliged to repeat the following directions which stem from many previous decisions that;

> (1) it must be the invariable practice for the prosecution and court to show the alleged murder weapon to the Doctor, for his opinion to be recorded whether it is or is not consistent with the wounds on the deceased, if the weap is accepted as such by the Court; (Compare ***Republic v. Kimbugwe S/O Nyololi*** (1936) E.A.C.A. 129; ***Republic v. Paulo Shimanyolay*** (1938) *5* E.A.C.A 135), cases of different types of injuries.
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> (2) when a doctor has been treating a patient while alive, that doctor should not carry out the post-mortem examination. A fresh opinion is necessary as to the cause of

death. It is also necessary to ascertain whether there has been any intervention exculpating the accused person. ***Yowanna Lubowa v. Republic.*** (1953) 20 E.A.C.A. 274; ***Republic v. Njarura*** (1944) 11 E.A.C.A. 59).

(3) Prosecutors and Judges a like, should not resort to loose statements such as that the panga "appeared to be blood stained." Unless there is evidence that that fact has been proved by the Government Chemist, or an eye witness has actually seen that to be the result of a blow. (Compare lack of expertise in ***Githenji Kabiro v. Republic*** (1955) 22 E.A.C.A 368.)

For the sake of comprehensiveness, we should note that no difficulty arose in the case of Kiwulide's identification, and the post-mortem report in his case.

On ground 2 it was complained that a great deal of hearsay evidence was entered upon the record. It was generally tendered in order to prove the consistency of Gertrude's description of her husband's conduct. As some of these conversations were not put to Gertrude, and indeed, went outside her evidence, they are of doubtful credibility. We would be prepared to rely upon Gertrude's evidence, and the fact that as a result of what she had told her mother-in-law, her father-in-law, Ddungu went to the scene at once, and found Kiwulide dead and Matilda seriously injured.

On ground 3, the argument of Mr. Matovu was that the learned Judge misinterpreted the place where the Appellant was found as showing that he was hiding with a guilty conscience. The appellant's case was that he was afraid of being attacked by the villagers, because they had concluded that he was the culprit. In fact, he had been told by his family to avoid arrest and go faraway. He was found hiding from the wrath of the villagers rather than hiding from a guilty conscience.

According to Bisagala, the Appellant threw away his panga, and remarked that he had no hope in life and that he may as well die. The Assessors considered this incident to show that

the Appellant ought to have gone to the funeral of Kiwulide, by that instead he has stayed in hiding until Bisagala found him, and then had the Appellant arrested. The Assessors were of the opinion that the Appellant had feared to go to the funeral, because he was afraid of what he had done. The learned Judged in effect accepted that part of the opinion of the Assessors. The latter would be in the best position to understand this situation. There was no legal impediment to reaching that conclusion.

Finally we come to ground 5, in which it was alleged that the alibi defence had been wrongly rejected. First of all the learned Judge directed herself correctly as to the legal approach to an alibi defence. She compared the evidence for the prosecution with that of the defence, and found that the Appellants' defence raised no doubt that the circumstantial evidence proved that the Appellant had killed Kiwulide and Matilda. In coming to his conclusion she had the strong opinion of the Assessors that that was the correct conclusion to reach.

Judging all these matters for ourselves, it seems to us that the Appellant was in an angry mood, that he was in a drunken unreasonable state of mind, looking for a panga, and annoyed with Matilda. Gertrude, his wife, was so greatly alarmed that the Appellant's mind was disturbed, that she called the Appellants' father. In the short time that intervened before they returned to the scene, Kiwulide had lost his life.
Had the Appellant really been in his house asleep, he would have been found there and his panga also. He was not there, nor was his panga. He was found hiding at the bottom of his land after three days. He expressed himself as having no hope.

We think that if he had been innocent, the Appellant would have called upon his great friend Bisagala to help him, because he was not guilt. Instead he expressed the despair of guilt. There was no enmity against the Appellant. The Appellant was the only person who harboured any antagonism against the deceased. We are satisfied, therefore, that short of the unacceptable evidence, the trial Court came to the right conclusion, that the Appellant killed Kiwulidde, by inflicting such great wounds on him that he bled to death. His attach on Matilda also led to her death in due course.

We agree with the learned Judge that in the drunken state of the Appellant, he might not have been able to form the necessary intent to kill. We note the strange direction which the learned Judge gave on intoxication, as follows:

> ***"The law regarding intoxication as a defence is not whether the Accused was so drunk that his mind was affected by alcohol. It is rather whether having regard to all the circumstances of the case, including those relating to drinking, it can be said that the prosecution have established beyond reasonable doubt the requisite malice aforethought.*** "(See Sesawi v. Uganda (1979) H.C.B. 112)

We would refer the learned Judge to section 13(4) of the Penal Code:

> ***"Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."***

We would advise her to approach the matter as there directed. But nevertheless the learned Judge wisely substituted Manslaughter for Murder on the ground of intoxication.

Consequently we uphold the Appellants' convictions on counts 1 and 2.

We entertained the appeal against sentence on counts 1 and 2. We find no merit in it, and confirm the terms of concurrent imprisonment of 12 years, which the learned Judge imposed on each count.

The result *is* that the appeal is dismissed on counts 1 and 2 against conviction and sentence.

Delivered at Mengo 2nd day of June 1994.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

A.H.O. ODER, J.S.C

JUSTICE SUPREME COURT

H.G. PLATT, J.S.C.

JUSTICE, SUPREME COURT

I CERTIFY THAT THIS IS A

TRUE COPY OF THE ORIGINAL,

W. MASALU MUSENE

REGISTRAR, THE SUPREME COURT.