

UGANDA / JUDGMENT

**Uganda v No. 68816 PPC Elwelu
(Criminal Session Case 132 of 2023)
[2025] UGHC 118 (31 January 2025)
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COURT

High Court of Uganda

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Criminal Session Case 132 of 2023

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT HOIMA
H. C. CRIMINAL SESSION CASE NO. 00132 OF 2023 (Arising from Hoima Criminal
Case No.0040/2021; CRB No. 138/2021)**

UGANDA=====PROSECUTION

VERSUS

NO. 68816 PPC ELWELU DENIS SAMSON=====ACCUSED

BEFORE: HON. JUSTICE BYARUHANGA IESSE RUGYEMA

JUDGMENT

- The accused No.68816 PPC Elwelu Denis Samson, was indicted with [1] the offence of Murder C/ss 188 & 189 PCA. It is alleged that on 13/3/2023 at Kikuba 'A' Village in Kikuube District, the accused with malice aforethought unlawfully caused the death of Tumusiime Evelyne alias Namukisa. The accused pleaded not guilty to the offence.
- [2] It is the prosecution case that on 13/3/2023, during the COVID days and the related curfew regulations that were reigning during the period, the accused was part of the police 2-man team, headed by **Sgt Joseph Oyoro** (as he was then) as the commander, that went to Shedrack Muhumuza, the Area L. C. III Chairperson's place to quell the mob that had put a one **Ogang's** Music system machines and other people at risk. **Shedrack Muhumuza** had organised a celebration party for his election. As the police team managed the mob who were throwing stones and other hurting items, the accused discharged a bullet from his gun to dispel the mob. The bullet ended injuring a one **Tumusiime Evelyne** who was among the crowd and later succumbed to the injuries and died.

- In his sworn statement, the accused stated that on 13/3/2021, at around 9:00pm, he and his officer in-charge, Sgt Oyoro proceeded to Kiswaza at a one **Muhumuza's** place, the Area L. C. III Chairperson elect who had organised a party to celebrate his election. It was COVID time to close the partying but when they stopped the music that was being

played, the people celebrating the party became violent to police and the Disco jokers operating the Music system by throwing at them bricks, stones and cut off of trees. That the crowd became riotous and he was confronted by 4 men who include an energetic man who manhandled him and as he struggled trying to protect the gun, he discharged 2 ammunitions. This is when this man released him and the crowd scattered. He and his in-charge managed to vacate the ground and from the crowd. It was later when they had left the scene and withdrawn at the station that they received information regarding an injured lady. At around midnight, he was arrested on allegations of shooting a person during the crowd control at the Chairman's place. The bullet he discharged caught a lady who died while being rushed to Hoima hospital.

- In criminal cases, it is trite that it is the duty of the prosecution to prove the guilt of the accused person beyond reasonable doubt and that the burden of proof does not shift to the accused person. It remains with the prosecution except in some exceptional cases where the statute provide otherwise which is not applicable to the instant case, *Woolmington vs DPP* [1935] A. C 462 and *Oketh Okale vs R* [1965] E. A 555. It is also the law that a conviction should not be based on the weakness of the case as put up by defence but it must be based on the strength of the prosecution case, *Uganda vs Olova s/o Yovan Oweka* [1977] HCB 6.
- In the case of murder as the instant case, the prosecution can only secure a conviction after proving inter alia, each of the following ingredients:
 - (1) Death of the person named in the indictment.
 - (2) Death was unlawfully caused.
 - (3) Death was caused with malice aforethought.
 - (4) The accused participated in the commission of the offence or was responsible for the death of the deceased.
- As regards the ingredient of the offence, it was not contested by the defence. The prosecution adduced evidence of a post mortem report under S.66 TIA which was admitted as P. Exh.1 and the report is to the effect that the deceased sustained a fracture of the th finger and a deep

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fracture of the lower jaw from a gunshot. The deceased died of haemorrhagic shock.

- All homicides, i.e. the killing of a human being by another are presumed unlawful unless the killing is authorised by law e.g. execution of a lawful order/sentence, accidental or in defence of a person or property, the killing of the deceased was unlawful, **Gusambuzi**

Wesonga vs R [1948] 15 EACA 65. In the instant case, the accused raised the defence of self-defence and property. Whereas the ¹ingredient of the offence was duly proved beyond reasonable doubt, the ²ingredient of the offence is to be analysed while considering the ³rd and ⁴th ingredients of the offence.

- As regards the ³rd and ⁴th ingredients of the offence, the prosecution ⁸adduced evidence of the eye witness, Retired AIP Joseph Oyoro Carter (PW2) who testified that he commanded the operation to manage a crowd at the L. C. III Chairman's place celebrating his election victory during COVID times and while at the scene, violence erupted and the crowd/mob started throwing stones at the 2 men police. During the attack by the mob, the accused who was with him operated fire which he later heard that a bullet caught a lady. During cross examination, PW2 explained that at the scene, they were 2 in number and he had briefed the accused to only act in accordance with his command and therefore, the accused fired a bullet without his order.
- The accused and his witness, Ojwang Abubaker (DW2) who had ⁹accompanied the police to the scene on the instruction of his boss, a one **Ogam Steven** who had contributed a Music system (Disco) to the celebrants at the L. C. III Chairperson's party of his election victory, required the D. J to close the music as it had clocked 9:00pm because the rules of COVID then required early closure. The crowds who were enjoying the music became rowdy and defiant and started throwing bricks, stones, bottles and stick to police and the D. J. In the process, 4 boys attacked the accused and one of the energetic one got hold of the accused as teargas reigned and in the process, he heard bullets discharging. The discharged bullets scattered the crowd and the accused was able to save his gun which was at the risk of being grabbed and the music system equipment was also safely secured. It is later

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that a certain lady was reported injured by a stray bullet, she later died as she was being taken to the hospital.

- ¹⁰ Under S.191 PCA, malice aforethought is defined as an intentional killing of a human being or knowledge that the act or omission will result into death of a human being, see **Mugao & Anor vs R [1972] 1 E. A 543**. Decided cases have established that to determine whether or not the prosecution has proved malice aforethought, court takes into account the circumstances surrounding each particular case. The circumstances include the nature and number of injuries inflicted, the part of the body injured, the type of weapon used and the conduct of the accused before, during or immediately after the injuries were inflicted, see **Tubere vs R [1945] 12 EACA 63** and **Mbugua vs R [2000] 1 E. A 150 (CAK)**.
- ¹¹ In the instant case, it is apparent from PW2 the eye witness and the defence that the accused discharged bullets as a result of the crowd that was celebrating the L. C. III Chairman's election victory becoming rowdy and attacked police and the D. J of the Music system when it was ordered that they close the celebrations due to the COVID rules by then that required early closure. It is when in particular the accused was manhandled by one of

the energetic boys in the crowd that put at risk his person, gun and property that he found himself discharging 2 bullets from his gun and ended up unknowingly injuring the deceased who later succumbed to the bullet wounds and died while being taken. This explains why the accused after the incident to the hospital. remained at the station until midnight when he was arrested. He never fled the station.

- [12] It is clear from the above that the intention of the accused was to dispel the rowdy crowd and not to kill a human being. The accused's conduct after the incident is evidence of lack of knowledge that his act would cause death or result in the injury of anybody. I find that malice aforethought has not been proved against the accused person.
- [13] In the instant case, the accused raised a defence of self-defence and defence of property when he discharged the bullets that ended fatally injuring the deceased, S.15 (a) PCA.

In *P. C Ntegeka Ismail vs Uganda Crim. Appeal No.123/2020 (C. A)* citing *Palmer vs The Queen* [1971] 1 ALL ER 1077 and *Backford vs The Queen* [1987] 3 ALL ER 425, Court stated;

"The common law recognises that there are many circumstances in which one person may inflict violence on another without committing a crime, as for instance in sporting contests, surgical operations or, in the most extreme example, judicial execution. The common law has always recognised as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed". (underling given).

Further, that an accused person relying on the defence of self-defence must have used reasonable force to repel the attack, otherwise the defence will not be available.

[14] In the instant case, it is apparent that the attack by the crowd put him in an immediate peril and the gun he held was at the risk of being grabbed and property vandalised. At least, he genuinely and honestly believed that the man who manhandled him targeted the gun. appears he acted in a panicky manner to prevent crime by the rowdy crowd in the circumstances of this case.

[15] In his defence, the accused stated during cross examination thus:-

"It is the way that I was attacked that prompted the discharging" $\mathcal{L}$ of ammunition because the man who grabbed me was aiming at disarming me the gun. I released the bullet to the air to scare and scatter the crowd for our safety and the gun. I managed to save the gun and our lives".

The above evidence is well corroborated by the accused's Charge and caution statement (P. Exh.3) that was exhibited by the prosecution and the evidence of DW2 who was at the scene and therefore an eye witness.

[16] In view of the evidence of PW1 who stated that they were attacked and stones were being thrown at them by the crowd and the accused's Charge and caution statement (P. Exh.3), I believe the accused's version

as regards the material facts on the ground. The accused's actions were prompted by an attack on his person and need to protect the gun. According to the post mortem report, the deceased sustained an injury to the 4th finger. Clearly, this is evidence that she was never targeted and this must have been a result of bullet fragments that caught her among the crowd. In this case, no evidence was adduced by the prosecution to rule out the accused's claims that the bullet(s) caught the deceased accidentally on the 4th finger and the jaw.

[17] In P. C Ntegeka Ismail vs Uganda (supra)

"The law on self-defence as we understand it is that where there is aggression against a person from which death or grievous bodily harm may occur, that person is entitled to take reasonable defensive action against the aggression. What amounts to take reasonable defensive action is for the court to determine taking into account the unique circumstances of each case, but the court must consider the circumstances as the accused person honestly and genuinely believed them to be. Where a person attacked only did what he honestly and instinctively thought was necessary, he is deemed to have taken reasonable defensive action."

[18] In the instant case, I find that the accused person took defensive action genuinely and honestly believing that his person, the gun he was holding and property at the scene were at risk of the rowdy crowd. The discharging of 2 bullets in the air and not aiming at the crowd, was such reasonable action in the unique circumstances of this case.

[19] For the above reasons, in agreement with the gentleman and lady assessors, the death of the deceased is found to be excusable. It arose as a result of a crowd which had become uncontrollable and was dangerous during the COVID curfew time. The crowd hurled stones, sticks, bricks and even manhandled the armed accused person and in self-defence and defence of the gun and property at the scene discharged bullets in the air. The accused is found not guilty of the offence of Murder and is accordingly acquitted.

Dated at Hoima this 31st day of January, 2025. **Byaruhanga Jesse Ruggyema Tudge**

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