THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: Mukasa-Kikonyogo, DCJ, Byamugisha &Kavuma JJA

CRIMINAL APPEAL NO.96/03

BETWEEN

RUKATANGA REMIGIO::::::::::::::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

*[Appeal from conviction and sentence of the High Court of Uganda sitting at Mbarara (***Kagaba J***) dated 15th January 2001 in HCSC No.22/98]*

JUDGMENT OF THE COURT.

This is an appeal against conviction and sentence of the High Court sitting at Mbarara dated 15th January 2001.

The facts material to this appeal are that on 25th day of May 1997 at Kigando cell, Kyamwasha Parish, Rukoni sub-county Ruhama County in Ntungamo District, the appellant murdered his mother, Kamanguza Jovanis. The case for the prosecution was that the appellant and the deceased had a land dispute. The appellant had two sisters and two brothers. The deceased lived in her house with one of her daughters, Katengwa and a grandson, Rwendeire (PW2). The house of the appellant was adjacent to that of the deceased about twenty metres apart. The father of the appellant died when he was in Tanzania. When he returned

from Tanzania, the appellant wanted to inherit all the land left by his father. The deceased opposed him and she wanted the land to be shared between all the children included her two daughters Katengwa and Kangyenyenka. The matter was reported to the area local council to resolve the same. While the wrangles were still going on, the deceased was killed.

On the night in question while the deceased was sleeping in her house with Rwendeire and Katengwa (who did not testify) the appellant banged the door open and entered the house. He was armed with a panga and a torch which was lit. He first cut his sister Katengwa and then proceeded to the deceased's bedroom and started cutting her. The cutting was witnessed by Rwendeire who was hiding under the deceased's bed. The matter was reported to the General Secretary LC1, Kanyarutokye (PW1) and Karoli Komunda (PW4), LC1 Chairperson. The two officials visited the home of the deceased. The body was lying on the floor with cut wounds. The appellant was not at home.

The following day, the appellant was arrested from another village of Kyentama by two Local Defence personnel Benon Behangana (PW3) and the secretary of the area. He was found hiding in his brother-in-laws house. He first refused to come out when requested to do so. He however came out and surrendered when Benon Behangana fired a shot in the air.

The appellant was arrested and taken to Kitwe police post and handed over to No.30049 P.C Ndabahika (PW5). While the appellant was being escorted to the

police post, he told Benon Behangana that he had cut his sister and mother because of the misunderstandings over the land.

The prosecution called a total of seven witnesses to prove the indictment. The appellant was the only defence witness. In his defence he denied committing the offence. He stated that on the night his mother died he was not at home. He had taken his wife to a dispensary which was near her home. He had taken his wife two days before the incident. He admitted that he had a land dispute with members of his family but stated that he had no problem with his mother. He denied being arrested under the bed of his brother-in-law.

The trial judge evaluated the evidence on record and was satisfied that the death of Kamanguza had been proved beyond reasonable doubt by both the direct and expert evidence. He was also satisfied that whoever caused the death did so with malice aforethought because of the injuries inflicted with a *panga* which is a deadly weapon and the part of the body-the head which is a delicate part of the body. He considered the admission which the appellant made to Benon Behangana (PW3), the evidence of PW2, the only identifying witness, the dying declaration and the conduct of the appellant before and after the commission of the offence put together left the trial judge in no doubt about the accuracy of the fact that it is the appellant who killed the deceased. He rejected

his alibi and disagreed with the assessors. He convicted him and sentenced him to death –hence this appeal based on the following grounds:

1. **The learned trial judge erred in law and fact when he admitted the evidence of PW2, a minor without corroboration thereby occasioning substantial miscarriage of justice.**
2. **The learned trial judge erred in law and fact when he rejected the evidence of alibi by the appellant thereby occasioning substantial miscarriage of justice.**
3. **The learned trial judge erred in law and fact by failing to consider the contradictions and inconsistencies in the prosecution case thereby occasioning substantial miscarriage of justice.**
4. **The learned trial judge erred in law and fact when he failed to properly evaluate the evidence thus arriving at a wrong decision.**
5. **The learned trial judge erred in law and fact when he failed to allow the appellant to mitigate the sentence thereby occasioning substantial miscarriage of justice.**

At the hearing of the appeal, Mr Duncan Ondimu represented the appellant on state brief and Rose Tumuheise, PSA represented the respondent.

Mr Ondimu argued each ground separately. In submitting on ground one, counsel pointed out that the prosecution adduced the evidence of seven witnesses among them was a 12 year old who gave evidence unsworn

implicating the appellant. He stated that the 12 year old gave evidence that the deceased made a dying declaration and he was the only eye witness. Learned counsel further pointed out that the witness was under the bed and the only source of light was a torch which the appellant allegedly had. Counsel further submitted that under section 40(3) of the TIA and section 10 of the Oaths Act, the evidence of PW2 ought to have been corroborated materially. He cited the case of ***Mungai v R [2006] 2 EA 214*** and ***Uganda v Ssimbwa SCCA No.37/95*** in support of his submission. He emphasized that the daughters of the deceased ought to have testified to corroborate the testimony of PW2.

Ms Tumuheise in reply opposed the appeal. She submitted that the prosecution adduced sufficient evidence to prove beyond reasonable doubt all the ingredients of murder. As for the testimony of PW2 she stated that a *voire dire* was conducted and the witness knew the appellant very well as they both lived in the house next to the deceased. She pointed out that the witness hid under the bed and observed what was happening to the deceased as the appellant had a torch which was lit. The witness further stated that the appellant left the house grumbling in Runyankore that how many people the kibanja belongs to or words to that effect. She claimed that PW2 identified the appellant by aid of a torch light and by his voice.

On corroboration she submitted that the evidence of PW2 was corroborated by the testimony of PW3 and PW4 who testified that they looked for the appellant

to no avail and he was arrested five miles away in another village in a restless mood.

She further submitted that the appellant admitted to PW3 that he cut his mother because of a misunderstanding over land. She referred to the evidence of Dr Kworora who examined the appellant and found a laceration on one of his fingers which is consistent with the testimony of PW2 that the deceased tried to fight the assailant.

Under the Evidence Act, it is specifically provided in **section 133** that no particular number of witnesses is, in absence of any particular legislation to the contrary, required for the proof of any fact. However there are a number of instances under the law, a conviction cannot be sustained if it is based on the evidence of a single witness. One such legislation is **Section 40(3)** of the Trial on Indictments Act. It provides:

"Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given on oath, if in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her."

Section 10 of the Oaths Act provides:

"No person shall be convicted or judgment given upon the uncorroborated evidence of a person who shall have given his or her evidence without oath or affirmation."

There is no dispute that Rwendeire (PW2) the only eye witness to the commission of the offence was found to be a child of tender age after the trial judge conducted a *voire dire.* He gave his evidence unsworn. His evidence needed corroboration to confirm in material particular not only that the offence was committed but that it is the appellant who committed it. The corroboration which is required need not be direct evidence. It may be in the form of oral evidence, documentary evidence, medical evidence, etc.

In the matter now before us, the testimony of PW2 requires corroboration as a matter of law. We think there was ample corroboration of the evidence of PW2 that the deceased Kamanguza Jovanis is dead. The expert evidence given by Dr Mugisha of Itojo Hospital who carried out a postmortem examination on the body of the deceased confirmed that the deceased died of open head injury caused by a sharp object. The body had some other injuries on the wrist joint. The injuries found on the body confirm what PW2 stated that the appellant cut the deceased using a *panga.*

There was also evidence from Pw1, Polly Kanyarutokye, who testified that the deceased passed by his house on the material day at about 10 a.m. She informed him that she had gone to report to the Local council chairperson that the appellant wanted to kill him because of her attempt to give part of the land to her daughters. This witness also saw the body of the deceased with cut wounds.

The evidence of these witnesses corroborate the testimony of PW2 that the offence of murder was committed using a *panga* as a murder weapon.

The next important issue to consider is whether the testimony of PW2 as to the identity of the assailant was corroborated. This court is aware of the law relating to evidence of a single identifying witness as stated in the cases of ***Abdulla Bin Wendo and Another v R (1953)20 EACA 166; Roria v Republic [1967] EA 583*** and ***Abdalla Nabulere &others [1979] HCB 77*** which is that the court ought to approach such evidence with caution especially if the conditions favouring correct identification are difficult. The need for caution when dealing with evidence of identification is that a witness or witnesses might be honest but mistaken in their claim to have identified the assailant. The factors which favoured correct identification was torch light which the assailant was flashing, the assailant was known to the witness and the attack took sometime. The witness also heard the assailant say in his local language that how many people the land will belong to. He also heard the deceased mention the name of the appellant as her attacker.

On the other hand, the factors which disfavored correct identification of the assailant were the following:

1. The attack took place at night when visibility was difficult.

2. The attack was sudden and it must have taken the identifying witness by surprise.
3. The witness hid under the bed.

In the instant appeal the only identifying witness was also a child of tender age. The issue to address is whether his evidence was corroborated as sections 40(3) of TIA and section 10 of the Oaths Act requires.

The starting point is the admission of the appellant that he cut the deceased because of a dispute over land to Benon Behangana who arrested him. The witness is a member of the local defence unit and therefore not a police officer as defined under ***section 2*** of the Police Act (Cap 303 Laws of Uganda). The admission made to him is not excluded by sections 24 and 25 of the Evidence Act in our view.

The evidence of identification is further corroborated by the testimony of Kanyarutokye (PW1) who testified that the local council court had been handling a land dispute between the appellant and his mother and sisters. He further testified that on the material day the deceased passed by his house and informed him that she had gone to report threats from the appellant to the local council chairperson. The testimony of this witness was not challenged in cross-examination.

After consideration of all the testimony given by the witnesses and the surrounding circumstances we are satisfied that the evidence of a single identifying witness and a child of tender age were amply corroborated and it

placed the appellant at the scene of crime. It can be accepted as being free from any possibility of mistaken identity. Ground one ought to fail.

As for ground two, it was contended by counsel for the appellant that the learned judge erred to reject his alibi. When an accused persons puts up a defence of alibi, he/she does not assume the burden of proving it. What the law requires is for him to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act. In the instant appeal, the appellant stated that he left his village three days before the commission of the offence to take his sickly wife for medical treatment in another village five miles away. If this story is believed, then the appellant did not commit the imputed act.

The burden lies on the prosecution to destroy the alibi by adducing evidence which will place him at the scene of crime. One of the pieces of evidence is the testimony of PW2 which we have already referred to in this judgment. There are some other pieces of evidence which tend to incriminate the appellant. These include the testimony of PW1 who stated that when he visited the scene of crime he tried to look for the appellant but he was nowhere to be found. PW3 stated that the appellant was hiding under the bed- when he went to arrest him-something which he denied. PW3 further stated the appellant refused to come out of the house until he fired a shot in

the air. Furthermore, the witness stated that the brother-in law told him that the appellant had spent the night at his home. He did not mention anything about the sickness of the appellant's wife or the three days which the appellant stated he had spent at the home of his in-law. Although the witness was cross-examined by counsel who represented the appellant, the version of events as the appellant was being arrested was not shaken. We, therefore, accept the evidence of the prosecution that the appellant was arrested while hiding under the bed. This is not conduct of an innocent man. The appellant was being economical with the truth when he stated that he spent three days out of his house and yet his brother- in- law had no reason to lie about the number of nights the appellant had spent in the village. His alibi was false and the trial judge was right to reject it. Ground 2 fails.

Ground three of the appeal complained about the contradictions and inconsistencies in the prosecution case. Learned counsel for the appellant argued that the learned trial judge failed to consider the contradictions and therefore caused a miscarriage of justice. Learned counsel pointed out that there was a major contradiction in that PW2 stated that he remained under the bed hiding until the LCS came, whereas PW1 testified that the death of the deceased was reported to him by PW2 and the appellant's sister. The prosecution submitted that the contradictions were minor as they did not go to the root of the prosecution case.

The Supreme Court in the case of ***Uganda v Ssimbwa*** (supra) while relying on the case of ***Tajar v Uganda EACA No.107/95*** explained that in assessing the evidence of a witness his consistency or inconsistency unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected. Minor inconsistencies will not usually have the same effect, unless they point to deliberate untruthfulness.

The inconsistencies which learned counsel for the appellant complained of were minor and the learned trial judge was entitled to treat them as such. They did not go to the root of the case since they did not concern the death of the deceased and who caused it.

Ground three ought to fail.

Ground four of the appeal is on the evaluation of evidence. Learned counsel for the appellant complained that the trial judge failed to properly evaluate the evidence on record thereby arriving at the wrong decision. He did not point out the areas where the trial judge failed to evaluate evidence.

The prosecution opposed the appeal and supported the trial judge's evaluation of evidence.

The duty of a first appellate court was explained by the Supreme Court in the case of ***Henry Kifamunte v Uganda [1999] EA 127*** to the effect that a first

appellate court has a duty to reconsider all the material evidence that was before the trial court and reach its own conclusions.

The trial judge carefully explained all the ingredients of the offence of murder which had to be proved by the prosecution. He directed himself properly on the standard of proof. He further explained the dying declaration which is admitted under **section 30 of the Evidence Act** and the need for corroboration. The dying declaration was not the only evidence which the prosecution was relying on to prove its case.

The prosecution adduced the evidence of a prior threat to kill, the evidence of a dispute over land, the conduct of the appellant, the evidence of identification by PW2 all point to the guilt of the appellant. The learned trial judge considered all the material evidence and we are satisfied that he reached the right conclusion in finding the appellant guilty as charged.

The last ground of appeal is on sentence. Counsel for the appellant submitted that the trial judge erred not to allow the appellant to mitigate the sentence. He cited the case of ***Uganda v Susan Kigula &417 others SCCA No.3/06*** in which the Supreme Court declared the mandatory death sentence unconstitutional.

Section 94 of TIA states that before passing a sentence a person who is found guilty or pleads guilty ***"shall be called upon and be asked whether he has anything to say as to why sentence shall not be passed against him."***

The provisions of this section are clear on the requirement for mitigation before any sentence is imposed.

The sentence of death in the instant appeal was passed before the decision of the Supreme Court in the case of Kigula. By virtue of section 11 of the Judicature Act this court is empowered to do anything which could have been done by the court of first instance.

We shall therefore accept mitigating factors and determine the sentence.

Counsel for the appellant stated that the appellant was a first offender of advanced age. He was arrested on or about the 27th May 1997. He was convicted and sentenced on 15th January 2001. He was aged about 62 years at the time of the trial and has been on death row for 13 years.

The prosecution supported the sentence which was imposed by the trial court.

We find the factors outlined above mitigating enough for this court to interfere with the death sentence which was imposed. We substitute with a sentence of 15 years from the date of conviction.

In the result we dismiss the appeal against conviction. The appeal against the sentence of death is allowed by substituting the same with a sentence of 15 years imprisonment to run from the date of conviction.

Dated at Kampala this..14th..day of.....June.....2011.

L.E.M.Mukasa-Kikonyogo
Deputy Chief Justice

C.K.Byamugisha
Justice of Appeal

S.B.K.Kavuma
Justice of Appeal.