

**IN THE SUPREME COURT OF UGANDA**  
**HOLDEN AT MENGO**

**CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND  
KANYEIHAMBA JJ.S.C.**

**CRIMINAL APPEAL NO. 35 OF 2003**  
**BETWEEN**

**KIYENGO ZAVERIO:::APPELLANT**  
**AND**  
**UGANDA:::RESPONDENT**

*(Appeal from the judgment of the Court of Appeal (Mukasa-Kikonyogo DC J, Mpagi-Bahigeine, and Kitumba JJ.A.) at Kampala in Criminal Appeal No.24 of 2001 dated 3.2.03*

**JUDGMENT OF THE COURT.**

Kiyengo Zaverio, the appellant, was convicted *by* the High Court of Uganda, (Mukiibi J.) sitting at Masindi, for the murder of his father, Nsereko John Mawa, the deceased, and was sentenced to death. His appeal to the Court of Appeal was dismissed, hence this second appeal.

The evidence upon which the court *based* the appellant's conviction is *brief*. On 20.11.99, at *about* 4 p.m., the deceased visited the appellant's home. He found the appellant and a neighbour, one Birungi Alex, PW2, seated on a *bench* outside the appellant's house, drinking enguri. He joined them. The three continued drinking up to *about* 7 p.m. when the appellant invited Birungi to the

kitchen and then left him inside with Byabali Praxida, PW3, and Pauline Zikuza, PW4, the appellant's wife and daughter respectively. The appellant returned to the deceased who had remained outside sitting on the bench alone. He then hit the deceased on the head twice, using the back of an axe. The deceased fell down, and one of his eyes was dislodged from its socket. Blood flowed from the eye socket and the nose. A post mortem examination of the deceased's body subsequently revealed that the deceased had sustained a crushed eyeball and occipital laceration leading to internal haemorrhage and brain contusion that caused instant death. There was also evidence that when people came to the scene upon word going round that the deceased had died, the appellant chased some away threatening them with violence.

At the trial the cause of the fatal injuries was disputed. The prosecution contended that the deceased sustained the injuries from the two blows inflicted by the appellant as testified by Pauline Zikuza. The appellant on the other hand denied hitting the deceased and testified that the deceased sustained the injuries from falling off the bench due to drunkenness. After considering the evidence the trial court accepted the prosecution case and held that the appellant had hit the deceased as testified by his daughter. The Court of Appeal came to the same conclusion after re-evaluating the evidence. In this appeal, the appellant, quite appropriately in our view, does not seek to challenge that concurrent finding of the two lower courts. He only seeks to challenge the finding of *mens rea*. The sole ground of appeal in this Court is that -

***"The learned Justices of Appeal erred in law when in their re-evaluation of the evidence adduced at the trial, they misdirected themselves on the defence of intoxication."***

Mr. Mubiru, learned counsel for the appellant, criticized the Court of Appeal for upholding the trial court's refusal to avail the appellant the defence of intoxication. He maintained that the ground for the refusal, namely that the defence was not raised and had actually been disowned by the appellant and his counsel was erroneous. He submitted that the law enjoined the court to

consider, and avail to an accused person, every defence disclosed *by* the evidence *before* it, and cited **Clifford Patrick vs. R.** 72 Cr. App. R. 291, in support of his submission. He maintained that the Court of Appeal had misdirected itself in this regard. Learned counsel argued that if that court had addressed the proper question, namely if, in view of the evidence of the appellant's drinking, he had had the necessary *mens rea*, it would have concluded that the prosecution had not proved *beyond reasonable doubt* that he had. In conclusion counsel submitted that contrary to the law, the appellant's conviction was *based* on the weakness of the defence, for failure to plead intoxication, rather than on the strength of the prosecution case. In reply, Mr. Murumba, the learned Principal State Attorney submitted that the case of **Clifford Patrick vs. R.** (*supra*) was distinguishable *because*, in that case, unlike in the instant case, the defence had admitted the killing *but* relied on intoxication to show that the necessary intent was not proved. He stressed that in this case, the appellant expressly denied *being* drunk.

In the Court of Appeal, the fifth ground of appeal was that the trial court erred in holding that the appellant had killed the deceased with malice aforethought despite evidence of intoxication. In its judgment, the Court of Appeal, after *observing*, rightly in our view, that the court has to avail an accused person with a defence available on the evidence *before* it even if not raised *by* him, considered at length if the defence of intoxication was available to the appellant, in view of the prosecution evidence, which suggested that he was drunk at the material time. In the course of reevaluating the evidence, however, the learned Justices of Appeal made two *observations* that have given rise to the criticism of misdirection. After noting the prosecution evidence, which showed that at the material time the appellant was drunk, they *observed* -

***"The dilemma in this case is that both the appellant and his counsel at his trial did not only fail to raise intoxication or drunkenness as a defence but disowned it."*** In the end they concluded thus -

***"We are, therefore, not persuaded by counsel for the appellant, to avail to the appellant the defence of intoxication under s.13(4) of the Penal Code. To do so would be tantamount to putting a defence into his mouth."***

Clearly, these observations standing alone would amount to misdirection on the fundamental principle that the burden of proof in a criminal trial, remains on the prosecution throughout and, except in special cases, never shifts to the defence. The duty of the court to avail to an accused person every defence disclosed by evidence before it, even where the accused does not take advantage of it, is founded on that principle. Strictly, an accused person has no burden to raise a defence with the exception of the defence of insanity. Where, therefore, there is credible evidence establishing a defence, the court should not refrain from availing it to the accused for fear of "putting a defence in his or her mouth". If, as contended by learned counsel for the appellant, these observations were the only basis on which the Court of Appeal rejected the fifth ground of appeal, we would not have hesitated to hold that the misdirection vitiated the decision to uphold the conviction of murder.

The case of **Clifford Patrick vs. R** (supra), which counsel for the appellant sought to rely on, was an appeal against a conviction for murder in a jury trial. There was no dispute that when the accused killed his victim he was under the influence of drink. The appeal turned on the direction given to the jurors by the trial judge on the issue of drunkenness. He had directed the jurors to ask themselves if, at the material time, the accused person was in such state as to be incapable of forming the requisite intention. The Court of Appeal held this to be misdirection, as the question in issue was not whether the accused person was incapable or capable of forming the intention, but rather whether by reason of the drink he had taken he did not form the intention. On the ground that the jury had not been invited to answer the real question in issue, the conviction of murder was quashed and a verdict of manslaughter was substituted. In that case the misdirection to the jury had been central to the

decision to convict. If the jury had addressed the real question in issue it may well have returned a different verdict. The misdirection in the instant case does not appear to be in a similar central position to the decision to uphold the conviction.

In their judgment, the learned Justices of Appeal directed themselves on the law regarding the issue of intoxication correctly when they said -

*"Under section 13 of the Penal Code Act intoxication is not generally a defence to a criminal charge. That notwithstanding, it could become a defence if by reason of intoxication the accused became insane at the time but this would require a plea ....of insanity which is not the case here. The appellant disowned intoxication. He is not covered under that sub-section. However, under s.13(4) of the Penal Code, intoxication may be taken into account for the purposes of determining whether the accused had formed an intention to kill..."*

*In accordance with the holding in ... Illanda s/o Kisigo vs. R (1960) EA 780 the onus is on the prosecution to prove beyond reasonable doubt that the appellant's judgment was not affected by the drink to disable him from forming the necessary intention...The test to apply as enunciated... in Ssessawo vs. Uganda (1979) HCB 122, was whether having regard to all the circumstances, including those relating to drinking, it could safely be said that the prosecution had proved beyond reasonable doubt that the accused had the requisite intent at the material time. We shall apply this test to this case later."*

Subsequently, they applied the test to the facts and concluded thus -

***"Having regard to all the circumstances in this case including the aforesaid relating to drinking it could safely be said that the prosecution had proved beyond reasonable doubt that the appellant had the requisite intent to kill the deceased at the material time."***

In this conclusion the Court of Appeal was virtually in total agreement with the learned trial judge who said *inter alia* -

***"The accused's preparation to remove a possible eye witness and his effort to ensure that he had not been seen, in my view, show that his act was calculated or pre-conceived.... I find as did the assessors, that the prosecution has proved beyond reasonable doubt that the unlawful act committed by the accused person, and which caused the death of Nsereko John Mawa, was accompanied by malice aforethought"***

We need only add that this concurrent finding of fact was amply supported by evidence, and it cannot be assailed. We are satisfied, that the misdirection in the observations of the Court of Appeal, was not the basis for upholding the appellant's conviction for murder. The basis was that the prosecution proved malice aforethought beyond reasonable doubt. In our view, the observations were in effect superfluous.

In the result we find no merit in this appeal and accordingly we dismiss it.

***DATED at Mengo this 13<sup>th</sup> day of April, 2005.***

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

G.W. Kanyeihamba  
Justice of the Supreme Court.