

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON JUSTICE G. M. OKELLO, JA;
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

CRIMINAL APPEAL NO. 113 OF 1999

1. WANDERA FRED)
2. SULAIMAN MUSISI)
3. MUSANA JOSEPH)APPELLANTS

VERSUS

UGANDARESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala
(Mr. Justice Okumu Wengi) dated 15/10/99 in Criminal Session Case No. 1 of 1999)

REASONS FOR THE JUDGMENT OF THE COURT

The appellants, Wandera Fred, A1, Sulaiman Musisi, A2 and Musana Joseph A3 were tried by the High Court sitting at Kampala on an indictment for murder contrary to sections 183 and 184 of the Penal Code Act. On 15th October 1999, they were convicted as charged and each sentenced to death. They subsequently lodged this appeal to this court.

We heard the appeal on 27th November, 2001 and acquitted the appellants but we reserved our reasons. We now give our reasons for the acquittal.

The brief facts of the case are that in the month of October, 1996 a taxi driver called Mubiru Godfrey, P.W.8, was hired by some individual from a certain bar at Ntinda, Kampala. On the way P.W.8 was stopped by the passenger who together with some other people robbed his car

from him. P.W.8 had noticed that his assailants had a pistol. A few days later some people believed to be car robbers were spotted at a certain bar at the junction of Bukoto and Ntinda villages. When Mubiru, P.W.8, was informed he went to the Local Defence Unit personnel of the area who were on duty and informed them. He took four of them including the three appellants to the bar and identified the deceased as one of the suspected robbers. When the appellants entered the bar the 3rd Appellant ordered the suspected robbers to put up their hands but the deceased, instead, attempted to draw his pistol in self defence. Due to fear for their lives the appellants opened fire during which the deceased was injured. He was heard shouting that they were robbers but this was after the shooting. The deceased seriously injured but was able to talk soon after the shooting. He explained that he was an Intelligence Officer, Shalita Michael.

The Police, who happened to be nearby, visited the scene. They removed the deceased from the scene. They arrested the appellants who were held responsible for the shooting. The deceased was eventually taken to Mulago Hospital but died. The appellants were subsequently charged and prosecuted for the murder of the deceased.

At their trial Musana Joseph A3 had raised self defence in the charge and caution statement but he retracted the statement, which was, however, admitted. He, like, the other two appellants put up an alibi which was rejected by the Court and we think rightly so.

The learned trial judge having found evidence of self defence he, nevertheless, declined to avail it to the appellants because they had not pleaded it. He was of the opinion that the appellants should not have raised false alibi which did not further their case. He, therefore, found them guilty as charged and sentenced each one of them to death. Aggrieved by judgment of the High Court, the appellants appealed to this court. The sole ground on which Musana, A3 based his appeal was as follows:

“In view of the evidence on record that the deceased tried to use a pistol against the appellants when accosted by them; the learned trial judge erred in law in holding that the appellants would not rely on the defence of ‘self defence’ on the ground that they had pleaded an alibi”

The memorandum of Appeal filed on behalf of Wandera A1 and Musisi A2 contained eight grounds of Appeal but Mr. Muguluma representing them abandoned most of them and relied on the same ground as Appellant 3. He associated himself with and adopted the submissions of Mr. Ssenooba, the learned counsel for A3.

Mr. Vincent Okwanga, Senior State Attorney for the state, also concurred with both counsel for the appellants that the only issue of contention in this appeal is whether the defence of self defence was available to the appellants or not.

The learned trial judge, as can be seen from his judgment, was alive to the law governing self defence but, with respect, we find that he misdirected himself when he failed to avail it to the appellants for the reasons that they did not plead it.

We agree with the submission of Mr. Ssenooba, Counsel for A3, that even if an accused does not raise a defence but there is evidence of it, the judge has a duty to avail it to him. This was the view expressed in the case of Mancini vs. D.P.P. (1942) A. C. 1. It was followed with approval in the case of Didasi Kebengi vs. Uganda (1978) HCB 216 where it was held that:

“It is the duty of the trial court to deal with all the alternative defences, if any, if they emerge from all the evidence as fit for consideration notwithstanding that they are not put forward or raised by the defence, for every man on trial for murder is entitled to have the issue of manslaughter left to the assessors if there is evidence on which such a verdict can be given, to deprive him of this constitutes a grave miscarriage of justice”

In the instant case it is not disputed that the deceased died as a result of the injuries inflicted on him during the shooting by the appellants. The contention by the learned counsel for the appellants is that the appellants acted in self defence. We accept Mr. Ssenooba’s submission that the appellants were on duty when they were called to the bar by Mubiru (P.W.8).

It is also true and not disputed by the state that, it was honestly believed by everybody including the police that there were robbers in the bar. The truth came out after the shooting. The appellants were justified in the circumstances to fear for their lives. We do not agree with Mr. Okwanga’s submission that, it appeared the appellants did not go to the bar with the intention of

arresting the suspected robbers but of killing them. From the evidence of Gidudu, P.W.3, it is clear that the deceased who was an Intelligence Officer was armed with a pistol. The deceased explained that when he was accosted by the appellants whom he did not know he also attempted to defend himself by drawing his pistol. That is what from the evidence on record scared A3 and prompted him to order his colleagues to open fire. It is not true as contended by Mr. Okwanga that the deceased was the target of the three appellants. Only one gun was aimed at the deceased, the rest were intended to give A3 cover since they were under the impression that the men in the bar were robbers and the appellants' lives were in danger.

In considering the defence of self defence under **Section 17 of the Penal Code Act**, the principles of English law on the matter would apply. Under English law, there is a broad distinction made where questions of self defence are raised. A person who is violently or feloniously attacked can repel force by force and if in so doing he kills the attacker that killing is justifiable, provided there is reasonable necessity for killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or apprehended from the attack is really serious. In such cases there appears to be no duty in law to retreat. In other cases of self defence where no violent felony is attempted a person is entitled to reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that is necessary in the circumstances to retreat or avoid a fight or disengage from the fight, he may use such force, deadly force included, in the circumstances. In either case if force used is excessive, but there are other elements of self defence present there may be conviction of manslaughter. See (**Sulemani s/o Ussi vs. R (1963) E.A 442 Manzi Mengi v R (1964) EA 289 (C.A), Palmer v R (1971) 1 ALL E. R.1077**) The question whether a person acted in self defence or not is one of fact and each case must be considered and judged on its facts and surrounding circumstances as a whole **Plamer v R** (Supra)

In agreement with both counsel for the appellants, we are of the view that there was no opportunity to retreat in the instant case given the fact that the deceased had a pistol. There was no room to manoeuvre. The appellants apparently believed that their lives were in danger as the deceased did and we think justifiably so.

As the circumstances of this case present themselves they provide the appellants, with the defence of complete self defence. It was unfortunate that an innocent man lost his life in those circumstances.

Consequently we allowed the appeal and acquitted the three appellants.

Dated at Kampala this 23rd day of January, 2002

HON. LADY JUSTICE1. MUKASA-KIKONYOGO
DEPUTY CHIEF JUSTICE

HON JUSTICE G. M. OKELLO
JUSTICE OF APPEAL

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