THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.128 OF 2011

KAZARWA HENRY.....APPELLANTS

V E R S U S

UGANDA.....RESPONDENT

CORAM: **HON. MR. JUSTICE A.S.NSHIMYE, JA**
HON. MR.JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA

THE JUDGMENT OF COURT:

The appellant was originally charged with two others for murder in the High Court at Mbarara. The second accused, Kamugisha Tobias pleaded guilty at the commencement of the trial. He was convicted and sentenced to life imprisonment. Trial proceeded against the appellant (AIII) and one Nyakahungura Kenneth who was then A1. At the end of the trial both were convicted and sentenced to life imprisonment.

The facts of the case as found by the trial court were briefly the following:-

The deceased, Kyakabale Willy, had been in the bar owned by Mentor Nuwabine (PW6) with others on 14/02/2009.

He was attacked on his way home from the bar along Kaguta Road in Lyantonde. He raised alarm which was answered by PW4 Ntwale, PW5 Nkanjako and Beyendeza who found him lying in a pool of blood. He mentioned to them the people who had cut him to be Kazarwa, Kenneth Nyakahangura and Kamugisha Tobias.

PW4, Ntwale Geroge testified that as he was answering the alarm he saw the three running away. He explained that he was able to see and identify them as there was moonlight. They were about 10 metres away from him.

The appellant and the two others were arrested and charged, tried, convicted and sentenced. The appellant was dissatisfied with the conviction and sentence of life imprisonment hence this appeal. The appeal is on the following grounds:-

1. **The trial judge erred in law and fact when he relied on the dying declaration adduced by the prosecution to convict the appellant.**

2. **The trial judge erred in law and fact when he ignored the appellant's alibi and convicted him of murder.**

3. **The trial judge erred in law and fact when he did not properly evaluate the evidence before court thereby arriving at the wrong decision.**

4. **The trial judge erred in law when he disregarded Rules of Evidence and Procedure thereby rendering the whole trial irregular and a nullity.**

The appellant prayed for orders that:

(a)The appeal be allowed and the judgment of the High Court be quashed and set aside.

(b) The conviction and sentence of the appellant be set aside.

At the hearing of the appeal the appellant was represented by learned counsel, Mr. Mpumwire Abraham on private brief. The State

was represented by Mr. Muwonge Emmanuel a Principal State Attorney.

Counsel for the appellant argued grounds one, three and four together and then ground two separately. Counsel for the State responded in the same order.

Counsel for the appellant faulted the learned trial judge that he mainly premised the conviction of the appellant on a dying declaration which according to counsel was not corroborated.

Counsel submitted that the incident was at 10 p.m. and there was therefore poor visibility. He contended that PW3 and 4 who testified to have identified the accused persons could not have identified them at night. He further contended that the appellant had raised the defence of alibi but the trial judge did not even consider the defence.

Counsel called on this Court to quash the conviction and set aside the sentence.

Muwonge for the State opposed the appeal, supported the conviction and sentence of the appellant by the High Court.

He submitted that the dying declaration of the deceased was corroborated by the evidence of PW4 and PW3 who identified the convicts at the scene of crime. According to the State Attorney the witness knew the accused persons very well as they lived in the same village. They had seen each other at the bar that same day and there was moonlight which enabled the witness to adequately identify the three convicts.

The Principal State Attorney further submitted that the learned trial judge had properly evaluated the evidence adduced before him and came to a correct decision to convict the accused persons which he called on this court to uphold.

He conceded that the learned trial judge did not address the issue of alibi raised but that did not prejudice the appellant as there was adequate evidence placing him at the scene of crime.

Court Resolution of the appeal.

We first remind ourselves of our duty as a first appellate court under rule 30 of the Rules of this Court which states:

> **"Power to re-appraise evidence and to take additional evidence.**
>
> **(1)On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the Court may-**
>
> **(a)Re-appraise the evidence and draw inferences of fact; and**
>
> **(b) ....."**

The Supreme Court had occasion to state the duty of a first appellate Court in the case of **Kifamunte Henry versus Uganda Criminal Appeal No.10/1997** and stated it as follows:-

> **"The first appellate court has a duty to rehear the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."**

We shall now proceed to re-appraise the evidence. The evidence on record is that the deceased and the accused persons lived on the same village. They knew each other. They met in a bar on the day the

deceased was killed. The deceased raised alarm when he was attacked and cut. PW3, 4 and 5 answered the alarm. They found the deceased lying in a pool of blood and he told them he had been cut by the three accused persons.

PW4 said he had seen the three accused persons run away. According to PW4, there was moonlight and that is how he managed to see them.

The learned trial judge analysed the evidence of the dying declaration and found it consistent and reliable. He also found that the dying declaration was corroborated by the witness who reported that he saw the three accused persons fleeing from the scene. That he knew the accused persons and there was moonlight which enabled him to identify them.

We find it appropriate at this juncture to first state the law on dying declarations.

The Supreme Court has had occasion to state the law in **Criminal Appeal No.9 of 1987 Tindigwihyra Mbahe v Uganda** when it held:-

"The law concerning dying declarations briefly is that evidence of dying declaration must be received with caution because the test of cross examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise; the deceased may have stated his inferences from facts concerning which he may have omitted important particulars, for not having his attention called to them. Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is usually, more difficult that in daylight. The act that the deceased told different persons that the appellant was the assailant's is evidence of the consistency of his belief that such was the case: it is no guarantee of accuracy. It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration: See Okeith Okale and others vs. Republic (1965) EA 555 and Tomasi Omuken & Another vs. Uganda CAU (1978)."

In the instant case there was evidence that the appellant was well known to the deceased. They lived in the same village. They had been in the same bar that evening. There is also evidence that there was moonlight that evening. It was because of the moonlight that PW4 was able to identify the same accused persons. PW4 testified that he saw them flee the scene of crime. He testified that he saw them when he was about 10 metres away.

We find that there was corroboration of the dying declaration in the testimony of PW4 on the identification of the appellant and the two co-accused at the scene of crime. This witness saw them himself when he answered the alarm by deceased. He too had seen them (the suspects) earlier on the same night at the bar.

We do not accept the submission of counsel for the appellant that the dying declaration was not corroborated any other evidence. We find that the dying declaration was sufficiently corroborated by other evidence.

The learned trial judge was also faulted for his failure to consider the defence of alibi that was raised by the appellant. He said he was in Rukungiri. The law on the defence of Alibi was stated by the Supreme

Court in **Criminal Appeal No.10 of 2000 Mushikoma Watete & 3 others vs. Uganda**, when it held:-

> **"The defence of alibi is set up when an accused person, wishing to show that he could not have committed the offence charged, asserts that at the time the offence was committed he was in a different place from the scene of the crime. The law is well settled, that an accused person who puts forward an alibi as an answer to the charge against him, does not assume any burden of proving that answer. The burden remains on the prosecution to prove that the accused was at the scene of crime and not at the different place where he claims to have been. This emanates from the general principle propounded in the well-known decision of the House of Lords in Woolmington vs. Director of Public Prosecutions (1935) A.C. 462 to the effect that, with the exception of the defence of insanity, and some other statutory defences which are not relevant here, no burden ever rests on an accused person to establish his defence. That is true of the defence of alibi also. An accused person does not have any burden to prove his alibi. Needless to say, however, that for the prosecution to negative it, and more so, for the court to**

consider it as the defence, the alibi has to be put forward as the answer to the charge."

We find that the appellant's defence of alibi was considered by the learned trial judge in his judgment. The judge analysed the evidence and made a finding although he did not state that he was dealing with the defence of alibi. We return to this later in the judgment.

As a first appellate court we shall re-evaluate the evidence and make a finding of fact on the available evidence as whether the defence of alibi was properly evaluated.

There is evidence by PW6, Nuwabine Mentor. She owns a bar. She testified that on 14/02/2011 she returned from her parents home at about 7.00 p.m. She found Kyakabale (the deceased), Ntwale (Pw4), Nakanjako (PWs), boozing in her bar. She asked them to go away at about 9.00 p.m. and they left. After about two hours she was informed Kyakabale had been attacked and was injured but was still alive. He later died in the morning.

PW4 testified that he indeed was with the deceased and the accused persons at the bar of PW6.

This witness heard the alarm of the deceased at about 10.00 p.m. He ran to the scene and on the way he saw the appellant and the two co-accused flee the scene. On arrival he was informed by the deceased that he had been attacked and cut by the three accused persons.

Other witnesses also arrived to be told by the deceased the same story. The deceased was still alive till morning at Lyantonde Hospital.

This is the evidence we shall re-evaluate on the principle stated by the Supreme Court in **Bogere Moses and another vs. Uganda (SC) Criminal Appeal No.1 of 1997 (unreported)** when it held inter alia that:-

> **"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof of the required standard that the accused was at the scene of crime at the material time.**
>
> **To hold that such proof has been achieved, the Court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and**

the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judicially and give reasons whey one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of the acceptance per se the other version is unsustainable."

In the instant case, there is evidence that the appellant was at PW5's bar the evening the offence was committed. The deceased raised an alarm which was answered by witnesses that testified in Court. The deceased explained to them he had been cut by the accused persons who were well known to him. PW4 who answered the alarm testified that he saw the four accused persons when he was responding to the alarm. He said there was moonlight which enabled him to identify the appellant and the two other accused persons. In his defence the appellant says that on 14/02/2009 he worked from 8.00 a.m. to 6.30 p.m. when he went home reaching at 7.00 p.m. He slept with his wife and denies ever having committed the offence. His wife, Kanyesigye's evidence testified as DW3, supporting his line of defence.

The appellant does accept that he was in the area where the offence was committed on 14/02/2009. The offence was committed that night. On 15/02/2009 he said he was washing cows in the same area. He says he went to Rukungiri but was not going to hide. He went to build a house. Was the appellant put at the scene of the crime? Is his alibi credible?

We find that although the learned trial judge did not state clearly that he was considering the appellant's alibi, he actually did consider it and discredited it in his judgment. He handled it as follows:-

> **"In addition to this evidence the conduct of the accused persons especially Kazarwa Henry point to behaviour inconsistent with an innocent person. He saw a Police truck coming to his home the day after the murder and he run away or walked away fast, if you are to believe him. His version of why he moved in the opposite direction as Police came to his home leaving his wife was a cowardly act of a guilty person who well knew that his murder of an innocent person had caught up with him. His twist on why he run away is intended to make a fool of court and make it believe that the accused was walking away simply because a one Lubega had harassed him.**

The other conduct of A3 in particular is running away after the murder and hiding in Rukungiri. He again has spun a very log yarn about building a house. He was supported by DW 3, his wife. I studied her demeanour carefully as she testified and saw her pain and agony as she tried to state facts which she must have known were not facts. No wander she should not sustain it and started contradicting her husband A3 big time. From people he claimed he did not know and she acknowledged knowing them to whether or not he drunk.

I am satisfied that he fled to Rukungiri to try and evade arrest after killing the deceased. His conduct after the murder and the fact that the dying declaration names him as stated by three witnesses places him squarely at the scene of the crime."

The appellant in his own defence stated that he was in Lyantonde on the night of 14/02/2009. He said he left on 15/02/2009. That was after the offence had been committed. The appellant was put at the crime scene by the prosecution evidence that the judge discussed. His defence of alibi was properly discredited. We agree with the trial judge.

We find that his conviction was based on proper analyses of the available evidence by the trial judge.

We find no merit in this appeal and accordingly dismiss it.

The conviction by the trial judge is upheld and sentence imposed is confirmed.

Dated this day ....20th.....of ....January.....2014

.....

Hon. Justice A.S. Nshimye

JUSTICE OF APPEAL

.....

Hon. Justice Eldad Mwangusya

JUSTICE OF APPEAL

.....

Hon. Justice Richard Buteera

JUSTICE OF APPEAL