

UGANDA / JUDGMENT

Uganda v Salabwa & Anor (Htc-00-cr-sc-0791--2016) [2018] UGHCCRD 106 (16 May 2018)

[2018] UGHCCRD 106

COURT

HC: Criminal Division (Uganda)

BEFORE

Kwesiga, J

CASE / FILE NUMBER

Htc-00-cr-sc-0791--2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0791-2016

UGANDA :::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

1. WILLIAM SALABWA
2. MUGERWA VINCENT :::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE J. W. KWESIGA JUDGMENT

William Salabwa and Mugerwa Vincent are charged with Murder Contrary to Sections 188 and 189 of the Penal Code Act. It is alleged that on the 18th June 2011 at Naalya, Magonja village, Nangabo Sub-county in Wakiso District, with malice aforethought caused the death of Mutabazi Enock.

Throughout the trial, the record shows that Mr. Muhumuza Edward SSA appeared for the prosecution while Mr. Rashid Babu appeared for the Accused persons. The Accused persons pleaded not guilty to the charge of Murder. This left the burden of proof upon the prosecution to prove the following ingredients of the offence:-

1. Proof that Mutabazi Enock is dead.
2. That the death was caused unlawfully.

3. That death was caused with malice aforethought, that there was the appropriate mensrea.
4. That the Accused persons caused death of the said Mutabazi Enock.

I will first summarize the evidence given by the witnesses in the trial after which I will apply the evidence and the Law to determine whether the state has discharged its duty. The fundamental rule is that every person charged with any criminal offence is presumed innocent until he pleads guilty or he is proved guilty. (See Article 28(3)(a) of The Constitution of the Republic of Uganda.

Therefore, the prosecution is required to prove all the elements of the offence beyond reasonable doubt. See the holding by Lord Sankey LC in *Woolington Versus P. P.* [1935] AC 462.

To discharge its duty, the prosecution called the evidence of the witnesses whose evidence is summarized below:-

PW1 - Mugisha Alex. 35 years old peasant. He used to stay in the home of Al, Salabwa at Nalyaa Makajo, Nangabo and that A2 Mugerwa was Al's Lawyer, this part of evidence is not contested.

On 18th June 2011, Al who had taken cows to the farm at 9:00 a.m came back home running and reported that the land had been taken. Al rang A2 and told him the land was being taken. Later on A2 came and told everyone that had gathered to get armed with pangas, sticks to fight those who were taking the land. PW1, Al, Musoke and Kajabi got armed with panga and sticks. A2 instructed the group to raise alarm and run towards the land.

He saw Musoke raising a panga to cut Kalisa but Kalisa dodged and it cut a banana plant. The policeman fired bullets. A2 commanded the group not to fear and the group moved towards the people who were planting boundary poles.

A2 was talking to a man when Musoke came with a panga. The man tried to run but A2 held the man and Musoke came and cut the man on the head. Musoke is a son of Al.

Later, his relationship with Al became bad, he left. He was arrested from Rukungiri, charged with Murder. Under cross-examination he stated, he was with Al when A2 arrived and Al said A2 was his Lawyer. He used to

live in the boys quarters of Al. Musoke had his own home and family. He did not know the deceased and did not mention the name Enock to the police. Al and A2 did not cut the deceased, it was Musoke who cut the deceased.

PW2 - John Kalisa. 43 years old businessman. He knew the deceased Enock Mutabazi. On 18th June 2011 was at the scene by 8:00 a.m and fencing off the land with barbed wires. Mutabazi, at 9:00 a.m came with policemen and Al William Salabwa came with his son Musoke Salabwa with his son Musoke but left and shortly Musoke returned with a camera man and started taking pictures.

The policemen chased both Musoke and camera man. At about 11:00 a.m A1 and A2 came with other 3 men. A2 said to them "How can you fail to do anything when they are taking away your land ?? Even if it meant death, let it be".

Following those words, Musoke attacked PW2 with a panga which cut a banana tree. PW2 used a stick he had to defend himself and attacked A1, he ran away from a man who had come to him with a panga to where Mutabazi was standing with A2, Mugerwa. He saw Mugerwa holding Mutabazi Enock and Musoke, cut Mutabazi with a panga on the head. The policeman grabbed Mugerwa A2 by the trousers. Mutabazi died at the scene, the body was taken to Mulago Hospital.

In cross-examination, PW2. He stated that he made two police statements. He disagreed with what was in the first statement and he made a second one. Kataratambi (Police Officer) had given Orders for fencing the disputed land. Muzee Salabwa (A1) was absent. Musoke and the cameraman were chased by the policemen. Musoke cut the deceased after A2 had thrown the deceased down, Musoke was on top of the deceased. AIP Kamya arrested Mugerwa there and then.

PW3 - Muqabi James, 39 years old businessman. He knew A1 Salabwa William after buying the land at Gayaza together with late Enock. On 18th

June 2011 he went to the land with the deceased, a hired grader with policemen from land protection unit from CPS and proceeded to the land at Manyangwa. He was with D/AIP Kamya and other policemen. He loaded poles twice and brought worker's food. At 11:00 a.m while delivering water for workers, he met them running away and reported that Enock had been cut.

He proceeded to the scene and found Enock dead with an open cut wound on the head. He came to the scene when the killing of Enock was completed.

PW4 Sgt. Chesito Marin, 48 years old, Policeman. He first met A1 and A2 at CPS Kampala then second time at the scene of crime, the disputed land.

On 18th June 2011 they were deployed at the opening of boundaries. A1 Salabwa and Musoke, his son came to stop the process. Around 11:00 a. Musoke and a Cameraman came, tried to take photographs of what was going on. The police chased them. Later about 9 people came led by A1 and A2 with pangas and sticks. Mugerwa told them to defend their land even if it means death. Musoke using a panga attacked Kalisa but missed him. But cut Mutabazi who died. DIP Kamya arrested Mugerwa A2.

Linder cross-examination, PW4 stated that when they left CPS Land Protection Unit to the land, there were no Matching Orders, no complaint filed/recorded. The statement was self recorded but did not contain what he has stated in court.

PW5 — P/AIP Naniu David, 37 years old Policeman, the Investigating Officer visited the scene, saw a panga, blood and stains on the ground, drew a scene of crime sketch map (PE.4).

* Did not subject the panga to any finger print examination or DNA tests.

PW6 - Jawal Nelson (Sgt), Storeman kept and produced in court the recovered panga, PE.6.

PW7 - ASP Nakabugo Juliet 34 years old, the arresting Officer, called A2, Mugerwa who came to the police station with A1 and she arrested them.

Under Section 66 of Trial on Indictment Act., the post mortem Report and PF.24 for A1 and A2 were admitted as PI, P2 and P3.

PI - Showed deceased died on 18th June 2011 and cause of death was brain injury.

P2 - Shows that A2, Mugerwa Vincent is mentally normall. (See PF.24)).

P3 - William Salabwa, 69 years old mentally normal. (See PF.24).

With the above, the prosecution case was closed and court found a prima facie case requiring the Accused persons to be put to their defence.

PW4 - Chesito Martin (Sgt.) was at the scene with many other policemen including Kamya who commanded the police to the scene but were not called as witnesses for the prosecution or defence. His self recorded statement made on the 18th June 2011 (admitted as Defence Exhibit DE.2). He states that the police went to the disputed land to fence it off but ended up grading the land. There was resistance from A1 and his family and other people he recorded;-

"—People became rowdy and I fired some bullets in the air to disperse the crowd. Then the people dispersed the area I was firing from, but later some one running told me that they have cut someone and he is lying down there. Then when we went with IP Kamya to check, we found that it was someone called Enock whom they had cut on the face without our knowledge actually:

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* I for one, I don't know who cut him because at that time he was not near me. We discovered it later after some because I was busy chasing the crowd and firing in the air. We told the graderman to leave the place".

I have reproduced this part of the self-recorded evidence of the police officer who appears as an eye witness and prosecution witness PW4. The above statement is in total contradiction with what he told court that "— A9 people came led by A1 and A2 with pangas and sticks. Mugerwa told them to defend their land even if it means death. Musoke using a panga attacked Kalisa but missed him. But he cut Mutabazi who died. D/AIP, Kamya arrested Mugerwa A2"

This is vital evidence for proving participation of the Accused persons and fatally wounding of the deceased.

The other prosecution evidence that I find relevant are the statements admitted as prosecution exhibits PX1 and PX2 admitted through cross- examination of the Accused persons. These are charge and caution statements of A1, William Salabwa and A2, Mugerwa Vincent.

I will examine them at this stage, immediately after the self-recorded statement of PW4, A1 and A2 were all at the scene of crime at the material time and these statements were recorded when the events were quite fresh and most probably before being influenced by other people's speculative versions after the events.

PEX1 states that A1 was surprised by police protecting people who were fencing off his land which was a subject of a suit in the High Court, for which he had an injunction stopping one Mwebe and all those claiming under him. He called his Lawyer, Mugerwa - A2 who came later with a journalist who was beaten up by the police and his camera taken.

There were gunshots and on advice of by standers he left his home for safety.

In PEX2 Mugerwa confirmed he was called by A1 as his Lawyer in the pending suits over the land. They had, before this incident, a series of

meeting to resolve the land issues which included the kibanja belonging to A1.

The police made gunshots, there was a mob of about 100 people, people went into disarray, he remained talking to police officers while the mob advanced to the tractor man. He moved and saw the wounded man, called police and he saw the journalist he brought bleeding from the head, he rushed him for medical treatment.

I will summarize defence testimony at the trial and from the onset I do observe that the defence version is consistent with what is depicted in the charge and caution statements of both A1 and A2 (PEX1 & PEX2).

DW1, (A1) who died shortly after his defence evidence confirmed that he called A2 as his Lawyer when he got invaded by many people guarded by police. He came with a Cameraman (DW3).

He knew Enock Mutabazi, James Mugabi and Kalisa who that morning, came to his home before proceeding to cut his crops. He learnt from Mugerwa that Enock had been killed, he had not gone to the scene where Enock was killed. He did not hear Mugerwa command people to kill anybody.

He had never lived with PW1, Mugisha Alex. He had met the deceased at Kasangati before persuading him to drop the court case where he had sued Nelson Mwebe who had illegally sold the deceased his land.

DW2 (A2) Mugerwa Vincent basically gave the same version as DW1 (A1) he painted a picture of mob activities involving the deceased, his companions and police they came with, on one hand and the people who gathered responding to alarms and gunshots. He identified or recognized Enock while he was being carried away after the fatal injury.

The Bukedde Cameraman had been injured on the head, was being chased by the mob so he rushed him to Kasangati for treatment. Under cross- examination - by Mr. Edward Muhumuza (SSA) he told court that:-

1. He got involved in this matter as an Advocate, he had instruction of A1 in a Civil Suit that was pending.
2. He knew the Late Enock before this date, he was called to the scene by A1 on telephone.
3. He was on a mission to gather evidence, that is why he required a Cameraman.
4. He saw the deceased after he had been injured. He called D/AIP, Kamya who came and called out the name of Enock.
5. When police fired bullets, the people scattered while running.
6. He was talking to D/IP, Kamya because it had been agreed that people do not go back to the land pending court dissolution but Kamya said he was under superior instructions.
7. The deceased was injured about 20 metres from where he was standing talking to D/IP, Kamya. It was behind a shrub and could not see the point where the deceased was cut from.

DW3 - Mavambala Steven was called to take photographs at the scene as a free lance - Bukedde newsman. He witnessed A1's land being graded. A policeman shot below his legs. Other many policemen were armed with guns and sticks. (See photograph admitted as DEX No).

Several youths gathered fought the graders and the police got involved in a running batter with the crowd. 0121009237401

He stated:- " The Police got engaged in beating up the youths. I was still taking photographs, a youth was being chased by police with a panga that he threw and hit a person. It was a policeman that swang the panga that injured a person. Blood was coming up, another policeman came and we struggled over my camera. Another policeman hit me with a panga on the head and I fell down. The camera was broken and taken by the policemen"

There were many bullets fired, there were many people and youths, who were resisting grading of the land in dispute. "I saw the person and captured him on the camera. He had been cut on the head with a panga. I saw the person who cut him, he is in the camera. The person who cut was putting on police uniform and had a police head cap". This was a statement under cross-examination.

DW4 - Kiwanuka Siraai, the neighbor to the Accused one's village and a photographer, he found policemen armed with guns, sticks and pangas. He took photographs, he was beaten and his camera damaged by police. Fighting erupted between the policemen and youths who had gathered.

* A policeman came holding a panga, cut a person on the head and the man fell down"

Under cross-examination he further stated:- "I saw the person who injured him. He was injured by a policeman who was holding a panga" Referred to Exhibit DE.1. a photograph. "That is the late Enock Mutabazi. I saw the person who cut him. It was a policeman who had a blue police uniform. He was tall and small. He does not appear in this photograph"

DW3 - Mavambala Steven and PW4 Kiwanuka Siraii in their testimony insist to have been at the scene for purposes of taking photographs of the events and that they both identified a policeman in blue police uniform armed with a panga which he used to cut the deceased on the head.

In the final submission, Mr. Rashid Babu stated that death was by accident and that A1 and A2 did not participate in causing the death.

Mr. Edward Muhumuza (SSA) on the other hand submitted that the prosecution proved all the ingredients of the offence including participation of A1 and A2.

I set out the vital parts of the testimonies of the persons who claimed to be eye witnesses because the whole case against the two Accused persons depends on evidence of participation. It is not contested that Enock Mutabazi died on 18th June 2011 at Magonja, Nangaba. He did not die of natural cause. His death was a homicide. In the case of Paulo Omale

Versus Uganda - Criminal appeal No. 6 of 1977 (C. A) it was stated that the burden of proof is on the prosecution to prove beyond reasonable doubt that the Accused person, with malice aforethought killed the deceased. Same principles of Law on the burden of proof and standard of proof was stated in much older decisions in the following cases:-

* Woolington Versus DPP (1935) AC 154.

* Mancini Versus DPP (1942) AC 1.

* Chan Kau Versus R. (1955) AC 206, and a lot more cases.

Each of the Accused person's pleaded not guilty and gave defence evidence on oath and called additional evidence of DW3 and DW4 which will be examined.

The defence as a whole is denial of participation. Whether the Accused persons called evidence in defence or not, this court, as a trial court has the duty to consider all possible defences that emerge in course of hearing whether expressly averred or not since after all, the Accused persons have the options of keeping silent at the time of defence. This is well settled in R. Versus Sharnipal Singh (1962) EA 13.

The trial Judge has a duty to consider alternative defences if they emerge from the evidence even if they were not specifically put forward by the Accused.

Every homicide is unlawful unless it is caused accidentally or justifiably. This is because death caused accidentally rules out the existence of malice aforethought. Unintentional killing is excusable homicide because is devoid of mensrea. On the other hand, it is justifiable homicide if it is caused in self defence. Both A1 and A2 did not attempt to justify a case of self defence. The remote evidence to the issue is that A1, an old sick person called A2 who came to the scene with a view to prevent or record a process of what A1 called trespass and garden destruction.

The operation, in favour of the deceased was protected by police and other people who got involved in a fight with a crowd/public that gathered as a

reaction to the event. The evidence does not establish any actions, on the part of A1 or A2 that would disclose self-defence of a person or property.

In Chan Kau Versus R. (19551 2 WLR 192 the privy council stated

* In cases where the evidence discloses a possible defence of self defence, the onus remains up to the prosecution to establish that the Accused is guilty of the crime of murder and the onus never shifts to the Accused person to establish his defence anymore than it is for him to establish provocation or any other defence apart from insanity". Therefore, I do rule out self-defence.

Self-defence can not exist where the Accused totally denies participation. The question that must be resolved is who cut the deceased? PW1 stated that A2 held the deceased while Musoke did the cutting. PW2 said that A2 held the deceased, threw him on the ground while somebody else did the cutting.

The defence version is according to DW3 and DW4 that the deceased was cut with a panga by a policeman.

These two versions have been evaluated with the evidence of the police officer who was at the scene, PW4, whose evidence I have set out above in details. He gave two contradictory versions in his self-recorded statement and testimony in court.

A similar situation or witness was dealt with in the case of Uganda Versus E. Dirisa Ssali and 3 Others (1991) HCB 40. The Complainant had made two police statements before the trial which were inconsistent with each other. The court testimony also materially differed from the police statement. Berko J. (RIP) (as he then was) held:-

1. The inconsistencies and contradictions between the Complainant's evidence in court and his previous statements to the police could not be said to be minor. They were so contradictory, inconsistent and confusing that it was impossible to say that he was talking about the same event.
2. Police statements taken on caution are not worthless because they are not given under oath. Atleast they can be used to show inconsistency and tendered in evidence by defence to prove contradictions that have not been admitted.
3. Prosecution evidence which is unreliable and tainted with discrepancies and contradictions cannot be relied on to convict the Accused.

I am also alive to and considered the holding by Ntabgoba Ag. J. (as he then was) in - **Uganda Versus Joseph Lote (19781HCB 269** when he was considering the discrepancy between a police statement and testimony in court, he held:- "It is what a witness states in court that the court will accept as that witness's evidence because it is stated under oath and the defence has had an opportunity to cross-examine the witness on it What a witness states to the police is neither stated on oath nor is the witness cross-examined on it by the defence and therefore, cannot be treated as that witness evidence by court"

The two decisions are very helpful in evaluation of the evidence of PW4, Chesito Martin that I have found overwhelmingly unreliable. His testimony in court is a total departure from his police statement. He is a Police Officer, of a rank of a Sergeant. This was a self recorded statement and his court testimony is a total opposite of what he stated to have witnessed at the scene.

There is no possibility of a mistake in recording his police statement by another person. It was self recorded. It is not a discrepancy related to details but a totally different story.

In my view, he told court what he did not see. He lied to court, he is not worth believing or relied on to prove participation of any of the Accused persons.

The defence version is that the deceased was fatally injured by the police.

There is a possibility that this kind of evidence is fabricated to cast doubt on the Accused persons' guilt. It is trite that the Accused person shall be convicted on the strength of the prosecution evidence but never on the weakness of the defence or lack of defence. See case of Israel Epuku S/ O Achutu (19341 1 EACA 166.

In discharging it's duty of proving the guilt of the Accused persons beyond reasonable doubt, must prove beyond reasonable doubt every essential ingredient of the offence.

The evidence in this case shows there was mob which had been drawn by unlawful presence of the deceased, his companions and the police and further drawn by gunshots of the police which culminated in a total break-down of Law and Order.

The police in pursuing the mob participated in assaulting, people including DW3 and DW4. The set-up was so disorderly that the police armed with guns, sticks and pangas would assault anybody in the depicted disarray. It is most unfortunate that the police that is supposed to protect people and their property turned into assailants.

Al was an aggrieved person. It is undisputed that his land was at the time a subject of court proceedings involving Al and one Mwebe Nelson from whom the deceased Enock Mutabazi, derived his claim of right as a Purchaser of the registered interests. It is further established that Late Enock Mutabazi, his brother Mugabe, the Late Salabwa (Al) had been engaged in protracted discussion to resolve the issues.

The so called Land Protection Unit of police, commanded by one D/IP Kamya in my view acted unprofessionally and highhanded when they descended on land claimed by Al as a kibanja holding pending before the court's of Law without first obtaining a court Order to alienate the land in favour of the deceased to the prejudice of Al who has since died after completing his defence. This was done notwithstanding the fact that there was an injunction for maintaining the status quo!

It is true that the jurisdiction of determining the proprietary rights of the parties falls under the civil courts, however, I observe the illegality of the police actions that ended in the death of the Late Enock Mutabazi that could have been avoided had the police acted professionally and more diligently than they did in this unfortunate case.

It is not for this illegality that any culprit who killed Mutabazi would earn an acquittal but the case as a whole leaves doubt as to whether A1 and A2 are the culprits. It is not clear as the case is presented whether the culprit was a policeman, a member of the crowd and whether A1 or A2 had any common intention with any of these suspects. It is trite that once court entertains any doubt in the course of a trial, that doubt will be discharged in favour of the Accused person.

I will at this stage comment on some vital omissions in the state case. Both Accused persons, as early as 20th June 2011 the detailed defence position was disclosed in the charge and caution statement of Mugerwa Vincent, he gave the history of the dispute (See Exh. P.2) including the fact that he was talking to D/IP Kamya when the deceased was cut.

As early as 18th June 2006, the police had a statement of PW4 now Exh. DE2 which depicted D/IP Kamya as the Officer in charge of this operation and therefore, a suitable witness. D/IP Kamya would have been an appropriate witness because Chesito Martin's statement shows Kamya was the first Police Officer together with PW4 to see and recognize the deceased after the injury.

Finally, I do observe that the contradictory statement of PW4 was tendered by the defence to depict his evidence in court as un-reliable. On the other hand, the charge and caution statements of A1 and A2 were tendered by the prosecution as PX1 and PX2 and these statements all became part of the evidence in this case as a whole, and they absolve the Accused persons.

In the final analysis, their contents considered together with the oral testimonies make the prosecution evidence on participation totally un-reliable and no conviction can be based on it.

Poor investigation is further manifested in the evidence of D/AIP Nanju David who recovered a panga near the scene of crime. There is no evidence that he took any steps to establish who was the owner of the panga or whether this was the "killer weapon".

This Exhibit P.4 is useless to the case. The other Police Officers, Sgt. Jawal Nelson (PW6) and ASP Nakabugo Juliet (PW7) were not helpful to the prosecution case at all.

The prosecution has not proved that William Salabwa or Mugerwa Vincent participated in causing the deceased's death.

The only Assessor in this case, gave opinion that the prosecution failed to prove all the ingredients of the offence and I agree and I hereby acquit each of the Accused persons.

Dated this 16th day of May 2018

J. W. KWESIGA:

16/5/2018

Judgment delivered in the presence of :

Mr. Edward Muhumuza SSA for state

Mr. Rashid Babu for accused

Accused present

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