

UGANDA / JUDGMENT

Damulira v Reginam (Criminal Appeal No. 48 of 1956) [1950] EACA 501 (1 January 1950)

[1950] EACA 501

COURT

East African Court of Appeal

BEFORE

Bacon, JA, Sinclair, VP, Worley, P

CASE / FILE NUMBER

Criminal Appeal No. 48 of 1956

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H. M. COURT OF APPEAL FOR EASTERN AFRICA

Before SIR NEWNHAM WORLEY (President), SINCLAIR (Vice-President) and BACON, Justice of Appeal

YOWERI DAMULIRA, Appellant (Original Accused)**REGINAM, Respondent****Criminal Appeal No. 48 of 1956**

(Appeal from the decision of H. M. High Court of Uganda, Lewis, J.)

Homicide in defence of property—Degree of force permissible—Malice—Uganda Penal Code, section 182.

The accused was convicted of the murder of a suspected chicken thief whom he beat with a stick causing injuries which resulted in death.

Held (12-4-56).—The trial Judge had failed to direct himself specifically on the question of malice and the evidence left a reasonable doubt whether the accused intended to kill or do grievous bodily harm to the deceased.

Conviction for murder quashed and a conviction for manslaughter substituted.

No cases.

Appellant in person.

Dickie for respondent.

JUDGMENT (prepared by Sinclair, Vice-President).—The appellant was convicted by the High Court of Uganda of the murder of one Male. He did not dispute that he caused the death of the deceased, but his defence was that he thought he was striking an animal. In an extra-judicial statement which he made to the police he said that on the night when the deceased received his fatal injuries he was sleeping alone in his house. The house was built of mud and thatch. At the back of the house and forming part of it was a chicken roost. The back wall of the house was one of the walls of the chicken roost and there was an entrance into the house from the chicken roost. There were no chickens in the roost at the time as they had all been stolen some time previously. Late in the night he was wakened by hearing the door of the chicken roost being opened. He called out twice "Who is that", but received no answer. He heard the door of the chicken roost being opened again and he then went outside. Behind a tree about four feet from the house he saw a "bulky thing" and thinking it was an animal he struck it three times with his stick. At the third blow he heard the deceased cry out "Don't kill me. I am Male". He asked the deceased why he had come, to which the deceased replied "Nothing". He told the deceased to go and when he saw him moving off, he returned to his house. After some time he heard the deceased call out. He got up and found the deceased had fallen down under a tree. He then reported to his neighbours. At the trial he adhered substantially to this statement.

The deceased was taken to Mityana Hospital where he died later in the day from his injuries. The post-mortem disclosed that he had a cut in the scalp one and three-quarter inches long, bleeding over the brain in the right frontal and left occipital regions, bruising on both forearms above and below the elbows and further bruising on the chest. The cause of death was shock from multiple injuries.

The learned trial Judge rejected the appellant's story that he thought he was beating an animal and was satisfied that the appellant knew he was striking a man. He inferred that the deceased, who had previously been convicted of theft, went to the house to steal and found that the appellant must have drawn the same inference. After reviewing the law as to the use of force against a housebreaker or a trespasser, he held that the deceased did not show any intention to accomplish theft by force and that, in the circumstances, the appellant had no legal justification for beating the deceased at all, let alone in the manner he did. Accordingly he convicted the appellant of murder.

The learned Judge gave cogent reasons for his finding that the appellant knew he was striking a man and we can find no good reason for disagreeing with that finding. But in his judgment he did not specifically direct himself on the question of malice aforethought. We have therefore had to consider whether the evidence established beyond reasonable doubt that when he assaulted the deceased, the appellant intended either to kill him or at least to inflict grievous bodily harm. The stick which the appellant used in his assault on the deceased had a diameter varying between about one inch to one and a half inches and weighed about one and a half pounds. It was not a

lethal weapon. When death is caused by the use of a non-lethal weapon an inference of malice is much less readily drawn than when a lethal weapon is used. Here the deceased was apparently crouching behind a tree and in the darkness it is unlikely that the appellant could have deliberately directed his blows at vital parts of the body. Taking that factor and the nature of the weapon into consideration we think that there is at least a reasonable doubt as to whether the appellant intended to kill or do grievous harm to the deceased. The conviction for murder cannot therefore stand.

The remaining question to be decided is whether the appellant was justified in using the degree of force he did in defence of his property. There is no doubt that the appellant was entitled to drive off a person who was attempting to break into his house and, if necessary, to inflict death in so doing. As is stated in Archbold's Criminal Pleading Evidence and Practice, 33rd ed., p. 943: "If any person ... attempts burglariously to break into a dwelling-house in the nighttime, and is killed in the attempt, the slayer is entitled to acquittal, for the homicide is justifiable, and the killing is without felony". But the homicide can be justified only if it is necessary. In **Russell on Crime**, 10th ed. at p. 498 it is said: "It has been observed that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only on the plea of necessity, it cannot be justified unless the necessity continues up to the time when the party is killed". At the time when the deceased was attacked by the appellant he had desisted, at least temporarily, from the attempt to break into the house and it was not at that time necessary for the appellant to use extreme force to prevent the deceased from breaking in. Had the appellant attacked the deceased when he was actually attempting to break into the house he would no doubt have been justified in using the force he did. He was, however, entitled to use such force as was reasonably necessary to expel the deceased from his premises or to arrest him, but we think that the force which he used was unnecessary and excessive in the circumstances.

Accordingly the conviction for murder is quashed and the sentence of death set aside and a conviction for manslaughter contrary to section 182 of the Penal Code is substituted therefor. The appellant will undergo a sentence of one year imprisonment with hard labour to commence from the date of conviction by the High Court.

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