THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

***CORAM*:**

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE S.B.K. KAVUMA, JA

CRIMINAL APPEAL NO. 113/2002

RWANYAGA CHARLES :::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(From C.S.C. No. 52/2001 before Hon. V.F. Musoke Kibuuka, J)

JUDGEMENT OF THE COURT

The appeal is against the conviction and death sentence, passed by the High Court at Kampala, on 16th July 2002, for the offence of murder contrary to ***sections 188*** and ***189*** of the ***Penal Code Act***.

The facts were that on 5th February 2000 at Kakooge, Luwanga Nakasongola, the appellant dropped into a shop belonging to one Namuli (PW5), at around 11:00 p.m. He found the deceased in the shop and asked him for his graduated tax ticket. He took the deceased behind the shop and to another house to look for the tax ticket.

The appellant came back a second time and took the same man (deceased) behind a neighbouring house. Soon thereafter gunshots were heard. When people gathered to find out what had happened, the appellant who was hostile told them that he had been attacked by *'aduis'*. He showed them a wound on his leg. As the Secretary for defence (PW3) approached him with a torch to examine his wound, he threatened to shoot him and then disappeared into the darkness

of the night. Security officials arrived at the scene and saw the bullet-riddled body of the deceased.

The appellant was, however, arrested the following day from a Health Centre. The postmortem on the deceased was carried out the following day by Dr. Ochen (PW1). The body had multiple gunshot wounds over the head, shattered upper limb and chest. He was indicted for the offence of murder. At the trial his defence was self-defence which the trial court rejected.

Mr. Henry Kunya appeared for the appellant while Mr. Andrew Odit, Principal State Attorney (PSA) represented the respondent.

The memorandum of appeal comprises three grounds:

"1. That the learned trial judge erred in law and fact in holding that the necessary ingredients had been proved against the appellant by the prosecution whereas not.

2. That the learned trial judge erred in law and fact when he rejected the appellant's defence of self-defence.

3. That the learned trial judge erred in fact and in law in failing to subject the evidence on record to a through evaluation and hence reached an erroneous decision."

Mr. Kunya argued grounds 1 and 3 together; ground 2 separately.

Concerning grounds 1 and 3, Mr. Kunya submitted that these grounds dealt with the participation or otherwise of the appellant.

He argued that there was no eye witness to the commission of the offence. Namuli, the shop keeper (PW5), the only eye witness was merely compelled to testify, having persistently disobeyed the court summons. A warrant of arrest had to be issued to force her attendance in court. She however, testified that she had been drinking with the deceased that night when the appellant entered the shop and took him behind the house while asking him for his graduated tax ticket. Gun shots were heard, soon thereafter.

Learned counsel contended that her evidence should have been taken with a pinch of salt on the ground that she had been forced to testify. Thus the learned judge erred to find that an unlawful act had been committed with malice aforethought.

Mr. Kunya asserted that the death was accidental. The appellant put forward the defence of a scuffle. There was therefore no justification for the court's findings especially as no one had witnessed the killing. The wound sustained by the appellant was never disputed. In fact he was arrested from Nabiswera Health Centre where he had gone for treatment and was not in hiding. He prayed court to allow grounds 1 and 3.

Mr. Odit, PSA supported the Judge's findings in regard to grounds 1 and 3.

Regarding PW5's being compelled to come to court, learned counsel submitted that all potential witnesses did not come to court. This could have been due to circumstances beyond their control. They were all compellable.

The learned trial judge dealt with the question of malice aforethought and the unlawfulness of the act. There was no defence of accident available. The prosecution evidence squarely put the appellant at the scene of crime, behind where they were drinking. Though the appellant said he was attacked on the road walking but the evidence put him behind the house. There was no scuffle. He was the last person seen with the deceased alive. The learned judge addressed the issue of the wound on the appellant's and found it was deliberately inflicted to confuse. Mr. Odit prayed court to dismiss grounds 1 and 3.

The learned judge found:

> ***" … There is nothing on record to show that the homicide was authorized by law. There is nothing to show that it was accidentally caused either. The accused, in his claim relating to being attacked by two men along the road which he claims, I have already rejected, attempted to suggest that the gun might have gone off during the alleged scuffle between himself and the alleged attacker. Since the claim of an attack on the accused is clearly an empty lie, there is no basis for concluding that the firing of the SMG rifle which the accused carried during the fateful evening was accidental.***
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> ***On the contrary, the evidence on record shows clearly that the accused selected his victim deliberately. He took him to the slaughter site and deliberately killed him. It was a very cruel and deliberate murder for which no***

excuse existed. It is, therefore, clear that this essential ingredient of the offence of murder has also been proved beyond any reasonable doubt.

In respect of the essential ingredient of malice aforethought, the evidence of all five prosecution witnesses is that the deceased was shot several times with a firearm. A gun is possibly the most lethal weapon known to the human being. It is often used in homicides. Whoever uses such a lethal weapon against another human being intends to kill that human being ….

In addition, the evidence clearly shows that the shooting was not only repetitive but also aimed at the most vulnerable parts of the deceased's body such as the head and the chest. Each of those vulnerable parts had several bullet wounds located upon it. In these circumstances, I find that malice aforethought would be properly inferred. See: Tubere v R (1945) 12 EACA 63 and Uganda v Kyobwengye (1988-1990) HCB 49.

I therefore, conclude that the prosecution has, in the instant case, proved that the act which caused the death of Kidega George, was accompanied by malice aforethought."

First of all, the issue of the witnesses' recalcitrance in answering the witness summonses raised by Mr. Kunya is not supported by the witnesses' conduct in court and the nature of their evidence. In this regard we would agree with Mr. Odit that witnesses could fail or find it difficult to answer witness summons for a variety of reasons. It would be unreasonable to impute ill motives from any such failure to attend court. Though a witness may be an accomplished liar, in most cases this is easily detected from the way they conduct themselves in answering questions in court. This, however, was not the case as the record indicates. Testimonies were spontaneous and the evidence flowed easily from each witness. Furthermore, the learned trial judge minutely examined the evidence with regard to all the ingredients of the offence, as the excerpt above shows. Their demeanour could not have escaped his attention.

The appellant's unsworn statement in court was that on 5th February 2000 at 6 p.m., he was coming from the house of the Secretary for defence LC I, (PW3) when he met two men who attacked him and tried to grab his gun. In the ensuing scuffle ***"the gun started shooting out bullets I was shot and he too was shot,"*** he stated. This story is not born out by the ghastly injuries sustained by the deceased. According to the doctor (PW1) who examined the body, the right upper limb was shattered by the shots; there were gunshot wounds over the head and chest.

'... The victim was shot with five ammunitions. The shooting must have been at short range about 3 to 7 metres away', so the report says.

We are of the view, therefore, that had the appellant and the *'aduis'* been fighting for the gun and it started releasing bullets, the shots should not all have targeted the deceased in such a manner, less so, only on the upper part of the body.

We also agree that under the circumstances of this case, self-defence was not available to the appellant. He was the last person seen with the deceased having been in and out of the shop with him thrice, quizzing him about his graduated tax ticket. It was soon after the third time that gunshots were heard. This was not on the road as the appellant claimed. It was behind a house near the PW5's shop from which they had been drinking. The grim injuries on the shattered body of the deceased could only reflect a sadistic propensity on part of the attacker as rightly pointed out by the learned judge. There was no evidence of any scuffle. The tiny wound on the appellant's leg must have been self inflicted in order to contrive an attack by ***"aduis"***. It was a futile failure.

Soon after the shooting, the appellant threatened to shoot the Secretary for defence LC I (PW3) who was approaching him with a torch to examine his wound. He then escaped into the darkness of the night. He was only arrested the following day, on 6th February, 2000 at Nabiswera Health Centre. This is not the normal conduct of an innocent person who had just been attacked by *'aduis'*. The act of killing the deceased with malice aforethought by the appellant was amply established as found by the learned judge.

Consequently we find no merit in this appeal which we dismiss forthwith.

Dated at Kampala this.9th day of April 2009.

HON. A.E.N. MPAGI-BAHIGEINE
JUSTICE OF APPEAL

HON. S.G. ENGWAU
JUSTICE OF APPEAL

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