THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI,CJ, ODER, TSEKOOKO, KAROKORA AND MULENGA, JSC)

CRIMINAL APPEAL No.16 OF 2002

BETWEEN

BYABAGAMBI GABRIEL …….. APPELLANT

AND

UGANDA ……RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Kato, Engwau and Twinomujuni, JJ.A) dated 26th April, 2002 in Criminal Appeal No.71 of 2001]

JUDGMENT OF THE COURT

This is an appeal against the decision of the Court of Appeal. That court dismissed an appeal by the appellant who had been convicted of murder and sentenced to death by Musoke-Kibuuka, J, of the High Court. In the High Court, the indictment alleged that on 3/2/1999, the appellant together with another person murdered Silver Byomuhangi, the deceased.

The facts in this case are simple.

The appellant was an uncle of the deceased. The father of the deceased appears to have fathered him outside marriage and disappeared some time before 1985. During that year, the mother of the deceased introduced him to the appellant as the latter's nephew, whereupon the

appellant gave him some property. Later a misunderstanding arose between the two because of land belonging to the deceased's father. L.C. officials decided the dispute in favour of the deceased. Then a child of the deceased became ill. The deceased suspected and also complained that the child was bewitched by the appellant. This made worse the already bad relationship between the two. On 3/6/1999, the deceased attacked the home of the appellant and assaulted the latter's wife. She ran into appellant's house and the deceased threw a hoe at her. He also broke a door of the house.

On 3/7/1999, at about 5.00 p.m., the deceased met Maria Tumuhirwe, (DW2) a daughter-in-law of the appellant, at Bakyokyeza Trading Centre. Also present were Mugisha, a son of the appellant, and Kakuhikire, a brother of the appellant. The deceased then told Maria to: ***"Go and tell him (appellant) that I am coming there to cut all of you."***

The deceased said so because the appellant and his son had bewitched a son of the deceased. The deceased followed the threatening message by demanding for a panga from Mugisha. The deceased hurriedly left the trading centre. In view of this, Maria rushed home and delivered the deceased's message to the appellant. Upon hearing the message, most members of the appellant's household fled the home. Maria reported the same threat immediately to Daniel Rwakasingye (PW5) an LC1 Chairman, who was tending his cattle nearby. Soon the deceased appeared at the appellant's home. A hot argument ensued between the deceased and the appellant.

Tumusiime Dan, (PW4) a neighbour of the deceased heard the quarrel and went to the scene. By the time of his arrival, the hot argument had subsided but the appellant was seated in the verandah of his house armed with a panga. January, a young son of the appellant stood in the doorway of the main house while the deceased stood in the compound. Tumusiime advised the deceased to take the sick child to hospital instead of accusing his uncle of witchcraft. Tumusiime walked towards his home but after walking for about 20 metres, he heard a sharp cutting sound which forced him to return to the scene. There he found the appellant and January hurrying away from the scene, while the deceased lay dead in a pool of blood. Eventually the appellant reported himself to PW5 who kept him in his house under protective custody until police arrived and arrested the appellant. Later the appellant made a confession in a charge and caution statement claiming that he killed the deceased in self-defence. During the trial the appellant repeated the substance of that confession statement in his defence.

The assessors advised conviction for murder. The learned trial judge ruled out the defences of self-defence and of provocation and so he convicted the appellant of murder and sentenced him to death. The Court of Appeal dismissed the first appeal. The appellant has now brought this appeal based on two grounds which state that: -

> ***"1. The learned Justices of Appeal erred in law when they upheld the learned trial judge's decision rejecting the appellant's defences (Sic) of provocation and self defence.***
>
> ***2. The learned Justices of Appeal did not properly reappraise the evidence on record thus wrongly upheld the conviction of murder."***

Mr. Tayebwa, counsel for the appellant, argued the two grounds together. Counsel contended that the trial judge and the Court of Appeal did not properly evaluate the evidence for both sides especially that of the appellant. He further contended that although the trial judge correctly set out the law of self-defence, he did not apply it properly to the facts of the case. Counsel contended that in the circumstances of this case the appellant was entitled to defend himself. These circumstances were firstly that the deceased had attacked the appellant's home a month earlier; second, the threat sent to the appellant by the deceased was followed immediately by confrontation between the two; Lastly there was no evidence to prove that the appellant was not in eminent danger in all the circumstances of the case. Counsel further argued that the evidence of Tumusiime (PW4) showed that there was provocation. He asked us to allow the appeal.

Mr. Okwanga, the Principal State Attorney, supported the decisions of the two courts below. He contended that the Court of Appeal properly re-evaluated the evidence. He submitted that neither the defence of self-defence nor that of provocation was available to the appellant. On provocation, Mr. Okwanga submitted that the accusation of witchcraft by the deceased, even if it amounted to insult, did not justify the appellant's reaction. Similarly on self-defence the learned Principal State Attorney submitted that the defence was not available because the deceased was unarmed when he went to the appellant's home. In the alternative Mr. Okwanga submitted that the force used by the appellant was excessive.

In our opinion, this is a borderline case. The facts, in this case, tend to show that the defence of self-defence is more plausible than that of provocation. The deceased was a son of the appellant's brother. Normally the deceased would respect the appellant. This is especially so because the appellant looked after the deceased's property before handing the same to him later. There was evidence of misunderstandings between the two because of the property. On 3/6/1999, the deceased invaded the appellant's home and assaulted the latter's wife in the appellant's home. According to the evidence of the appellant: -

> ***"Byomuhangi once before came to my home and tried to kill my wife. When she ran into the house, he cut the door. He used to attack me because he used to say that I used to bewitch him. I reported that incident to the Chairperson L C . I . The Muruka Chief came and witnessed the damage on the house."***

In this respect, the appellant was substantially supported on the points raised in this portion of his evidence by the prosecution evidence of Daniel Rwakasingye, (PW5). This witness testified that following the June incident, he visited the appellant's home and found that a door had been cut and part of it was missing. In the charge and caution statement, which was produced by the prosecution, as evidence for its side, the appellant stated: -

> ***"I killed him in my compound when he invaded me intending to kill me. This was the third time since he started invading me. He was claiming that I was bewitching him. And we had a land dispute. I cut him in order to prevent him from cutting me and kill (sic) me"***

We note that before he was killed, the deceased sent a threatening message through Maria seriously announcing that he was going to cut the appellant and members of his family. Apart from his young son, January, who chose to stand by his father at the hour of need, the rest of the family took the threatening announcement very seriously and fled from their very home. Those who fled included Maria who had delivered the threatening announcement. The deceased arrived at the appellant's home soon after he had

sent the threatening message and found the appellant in his own home compound presumably fearing for the worst and, therefore, armed with a panga. Soon after his arrival and even when the appellant was armed with a panga, a hot quarrel ensued during which the deceased told the appellant, in the presence of the appellant's son, that the appellant was bewitching his child. The quarrel seemed to have been so hot that it attracted a neighbour, Tumusiime, who went to the scene and advised the deceased to stop accusing his uncle of witchcraft but instead he should take the child to hospital for treatment.

Evidence is not clear about what was the mood of the two when Tumusiime arrived and when he left. What appears noteworthy is that the deceased did not go away after Tumusiime's advice. Instead he posed a challenge by remaining in the appellant's compound standing while the appellant sat down most probably smarting under the deceased's insult. There is no eyewitness to what happened immediately before the appellant cut the deceased. But there must have been tension. The only evidence is that of the appellant. We have quoted what the appellant told the police in his caution statement soon after his arrest. In his unsworn evidence, this is how the appellant stated his case, in so far as relevant:

> ***"It was that very day that very hour when Tumuhairwe came to tell me that I prepare myself for death. Maria Tumuhairwe went and I remained at home alone. The other members of the family went away from home. I remained at home alone. I was seated on the verandah of the house.***
>
> ***Then Byomuhangi came. He came so near me. Then I got a small hoe from near the door. I hit him with both hands. He fell on the verandah of the house.***
>
> ***I was trying to save myself when I threw the hoe. I was trying to save myself. He fell down."***

The fact that the deceased was so menacingly daring after sending a very serious death threat he went to appellant's home, insulted him in his own home in the presence of his own son must have put the appellant on defence. We think that the appellant, like any other person of his status, was forced to react the way he did. The evidence of provocation was not excluded. Even if the

evidence of provocation was not so strong as to amount in law to a defence for the appellant as required by the standard set by the trial judge and the Court of Appeal, in our opinion, the appellant was entitled to use force to defend both himself and his home.

There are authorities which show that an owner of a home need not flee the home when attacked there. He is entitled to defend himself and or his home. See **Zedekia Lukwago v R.,(1956)** 23 E.A.C.A. 507 where Eastern Africa Court of Appeal held that

> **"It is not the law that a householder attacked in his own home by an intruder is required to use all means to escape. In such circumstances a hard and fast distinction between the right of defence of property and the right of defence of the person cannot be drawn. A householder is entitled either to seek to arrest or to expel the intruder and if attacked in so doing to use all necessary force to repel such attack He can kill in the process."**

In our opinion this statement applies with equal force even where the attack takes place within the courtyard of the house as happened in this case. There is authority for the proposition that in certain circumstances, both the defences of provocation and of self-defence can be available to an accused at the same time. In **Hau *S/o Akonaay v R. , (1954) 21*** *E.A.C.A. 276,* the accused quarrelled with X. The quarrel was followed by a fight in which X. was killed. The accused was armed only with a stick. **X** was armed with a stick and a spear. The accused got in the first blow.

The Eastern Africa Court of Appeal held that it is immaterial in such cases which party offers the provocation or commits the first assault and that in the case there existed elements both of self-defence and provocation, and that the inference of malice aforethought was rebutted by the circumstances, **it mattering little whether the acts be regarded as done in excess of self defence or under the stress of provocation,** (emphasis supplied) .

Although the case before us is not on all fours with the two authorities, the principles applied in these authorities are relevant to this appeal both on provocation and on self-defence.

Normally a successful defence of self-defence in homicide cases would lead to acquittal of an accused. However because of the two injuries inflicted on the deceased as revealed in this case by the post mortem report, we think that the force used by the appellant was excessive but not so excessive as to remove the defence of self-defence from the appellant.

We, therefore, hold that both the trial judge and the Court of Appeal erred when they held that neither defence was available to the appellant. Self-defence was established. The two grounds of appeal must, therefore, succeed.

For the foregoing reasons, the appeal is allowed. We quash the conviction of murder. We substitute a conviction of manslaughter C/s 185 of the Penal Code Act. In sentencing the appellant we take into account the period of 2 years which he spent on remand from July 1999 to 29/6/2001 before he was convicted and also take into account a further period of $2^{1}/_{2}$ years from 29/6/2001 to today during which appellant has been in custody pending disposal of this appeal. We sentence him to a term of six years imprisonment.

Dated at Mengo this 15th day of January 2004.

***B.J.* ODOKI**
CHIEF JUSTICE

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

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

J.N. MULENGA

JUSTICE OF THE SUPREME COURT