THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.5 OF 1998

CORAM: HON. MR. JUSTICE G.M. OKELLO,JA

HON. MR. JUSTICE S.G. ENGWAU,JA

HON. LADY JUSTICE C.N.B. KITUMBA,JA

BETWEEN

OBADIA KUKU…………………………………………………………… APPELLANT

AND

UGANDA…………………………………………………………...... RES PONDENT

(Appeal from the Judgment of the H/C (Mukanza, J) at Mpigi in High Court Criminal Session Case No.469 of 1995 given on 4/2/98)

JUDGMENT OF THE COURT

The appellant was on 4/2/93 convicted by High Court (Mukanza,J) sitting at Mpigi of murder contrary to section 183 of the Penal Code and was sentenced to death.

The appellant, a special police constable and a former military instructor, was at the material time attached to Nakawuka Police Post. On 6/6/95, the appellant, Cpl Mwata Henry, officer-in-charge (O/C) of Nakawuka Police Post (PW2) and a few other policemen were on their way to Sisa village to check on their other colleagues who had been on duty there over the night. it was suspected that :ehi camp was being established in that area. On the way, they found the deceased digging in his garden. He was one of the people suspected to be involved in the rebel activities in the area. The appellant who appeared to have known the deceased, a military veteran before, called him by his first name 'God' meaning Godfrey. The deceased responded and came to

where the appellant and his colleagues were but stopped a few meters away from them. When the appellant told the deceased to go to the Police Post to assist the police, he refused, dropped down his hoe which he had held in his hand and started to run away. Without instruction from his O/C, the appellant started to chase the deceased. Soon his O/C (PW2) and his other colleagues (Waswa John (PW1) and Temuteo Bukede (PW3) heard rapid gunshots in the direction followed by the appellant. They started to follow the appellant. When they met him, the appellant told them that "bullets have caught the deceased and that he was already dead." On confirming that the deceased was shot dead, Cpl Mwata Henry disarmed, arrested and detained the appellant at the police post. Later he informed his boss, the District Police Commander Entebbe. Eventually the appellant was charged with the murder of the deceased.

At the trial, his defence was accident. That the bullet which shot the deceased went off accidentally when the appellant slipped on slippery morning grass. The trial judge rejected that defence and convicted the appellant.

There is only one ground of appeal, the second one having been abandoned. The sole ground is that "the learned trial judge erred when he failed to evaluate the evidence before him as a whole which resulted in a miscarriage of justice to the detriment of the appellant."

Prof. Joseph icakooza, learned counsel for the appellant, contended that the trial judge was not justified to reject the appellant's defence when there was no evidence to support his finding that the appellant shot the deceased deliberately and with malice aforethought.

The appellant in his unsworn statement told Court that:-

> "The O/C pushed and asked me to follow the man. The man run and I followed, so I heard the voice coming behind about when I had from far for 4 meters (sic). The voice was saying covering fire with air or otherwise scarce the deceased/escape (sic) . I started firing in the air and the deceased was running As I was pursiing having reached a corner

near a coffee which ifi shamba tree (sic), I saw the deceased aiming a hoe at me (sic). As the deceased along the hoe, I knelt down as the gun was already corked. We had ran far 80 meters (sic) I now say we have ran for 80 meters. As I reached in the corner, I found the deceased aiming a hoe when the accused saw the deceased threw the hoe at me (sic). After throwing
: the hoe at me, the deceased turned back and started running. As I was trying to avoid the hoe where was coming (sic) . He replied and knelt down, as I was trying to hold the gun tightly the bullet came out accidentally and shot the deceased at the back (sic). I then saw him falling down. I reached where he was and I saw blood coming out from the chest. As it was not my intention to kill the deceased I went back to my friends."

Ms Khisa, Principal State Attorney, who appeared for the respondent, contended that there was no evidence not only that the 0/c did not instruct the appellant to chase the deceased but also that he should not at all fire the gun even in the air. She pointed out that the evidence of the O/C dispelled the appellant's claim that the deceased aimed a hoe at him because the deceased had dropped down his hoe when he started to run. Further that the evidence of the O/C and that of Temuteo Bukede dispelled the appellant's claim of first shooting in the air and then one last accidental shooting because when the appellant ran after the deceased, the witnesses soon heard rapid gun shots without a break in between. When they later met and asked him what he had done, the appellant replied that he had shot him (deceased). When the O/C asked him why he had shot him, the appellant replied that "those were the people disturbing us." According to Ms Khisa, the above evidence indicated that the killing was deliberate and with malice aforethought.

We find contradictions in the prosecution evidence in two important aspect. Firstly, with regard to the hoe, while the O/C testified that the deceased dropped the hoe and started running, Temuteo Bukede told Court that they found the hoe only 3 meters from the body. This evidence of Temuteo is supported by the evidence of Waswa John who testified that the deceased ran with his hoe in his hand. These two contradictory statements in the evidence of the prosecution can not both be true. The evidence of Bukede which is corroborated by the evidence of Waswa John lent credence to the appellant's claim that the deceased threw a hoe at him and that in dodging

the hoe, he slipped on slippery morning *grass* and knelt down when the bullet which shot the deceased went off accidentally as the gun was already corked.

Secondly, while both the O/C and Bukede agree that they heard rapid gun shots, the 0/c told Court that on meeting the appellant who was returning from chasing the deceased, the witness asked him what he had done. To that the appellant replied that “he shot him”. When asked why he shot him, the appellant answered that “these were the people disturbing us.” Bukede however, denied, not only that he heard the O/C ask the appellant “why he shot him” but also that he did not hear the answer which he O/C attributed to the appellant in response to the question He also denied that he heard what the appellant replied the O/C that “I shot him”. According to Bukede, the appellant replied that “the bullets caught him.” That evidence of Bukede in this regard tallies with the evidence of
Waswa John. In our view, the phrase “the bullets caught him” suggested involuntary shooting. That supported the appellant’s story.

The trial judge dealt with the contradictions in his judgment in this way:

> “There were indeed some contradictions1 inconsistency in the prosecution case as what the accused told PW1, PW2 and PW3 but were not grave and as such the evidence of the witnesses could not be rejected but I find the inconsistency and contradictions are similar and they do not point to deliberate untruthfulness and as such I would accept the evidence of PW1, PW2 and PW3 as being the truth I believe them in.”

With the utmost respect, we do not agree with the trial judge. We think these contradictions are grave and cast doubt on the prosection case. Had he properly evaluated the evidence before him, the learned trial judge would have seen the gravity of these contradictions and would not have found that the prosecution had proved beyond reasonable doubt that the shooting was deliberate

and with malice aforethought.

The learned trial judge further stated n his judgment that:

> "I further agree with the gentlemen assessors that the accused stopped shooting the deceased after releasing the seven bullets because he had achieved his objective."

There is not an iota of evidence on record to support that view. There is no scintilla of evidence as to the objective of the appellant. It is trite that Judges or Magistrates must act only on the evidence before them.

Ms Khisa submitted that even if it were believed that the appellant was instructed by his O/C to follow and arrest the deceased, then the force used was excessive. With respect, we do not subscribe to thatsubmission. The defence in this case is straight and simple:
accidental killing. It is plain that in such a case, excessiveness of the force used does not arise. It could only have arisen if the defence had been self-defence or defence of property. That was not the case.

In the circumstances of this case, we think that appellant's complaint was well taken. It is unsafe to allow the conviction to stand.

In the result, we allow the appeal, quash the conviction, set aside the sentence of death and order the appellant to be set free forthwith unless being held on some other lawful grounds.

Dated at Kampala this 28th day of July 1999.

G.M. Okello

Justice of Aea1

S.G. Engwau

Justice of Apea1

C.N.B. Kitumba

Justice of Appeal