

UGANDA / JUDGMENT

Uganda v Kimuda & Ors (Criminal Session Case No. 1201/96) [1996] UGHCCRD 3 (8 November 1996)

[1996] UGHCCRD 3

COURT

HC: Criminal Division (Uganda)

BEFORE

Engwau, J

CASE / FILE NUMBER

Criminal Session Case No. 1201/96

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT Jinja**CRIMINAL SESSION CASE NO. 1201/96 UGANDA VERSUS
MANUEL KIMUDA BENEFACE MUDHERE ACCUSED MUHAMED
GULOBA****BEFORE: THE HONOURABLE MR. JUSTICE S. G. ENGWAU****JUDGMENT**

A1 Manuel Kimuda, A2 Banaface Mudhame and A3 Muhamed Guloba all of Rvala 'C' village, Badondo exhounty in Jinja District were jointly indicted for murder s/ss 183 and 184 of the Renal Code Act. It was alleged that the three accused persons on 12th day of Neughber to at Dayale "U" village Budond, subcounty in Jinja Distribut, murdered Mutwalibi Were.

The prosecution made an effort to prove the above allegation by calling find mitnesses. Evidence of PWI is that on the fateful day at around 11.00a,m she was cooking in her home when she heard an alarm being made from the direction of the land of A1. The answered the alarm and on her way she met A2 riding his bioyole towards the direction where the alarm was being made.

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As they were running towards the scene A2 abandoned his bicycle and both of them continued running on foot with A2 on the lead. At the scene of crime PW1 said she found A1 holding the deceased by one leg and A3 was holding him by the other leg and the deceased was lying down with his face full of blood. An inquiry by A2 on what was the matter, A1... immediately aliged that he had caught the deceased stealing his coffee from the garden.

Apparently on hearing that allegation the witness A2 also started to assault the deceased with a cassava stem which he had picked on the way to the scene. The continued to say all the three accused persons simultaneously beat the deceased with the cassava stems. She was too horrified with the sight that she hardly spent one minute at the scene. The ran back

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home while making an alarm in order to attract the attention of neighbours. As a result one Bumakali and Khalidi Nduse answered her alarm.

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On her way to the scene the second time with those people she mentioned had answered her alarm; they met A2 who informed them that the deceased had died. However, she saw the shirt which A2 was wearing had some blood stains. For fear the witness together with Bumakali and Khalidi did not reach the scene and : they dispersed individually to their different directions.

In his testimony, PT2 stated that on the 12th day of November 1995 at around 11.00a.m he heard an alarm while he was fishing in River Kiira. After fishing he way on his way home when he found a group of people gathered near a dead body which was lying down. He recognized the body to be that of Mutwalibi Were. The external appearance of the body gave the witness an impression that it was assaulted. It was soaked in blood so the witness made a report to the police.

On receiving information of a murder case allegedly committed in Buyala 'C' village on 12th November 1995, the police officer PW3 visited the scene of crime. At the scene the LCI chairman Buyala 'C' village identified the body of the deceased f as that of Mutwalibi Were. The witness on observing the body discovered multiple injuries on the head. The witness also found A1 and A2 at the scene. Around the scene the witness observed broken pieces of cassava stems which were stained with blood which he suspected to have been used in assaulting the deceased to death. In addition A2 handed to him a cassava stem which was allegedly used by A1 in assaulting the deceased to death. The witness was also given a black paper bag containing some ripe coffee beans allegedly stolen by the deceased. On the strength of all that information PW3 arrested A1 and took him to the police station with exhibits aforementioned. The following morning the witness took a doctor PW5 to the scene where a post mortem examination was carried out.

PW4 who also answered the alarm being raised by A1 on the material day said he found Mutwalibi Were dead on a coffee garden belonging to A1. He also found all the accused persons at the scene of crime and all of them were armed with cassava

stems. The witness testified that he found A2 standing near the body of the deceased while A2 and A3 were standing some distance away. The witness heard utterances by A1 to the effect that he was tired of theft while at the time he was beating the dead body with a cassava stem. In the course of doing that the witness heard A1 challenging the dead body to stand up and steal him again. However, A2 stood mute.

The witness further said he heard A3 also challenging the dead body to stand up and curse him as an uncle. PW4 said he was so scared of what he had been that he ran away to inform more people of the area about the incident. The witness left all the three accused persons wielding their weapons of cassava stems. After gathering more people the witness returned to the scene but this time he found A1 and A3 had already dropped down their cassava stems. On careful examination of the body, the witness said he saw a big cut wound across the middle of the deceased's head and the body was lying side ways. He also observed that there was a black container containing coffee beans which were allegedly stolen by the deceased.

The medical doctor who carried out the post mortem examination PW5 said that at the request of the police he visited the scene of crime at Buyala'C' villagg on 13.11.95. He found a dead body in a coffee garden which was identified to him as that of Butwalibi Were. His clothing was blood stained and he saw some broken cassava stems around the scene. The body which was well nourished was identified by one Khalidi Nduse. He observed multiple wounds on the head which he did not count or measure. In fact an autopsy was not done due to lack of facilities. In his opinion PW5 said the cause of death was head injury due to beatings by blunt objects which he suspected to be cassava stems.

On the very day PW5 also examined A1 and A2. He found A1 to be having a swelling on the right hand 10cm x 10cm and another swelling on the left knee measuring 10cm x 10cm. In his opinion the doctor concluded a blunt stick must have been used to inflict those injuries. However, mental condition of A1 was normal. As regards to A2 the doctor found no injuries on him and his mental condition was also normal. A3 was examined by PW5 on 21.11.95 where he observed no injury on him

and his mental condition was normal. The post mortem report on the deceased was exhibited in court as exhibit P1, medical report on A1 was Exh. P2, medical report on A2 was Exh. P3 and medical report on A3 was Exh. P4 respectively.

In his reaction to the prosecution evidence aforesaid, A1 denied the charge of murder and testified that on the material day as he was checking on his coffee garden he found the deceased picking his coffee as a thief. He raised an alarm which the deceased answered by picking a cassava stem with which he hit A1 across the back of his head causing a big out wound. In court A1 showed a large scar on that part of his head. In addition A1 claimed that the deceased beat him on the left arm as he was trying to protect his head and also beat him on the left knee. The

immediate reaction on the part of A# was that he snatched that cassava stick from the deceased with which he also hit the deceased across the head twice on the same spot. As a result the deceased fell down dead instantly. A1 said he remained at the scene of crime until his arrest. The weapon used was given to the police officer PW3 including some coffee beans contained in a black polythene bag which he found the deceased stealing. Further in his defence A1 pleaded the defence of provocation, defence of self defence and the defence of his property.

In his defence on unsworn statement A2 stated that in 1995 he was the vice chairman LC1 Buyala 'C' village. On that material day at around 11.00am he heard an alarm which he promptly answered. At the scene of crime he found the dead body of his late subject one Mutwalibi Were and he also found A1 at the scene. This was in a coffee garden belonging to A1 in which some cassava was also planted.

In his inquiry A1 informed him that he allegedly found the deceased stealing his coffee and when he raised an alarm the deceased violently attacked him. In self defence and in defence of property namely coffee, A1 admitted having grabbed the very cassava stick which the deceased was assaulting him and he also avenged by beating the deceased with the cassava stick. A2 continued to say he directed A1 to keep the scene untampered with meanwhile he was going for the police and more

LC officials. He also came along with the police officer ! PW3 to whom he handed A1 and exhibits including coffee beans in a black polythene bag and cassava sticks. The accused in his defence pleaded on alibi.

In his defence on unsworn statement A3 said on 12.11.95 at around 12.30a.m he was at his home buying coffee when he saw A2 collecting people of the area on the allegation that his father A1 had killed a thief he found stealing his coffee. Reacting on that information A3 said he walked the whole distance of 12 miles where he found the body of the deceased lying down in a coffee garden belonging to A1. He also found A1 at the scene armed with a cassava stick. A1 repeated the allegation that he had found the deceased stealing his coffee and when he raised the alarm the deceased attacked him. In self defence A1 grabbed the cassava stick with which he hit the deceased twice on the head and the deceased fell down dead instantly.

The accused further said he remained at the scene of crime the whole day waiting for the doctor to arrive but all in vain. The following day PW3 brought the doctor PW5 who then carried out a post mortem examination on the body of the deceased. A1 was arrested and taken to the police station with the necessary exhibits found at the scene. On 21.11.95 when A3 went to see his father (A1) at the police station he was also arrested on the allegation that he was suspected of this offence but raised a defence of alibi.

On arraignment all the 3 accused persons pleaded not guilty to the charge. In that regard a plea of not guilty made every ingredient of the offence an issue for the prosecution to prove on all of them: *R. v. Sims* (1946) 1 KB 531. This burden of proof always rests on the shoulders of the prosecution throughout the trial and that burden never shifts to an accused person. The standard of proof is that of beyond reasonable doubt and this principle was laid down as far back in the case of: *Woolmington v. DPP* (1935) AC 462.

The essential elements in a charge of murder include the following:-

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THAT, there was death of a person named in the \$(a)\$ indictment;

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- THAT, that death was unlawfully caused; \$(5)\$
- THAT, that death was caused with malice aforethought; and \$(c)\$

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THAT, the accused person participated in the killing \$(a)\$ after forming a common intention to peruse unlawful act.

It is evident from the evidence on record that Mutwalibi Were herein named in the indictment is dead. There is overwhelming evidence from both the prosecution witnesses and the accused persons to the effect that Mutwalibi Were met his death on 12.11.95 at Buyala 'C' village in the Jinja District. It is therefore safe to assert that the prosecution has proved this ingredient of the offence of murder beyond reasonable doubt.

On the issue of whether Mutwalibi Were's death was unlawfully caused on the material day, both the prosecution and the defence sides again conceded that Mutwalibi Were was unlawfully assaulted to death. In fact A1 plainly admitted having assaulted the deceased with a cassava stem on the head and he died instantly. In that regard again the prosecution has proved that ingredient of murder beyond reasonable doubt.

Whether whoever killed Mutwalibi Were did so with malice aforethought was another ingredient in issue. The prosecution evidence of eye witnesses is that when PW1 arrived at the scene of crime, she found the deceased lying down in a coffee garden. He was soaked in blood while A1 and A3 were both holding him by the legs respectively. She was so scared of the sight that she hardly spent one minute at the scene of crime. In the premises that witness did not see who assaulted the deceased to death. She did not also see the weapon which was used in causing that death.

In the evidence of PW4 another eye witness, when he answered the alarm he found the deceased lying dead in a coffee garden belonging to A1. This witness further testified that at the scene of crime he found all the 3 accused persons. A1 was standing nearest to the dead body while A2 and A3 were standing some distances away. The witness found the accused persons armed with

cassave stems. He did not see who struck the fatal blow which killed the deceased. However, the witness heard A1 making utterances to the effect that he was tired of theft and therefore he challenged the dead body to stand up and

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steal him again. While making such utterances the witness said he saw A1 beating the body with a cassave stem.

As regard A2, PW4 said he saw him standing some distance away from the dead body. Although the witness saw him armed with a cassava stem but he stood mute. The witness further testified that he also heard A3 making some utterances. He heard A3 challenging the dead body of his uncle to stand up and curse him. All in all this witness also did not see who actually murdered the deceased.

In his defence, A1 readily admitted having struck the deceased with a cassava stem on the head twice allegedly in self defence and also as a result of provocation. In his testimony on oath, A1 said he found the deceased stealing his coffee from the garden. The deceased had put the coffee beans in a polythene bag which A1 handed to the police as exhibits. On finding the deceased stealing his coffee, A1 raised an alarm which the deceased responded by picking a cassave stem with which he hit A1 on the back of the head. Apparently the wound was so big that at the trial a larger scar was visibly seen on the head of A1. Medical report compiled by the doctor PW5 who examined A1 one day only after the incident, found him also with a swelling on the right hand 10cm x 10cm and another swelling on the left knee 10cm x 10cm. The doctor concluded that a blunt object like a stick must have been used in causing those injuries.

To frame it all A1 claimed that he snatched the very cassava stem from the deceased with which he also struck him across the head twice on the same spot which sent the deceased dangling on the ground and he died instantly. A1 therefore raised a defence of provocation in which he said that there was no cooling moment for his temper and in that situation he also struck the deceased with the very stick which the deceased hit him. After carefully scrutinizing the evidence on record the assessors and I conceded that defence of provocation was available to A1 in the circumstances of the case: *John Habonga v. R.* (1973) 1 UGH 80.

In his defence A1 further pleaded self defence and the defence of property in that it was the deceased who hit him first with a cassave stem 3 times. In retaliation he grabbed

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the very cassava stem with which he also hit him twice. In the course of that fateful moment, A1 was trying to defend himself as the deceased violently attacked him first. In addition, the explanation by the accused was to the effect that he was aiming at disabling the deceased so that he (the deceased) would be arrested for the coffee he was found stealing. The evidence is that the weapon used in causing death was a cassava stem. In my view which was supported by the assessors, cassava stem is not a deadly weapon within the meaning and definition of section 22 of the Penal Code Act.

In view of the evidence on record, the assessors and I again agreed that self defence which A1 pleaded was available to him. As regards defence of property it must be a question of fact in each case whether the degree of force used in defence of property which caused death was, in the particular circumstances of the case, justifiable or, if, unjustifiable, whether it was such as to amount only to manslaughter, or so excessive as to constitute the offence of murder. A1 in his defence testified that he found the deceased stealing his coffee from the garden. PW3, PW4 and PW5 said they saw coffee in a black polythene bag. In fact the police officer who visited the scene PW3 said he took that coffee to the police station as exhibit. A1 was entitled to use force to protect his coffee which was being stolen. It was the deceased/thief who started beating him. In those circumstances A1 used reasonable force to retrieve his coffee: *Mayva s/o Robi v. R.* (1959)EA 660.

In our view, however, the defence of provocation, self defence and defence of property in the circumstances of this case did not exonerate A1 totally. The defences are available to A1 to the effect that he is guilty of a less cognate offence of manslaughter, c/ss 182 and 185 of the Penal Code Act.

In their defences on unsworn statements both A2 and A3 denied the charge of murder in toto. Each of them claimed to have gone to the scene of crime in answer to the alarm which was being made by A1. A2 in his capacity as vice chairman LCI of the area reported the matter to the police and handed A1 to the police when they visited the scene of crime. Both A2 and A3 pleaded : defence of an alibi. In the circumstances, it is

incumbent upon the prosecution to rebut the defence of alibi beyond reasonable doubt. It is trite law that the burden does not shift on to the accused person: *Sekitoleko v. Uganda* (1967) EA 531.

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In the instant case the eye witnesses PW1 and PW4 in their evidence put all the accused persons at the scene of crime. However, neither PW1 nor PW4 could precisely state the degree in which both A2 and A3 participated in the killing of the deceased on the material day. Apparently, both PW1 and PW4 arrived at the scene of crime after the deceased had already died. The mere fact that A2 and A3 were found at the scene by these witnesses is not in itself enough to prove that they participated in the killing of the deceased. If anything, that evidence is supportive of both A2 and A3 in their evidence when they stated that they went to the scene of crime in answer to the alarm which was raised. Contrary to the opinions of the assessors, with due respect, I am of the opinion that the defence of alibi pleaded by A2 and A3 is available to them. In the premises with due respect to the assessors' opinions I do not find cogent evidence on record linking A2 and A3 with the offence with which they are charged. Accordingly both A2 and A3 are hereby acquitted of the offence now before court under section 81(6) of Trial on Indictments Decree and each of them is discharged forthwith unless being lawfully held for some other crime.

> 5. G. ENGWAU JUDGE 8.11.1996

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Manslaughter carries a maximum sentence of life imprisonment. It is therefore a very serious offence indeed. However, this court has considered the circumstances under which this offence was committed. It was the deceased the struck the convict first when found stealing coffee.

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Court has vailed the convict the defences of provocation, self defence and the defence of his property. All along the accused was willing to plead guilty to the offence of manslaughter which was denied of him by the prosecution.

The convict is of an advanced age. He is about 60 years old. He has good record during his life except for this offence. He is first offender who has been on remand for well over 1 year.

The prosecution does not insist on a deterrant sentence either. Accordingly, a lenient sentence is appropriate in the circumstances of this case. The accused is therefore senienced to 2 years imprisonment.

> 3. G. INGTAU JUDGE \$0.11.96\$

R/A against conviction and sentence explained to the convict.

3. G. INGWAU JUDGE 8.11.96

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