**Mabonga v Republic**

**Division:** Court of Appeal at Kampala

**Date of judgment:** 13 May 1974

**Case Number:** 133/1973 (62/74)

**Before:** Sir William Duffus P, Wambuzi CJ and Mustafa JA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Uganda – Nyamuchoncho, J

*[1] Criminal Law – Murder – Provocation – Failure of judge to consider – Effect of.*

**JUDGMENT**

The considered judgment of the court was read by **Wambuzi CJ:** The appellant was convicted of murder contrary to s. 183 of the Penal Code and was sentenced to death. It appears that the deceased died as a result of a spear wound, a fact which was not disputed at the trial. The evidence against the appellant which was accepted by the trial judge consists firstly of a statement by the deceased naming the appellant to a number of people as his assailant and secondly a statement the appellant made to a magistrate, in which the appellant admitted the killing. The trial judge rejected the evidence of the only person who claimed to have been an eye-witness to the assault. He accepted the prosecution evidence to the effect that the deceased correctly identified his assailant as the incident took place at 2.00 p.m. in broad daylight and the appellant was well-known to the deceased. It appears they were brothers. The appellant’s complaints raised in his rather lengthy memorandum of appeal against his conviction may be summarised as follows: 1. T hat the trial court erred in sentencing him to death as there was no evidence that he was 18 years old or above. 2. T hat the trial court erred in rejecting the appellant’s contention that he was attacked by the deceased because: (i) there was evidence that there was a cow at the scene, the contention of the appellant being that the deceased had gone to his home and untied the appellant’s cows; (ii) there were two spears at the scene; and ( iii) the injury on the deceased was on the front part of the deceased’s body and not at the back. On the evidence of the first witness at the scene, it would appear that on the day in question the appellant was seen by this witness at about 11.00 a.m. driving some cows including the cow which was found at the scene when the witness went to investigate the cry made by the deceased at about 2.00 p.m. that day. In the statement, which the trial judge accepted, the appellant said: “Until 2.30 p.m. when he attacked me again at my home while having a panga in his hand. He then went to my cattle. United two of them. My father and I got these cows from sale of our land. He asked me saying: ‘why did you and your father sell the land and yet I have a wife whom I have not paid dowry for?’ I tried to raise an alarm but when my neighbour answered it, found I had already killed him. . . .” The judge considered this point and said in his judgment: “The accused in his statement suggested two defences for killing his brother, namely, self-defence and defence of property and although the accused abandoned these defences in his unsworn statement, I will deal with each defence very briefly. In that statement the accused said that on the day he killed the deceased, the deceased attacked him with a panga. There is no evidence on record to show that the deceased attacked the accused with a panga – there is no evidence to show that the accused acted in self-defence when he killed the deceased. On the contrary the evidence on record shows that the deceased was on his way home when he was attacked by the accused, the attack and assault took place on a foot-path several yards away from the house of the accused and near the house of Namusano. Had there been a fight Namusano would have been able to witness it.” With respect we think that the statement accepted by the trial judge gave the appellant yet another defence not considered by the judge which was provocation. The evidence shows that the deceased was speared on a path near the appellant’s house. The statement of the appellant shows a history of quarrels between the deceased and the appellant. Indeed it alleges a quarrel took place on the fateful day. We notice that the judge did not believe that the deceased untied the cattle in the home of the appellant. We, however, find it difficult to reconcile this conclusion with the evidence of the prosecution which was accepted by the judge which indicates that the appellant was in possession of the cow found at the scene earlier that same day. The question as to how the cow happened to be at the scene appears not to have been considered by the judge. Further the evidence shows that there were two spears at the scene. In respect of these the judge said: “Having accepted the statement I find it unnecessary to make a finding as to who is the owner of the spears that were used to kill the deceased. . . .” On the evidence one of the spears was in the body of the deceased and the other in the ground. There is no indication of how this second spear came to be in the ground. In these circumstances we think, with respect, that it is a wrong assumption to say that both spears were used to kill the deceased. Merely because the appellant claimed he had been attacked by the deceased with a panga does not mean that both spears were used by the appellant because he admitted the killing. Apart from the appellant’s statement there is no evidence of what actually happened. We think that the presence of the cow at the scene does lend support to the appellant’s claim that the deceased did go to the appellant’s home and may well have united some cows there. There could have been a quarrel between the deceased and the appellant. It is possible that the deceased left and was on his way home when he was attacked by the appellant who must have followed him presumably resisting the taking of the cow by the deceased. There is no evidence of how this attack was mounted but from the nature of the injury sustained by the deceased which was on the front part of his body, as indicated by the medical evidence, there must have been a direct confrontation between the two. The immediate question is in what circumstances did the spearing take place? On the evidence we are unable to say that the deceased could not have been in possession of the second spear. In the absence of any evidence of who possessed both spears at the material time, we are unable to say that merely because the appellant said he was attacked with a panga both spears must have been his. The trial judge did consider the issue of the defence of property but he should have gone further and considered the defence of provocation. We would in this respect refer to our judgment in the case of *Robi v. R*., [1959] E.A. 660 at p. 663 and in particular we would refer to the following extract: “The appellant was no doubt entitled to use reasonable force to prevent the taking of the cattle, and if, in good faith, he had used more force than was reasonable and had thereby killed the appellant, no doubt the offence would only have amounted to manslaughter. The force actually used, however, was a thrust with a spear through the chest which was clearly calculated to kill. We can see no distinction between such use of a lethal weapon like a spear, and the use of a firearm. The weapon and its method of use leave no doubt that the intent was to kill, and not merely to prevent the removal of cattle. There can be no justification in law for deliberate homicide in these circumstances, and we have no doubt that, subject to the question of provocation, the offence is murder.” and further– “As regards the question of provocation, Mr. Malik submitted that the deceased’s acts amounted to sufficient provocation to reduce the killing to manslaughter. Counsel for the Crown drew our attention to the case of *Yusufu s/o Lesso v. R*. (1952), 19 E.A.C.A. 249, in which it was held that the definition of provocation in the Tanganyika Penal Code (which is similar to the Kenya Penal Code) is: ‘confined to wrongful acts done to the person and does not extend to wrongful acts done to property.’ That decision, which differed from an earlier decision of this court in *R. v. Murume s/o Nayboba* (1945), 12 E.A.C.A. 80, must no doubt be considered in relation to the facts of that case, and we should not be prepared to accept the proposition that no acts of trespass to property could ever amount to ‘a wrongful act or insult . . . done to . . . a person’, cf. the passage from Roscoe’s *Criminal Evidence*, p. 782 which is cited above. We think that each case must be judged on its own facts.” In this case there was evidence in the statement of the appellant that the deceased had come armed with a panga and had attacked him and seized the cow. The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the cow was in the particular circumstances of this case provocation sufficient to have reduced the offence from murder to manslaughter. His failure to direct himself or the assessors to this issue was a serious misdirection. In the circumstances, we think it will be unsafe to allow the conviction for murder to stand, as on the evidence, provocation cannot be ruled out. We accordingly quash the conviction for murder and set aside the sentence of death. We substitute therefore a conviction for manslaughter and a sentence of ten years’ imprisonment. As regards the age of the appellant, we accepted the medical certificate tendered by the respondent at the hearing of the appeal to the effect that the appellant is aged 26 years.

*Appeal allowed.*

The appellant appeared in person.

For the respondent:

*JH Omondi* (State Attorney)