THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 20 OF 2003

WANDUBIRE CLEMENT :::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. JUSTICE A.EN. MPAGI-BAHIGEINE, JA

HON. JUSTICE.C.K.BYAMUGISHA JA

HON. JUSTICE .A. NSHIMYE, JA

Reasons for Decision

On 23-1-2009 we heard this appeal, dismissed it and reserved our reasons which we now proceed to give.

The appellant was indicted, tried and convicted of murder contrary to **sections 188 and 189** of the **Penal Code Act**.

The facts were that on 21st September 1998 at Kimaluli village in Mbale District, three persons were murdered in cold blood. The deceased were two policemen namely, No 18655 SGT Etuket; No. 29890 P.C Ojok and a civilian known as Musungu John. Prior to the tragedy on 13th June, 1998 John Musungu had complained to the police at Bugebero Police Post that the appellant had committed various offences of malicious damage to property, criminal trespass and threatening violence. The appellant had since evaded arrest.

In the morning of 21st day of September, 1998 the police made an attempt to apprehend him and the two deceased policemen led by the third deceased (the complainant) headed for the home of the appellant After reaching appellant's house the deceased introduced themselves to the appellant. From 6.00 a.m. to 8.00 a.m the appellant had refused to open the door. SGT Etuket forced the door open in order to access the appellant after all other

means had failed. As he entered the house, the appellant cut off his arm with a sharp panga thereby completely severing it. The appellant grabbed the gun, shot SGT Etuket dead and also shot the other two deceased. Thereafter appellant escaped with his son. They were followed by a mob of angry villagers which caught up with them and instantly killed his son, a one Nakendo. The appellant survived narrowly by police intervention which whisked him away to safety of police custody.

The appellant was subsequently indicted and charged on three counts of murder which he denied setting up a defence of provocation and self –defence. He was, however, convicted as charged and sentenced to death. Hence this appeal.

The memorandum of appeal comprised three grounds namely that:

1. **The learned Judge erred in law and fact when he failed to evaluate evidence on record thereby convicting the appellant.**
2. **The learned trial Judge erred in law and fact when he rejected the defences of provocation and self-defence and thus establishing malice a forethought.**
3. **The learned Judge erred in law and fact when e passed a very harsh sentence of death in the circumstances.**

At the hearing, Ms. Janet Nakakande Kigozi appeared for the appellant on a state brief while Ms.Alice Komuhangi Kauka Principal/State Attorney was for the respondent.

Ms. Kigozi handled grounds 1 and 2 together and ground 3 separately. So did Ms. Alice Komuhangi Kauka.

Concerning grounds 1 and 2, Ms. Kigozi contended that the learned trial judge wrongly dismissed the appellant's defence of provocation and self-defence. The appellant was provoked when the deceased invaded his house at an awkward time of 6.00 o'clock in the morning and started banging and demolishing his house. These acts certainly amounted to provocation. It was erroneous for the judge to dismiss the appellant's defence despite the five live bullets found in the appellant's house. The deceased had forced themselves

inside the appellant's house while armed and the house was surrounded by the whole village. There was cause for fright. There was, therefore, reasonable grounds for the appellant to act the way he did, in self defence.

Learned counsel submitted that, had the learned judge properly evaluated the evidence he would have convicted the appellant of manslaughter rather than murder. The learned Judge never considered the appellant's mitigating factors, namely that he was sick, and had eight kids with no body to care for them. Ms. Kigozi prayed for the appeal to be allowed.

Ms. Komuhangi, in reply, supported both conviction and sentence. She contended that at his trial, the appellant never raised these defences of provocation and self defence.
The appellant only stated that when attacked, he ran out through the window. The learned Judge, nonetheless, evaluated the two possible defences according to law.

The learned Judge observed:
"**Lastly as to the responsibility of the accused, the law is that "in every Criminal charge it is the guilt of the accused which is in issue. Normally it is undisputed that the crime was committed by somebody; and even where the question too is in issue, the crucial question is whether it was the accused who committed it" <u>Lenton s/o Mkirila –vs- Republic [1963] E.A.9at P.11</u>.**
Here it has been contended that the accused, though being at the scene, did jump out of the window when the door was being forced open and ran into hiding only to surface at the place where his late son had been killed lynched by the mob, only to be saved by the police. However, the police officer who was at the scene clearly identified him by peeping through the same window as the man who hit late Etuket on the head, amputated his left hand, picked the gun of the deceased, and used it to kill the three deceased persons. The time was now day light and the conditions favorable for correct identification. The incident took long enough as to rule out any possibility of error. Wafula Peter (PW3) who is a person of the area knew the accused very well and fully corroborated the officer's story. PW4 CPL Ojolim Sam

who had rescued the accused from the irate mob at Bunambukye Primary School found him with a gun and disarmed him. The accused had wanted to shoot him but the firing mechanism failed This is the same gun taken from one of the deceased policemen who had failed to fire it at the scene because of the same problem. All this evidence inextricably places the accused at the scene of the crime and fully connects him with the commission of it, so any possibility of alibi is considered and found rebutted by adequate and plausible evidence, so the alibi is rejected for the reasons given above".

Regarding the two defences of provocation and self-defence, the learned judge, after reviewing the relevant law concluded:

"…… The police were acting lawfully in seeking to gain entrance by force and apprehend a suspect under ***Section 16 of the Criminal procedure Code****. Secondly, a lot of time passed between the time of arrival, and the time of the killings coupled with exchange of words as to show the occupants of the house that the police were there for lawful purposes and had nothing to fear, but the occupants instead resorted to violence and hence the killings. Provocation is thus ruled out, and is not available in these circumstances. Similarly self-defence is ruled out since the circumstances show that the police were acting lawfully, they never attacked the occupants with any amount of force necessitating the cutting of late Etuket's hand, severing his left hand, picking up the gun of the deceased and shooting him dead together with P.C. Ojok and Johhn William Musungu".*

We cannot fault the learned trial judge. He exhaustively reviewed all the evidence on record. The appellant was pinned down in the commission of the three grisly murders in cold blood, for which the defence of provocation and self-defence cannot by any imaginable yard stick be availed him.

Submissions on the other ground were mere repetitions.

For the above reasons we dismissed the appeal.

The learned Judge considered the submissions in mitigation and found them unhelpful. This was case of extreme and unwarranted savagery.

We thus uphold the findings and the sentence passed by the High Court.

Dated at Kampala this 18th day of January 2010.

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

HON. JUSTICE.C.K.BYAMUGISHA
JUSTICE OF APPEAL

HON. JUSTICE .A. NSHIMYE
JUSTICE OF APPEAL