THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., ODER, J.S.C., & PLATT, J.S.C.)

CRIMINAL APPEAL NO. 2 2/93

BETWEEN

KASTO BUDEBO==========APPELLANT

AND

UGANDA========== **RESPONDENT**

(Appeal against Conviction and Sentence of High Court holden at Arua (Hon. Justice G.M. Okello) dated 29th of November, 1993).

IN

HIGH COURT CRIMINAL SESSION CASE NO; 150/93

JUDGMENT OF THE COURT:

The Appellant Budebu Kasto was convicted of Murder contrary to section 183 of the **Penal Code Act,** and sentenced to death. The fatal incident in which John Asiku died, occurred in the homestead of Budebu's father. Budebu had his own house there, and his sister Levinia (PW9) lived in another, perhaps the kitchen, with her children. Only Budebu and Levinia were staying in the homestead on the night between 31st August and 1st September, 1991. There is no doubt that John Asiku died in the homestead that night, a fact which was admitted by the Appellant, and indeed, John's body was found in the pit latrine of the homestead early on the morning of 1st September, 1991. Moreover, the Appellant admitted that he had struck an intruder in his house twice with a panga, after which the intruder was found to be John Asiku. The issues for trial were therefore whether the Appellant had been provoked, or had acted in defence of himself, or his property or had simply murdered the deceased.

Although so many vital facts had been admitted, it was still not an easy trial to conduct and the Appellant, has appealed on the grounds that the learned Judge was wrong to have rejected the defence of self-defence, and secondly the defence of provocation and defence of property.

The difficulty arises from the fact that the Appellant was alone in his house with John Asiku, the latter being either a guest or an intruder in the house. The other fact of concern is that the Appellant alleged that his torch, box and radio had been stolen, and this was never verified. The Appellant alleged that Levinia had been shown the empty space where these articles had been placed, but she was not questioned on this matter, and the authorities brought to the scene, were apparently more concerned with the blood in the house and the weapons found there, than the missing articles. It would seem necessary therefore to give the Appellant the benefit of this doubt, unless his evidence must be totally disbelieved. Yet, the case depends upon whether Levinia must be believed in preference to the Appellant.

With these preliminary/remarks, set out to guide the re-evaluation of the evidence, as this is the duty of this Court on first appeal, (see PANDYA v. R. (1957) E.A. 336), we turn to the evidence.

The Prosecution relied upon Levinia's evidence which was to the effect that John Asiku had paid the Appellant a visit on this afternoon of 31st August, seeking the Appellant's help in finding John employment. They spent the evening together, and then the Appellant asked Levinia to make a bed for John. Levinia used the spare mattress and spread it on the floor without a sheet. Where this was in the house is not clear. Levinia went to her house to sleep. Deep in the night, she heard a voice crying and ascertained it was the voice of John crying from the Appellant's house, and calling his father Yononia. Levinia got up and went to the Appellant's house and asked him why John was crying. The Appellant came out and said that perhaps John was unwell. While the Appellant was outside talking to Levinia the crying of John stopped. Levinia went back to her bed and the Appellant retired inside his house. Levinia was not satisfied and stayed awake and heard a sound of beating. So she listened for what seemed to her a full hour. John was crying and the door was closed.
Levinia went a second time and asked the Appellant why he was beating John. The Appellant came out and said that John was trying to steal his box. Levinia said that there was no sign that the box had been stolen -(but this remark cannot be taken at face value as she did not go into the Appellant's house at that stage and check whether it was lost). Instead she inquired why he did not raise an alarm; as none had been raised. The Appellant ordered her back to her

house and threatened to beat her. So she went back.

The Appellant returned to his house and resumed beating the deceased, or so she says. The deceased was still crying. Levinia went a third time to the Appellant and pleaded with him to stop beating the deceased. She related that she had tried to escape, but the Appellant saw her and threatened her and so she returned to the kitchen. The groaning stopped.

The Appellant later came to her and asked her to help him dispose of the dead body in the latrine. She at first refused, but under threat when assisted the Appellant. He removed the mattress, and pillow and threw them into the pit latrine. The Appellant took a bath and went to sleep. Levinia slipped away and reported the matter to the local authorities. They came to the scene, confirmed the death of John Asiku and having tried to arrest the Appellant, he escaped. He was later arrested on 25th September, 1991.

The Appellant's version of what happened was that he had received no visitor on that afternoon or evening and nobody else had slept in the Appellant's house.

He awoke at 3.00 a.m. and found the wind blowing through his house, and disturbed the curtain which partitioned his house. He got up to check whether the window was closed properly. He reached for his torch but did not find it; indeed his box and radio were missing. He then went to check his bicycle, but found the door open. He then suspected a thief in the house; especially when some iron bars fell down from the window. He stood by the door armed with a panga. He asked who was in the house. He called for his sister who did not respond. So he decided to go outside. As he was doing so the stranger came as if to attack him or push him outside. There was no light. The Appellant reacted by cutting the stranger twice. The latter fell down. He went to Levinia who lit a grass torch. It was discovered that the stranger was John and that the torch, box and radio were missing. The body was taken to the compound. John did not revive with water on his face. The Appellant searched for his missing articles In vain.

Levinia reported to the authorities. When they came they began to beat the Appellant who managed to escape.

The Appellant confirmed that the hoe, chisel and hammer found by the authorities had indeed been inside his house, left thereby a carpenter.

A comparison of these two accounts shows that either one or other is to be believed.

First, the arrival of John and his spending the night at the Appellant's house could have been confirmed by the woman who visited the Appellant and John that evening when some drink was taken. It was not.

Secondly, the loss of the torch, box and radio was not checked. It is not clear how Levinia thought that there was no sign of this loss. So were they in the house? She did not enter the house on her second visit to the Appellant. He had come out of his house; otherwise his door was closed. Later when the authorities arrived, no one seems to have looked for the torch, box and radio. Levinia went into the house with the authorities. The torch, box and radio were not noticed as there or not there. Had they been there, these articles must surely have been taken to disprove the Appellant's suggestion that he was reacting to a thief.

One small feature of Levinia's evidence is that she alleged that only a hoe had been found in the house, washed and leaning against the wall. The general consensus was that the hoe, chisel and hammer were found. They were supposed to have been blood-stained, but the rain fell on them during transportation, and washed them. Levinia's observation seems to have been faulty on this point. Every opportunity to ascertain whether there had been a theft was missed.

In these circumstances it would seem that the origin of this trouble concerned the Appellant's property. Even Levinia acknowledged that there was no other enmity, although she also

appeared to rule out interference with the Appellant's property as well. The Appellant did not at once complain of theft, or raised an alarm, but he did finally mention his box.

The next question concerns the medical finding of Dr. Amandu (Pw.11). There was a deep cut wound on the forehead, which, although only observed externally, reached the brain. There was another deep cut wound on the back of the head reaching the bone. The cut wound on the chin was not deep and did not reach the bone. The cut wound to the side of the neck was "quite deep", but had cut the major arteries and had caused a lot of bleeding. There were cut wounds "not so deep" on the throat and back of the neck. They were superficial and were suggestive of resistance. The cause of death was brain damage and haemorrhage.

In the Doctor's opinion, the injuries which caused death would have done so in about five minutes. They could have been caused by an axe, a panga; or a hoe if wielded with force. Although the Doctor saw the chisel and hammer he did not relate these weapons to the injuries as one other witness did. There were no apparent marks of beating on the body.

The most difficult part of Levinia's evidence to fit in, is that the assaults she described which took a full hour, did not co-exist with any activity of the deceased. If the deceased had been so badly injured as to prevent him from running away, or even moving at all it is difficult to see how the beating could last an hour. The Doctor suggested that the major injuries would have caused death in about five minutes; and certainly that must be true if the carotid arteries were severed in the side of the neck. On two occasions the Appellant left the deceased alone and came out to talk to Levinia, and the deceased did not move. Levinia heard no movement at any stage. It seems therefore that the deceased may have resisted attack, if the Doctor is right that the superficial cuts to the throat and neck were suggestive of resistance, but thereafter, he did not move and must have been incapacitated. It is likely that the blows to the forehead and back of the head could be heard, and may be also the side of the neck; but there seems something artificial about Levinia's story. It is doubtful if the assaults could have lasted an hour or that the beating could have been so prolonged. It is strange that the deceased could not move away when the appellant opened the door and talked to Levinia. If incapacitated death would supervene in five minutes.

Looked at the evidence this light the Appellant's defence has a time scale nearer to the medical evidence than Levinia's story. It seems also clear that some of the suggestions from those that visited the scene, such as the idea that the chisel was used to cause stab wounds were also ruled out by Dr. Amandu. There were no stab wounds according to the Doctor. It was more a case of a panga, axe and possibly a hoe although one witness thought that a panga could not have been used.

The surrounding medical circumstances do not support Levinia's evidence at all well. The surrounding physical facts were left open. The woman who visited John and Appellant, as Levinia alleged, was not called. It is not clear whether the torch, panga or box were still in the house or were missing. It is not clear whether the pool of blood in the Appellant's house could not have been where the Appellant alleged that the intruder fell or where the bed was. It is not clear how on the alleged third visit to the Appellant, Levinia could not have escaped. The appellant was in his house, the door was shut, how then would the Appellant see Levinia trying to go into the bush to escape. It is difficult to see why Levinia could not have escaped between the second and third visit. It must be remembered that Levinia was in reality in the position of an accessory after the fact.

As she reported the matter to the authorities the learned Judge may well have considered that she was an unwilling supporter of the Appellant. Whether she was an accomplice (as accessories after the fact are usually classed) was not actually considered. But, in any case, her evidence had to be treated with caution, while if she had been an accomplice the Judge ought to have sought corroboration (see ***Githae s/o Gathingi v. R.*** (1956) 23 E.A.C.A. 440; GATHITU KIONDO v. R (1956) 23 E.A.C.A. 526).

The result is that although Levinia may have impressed the Judge and the Assessors, a close examination of her evidence does not reveal that she was certainly a witness of truth. An unfortunate aspect of this trial is that Levinia's evidence was not subjected to that careful scrutiny which is prudent in a case where one person testifies against another, and especially in the case where that other must intrinsically be treated with care. It is clear that the difficulties in the evidence were not put to the Assessors or to the Judge himself. It follows that the Appellant's defence story appears to be as logical as that of Levinia. It would be Impossible for this Court, in the circumstances of this case, to say with any assurance that the

Appellant was properly convicted beyond reasonable doubt.

The learned Judge believed the evidence of Levinia and disbelieved the defence, and he had the concurrence of the Assessors. The learned Judge argued in the alternative that either the appellant had intended to kill the deceased or he had acted in defence of property so savagely, that the conviction must still be one of murder. He ruled out provocation. It is difficult to understand why that should have been excluded.

At the moment that the Appellant found himself under attack in the dark he was entitled to defend his person and his property. He was no doubt also provoked by the apparent attack on him. No hard and fast line can be drawn between self defence and defence of property in such a case. A householder is entitled either to seek to arrest or to expel an intruder. He does not have to retreat, but he may use reasonable force to effect his purpose ***Yoweri Damulira v. R*** (1956) 23 E.A.C.A 501; ***Zedekia Lukwago v R. (1956)*** 23 E.A.C.A 507. In this case the assailant was going push the push the Appellant out of the open door. The Appellant was going out in any case. The assailant was apparently not armed and had not as yet touched the Appellant. It follows that Appellant used unnecessary force in self or in defence of property. The Appellant was guilt of Manslaughter.

According, we acquit the Appellant or murder and convict him of the lesser offence of Manslaughter c/s 182 of the **Penal Code.** We set aside the sentence of death, and we will hear Counsel before substituting any other sentence.
Delivered at Mengo, this 7th day of October 1994

S.W.W WAMBUZI, **C.J.**
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