

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO.0215 OF 2011

1. BYARUHANGA JULIUS

2. KATO GODFREY

10 3. KESANDE GRACE:.....APPELLANTS

VERSUS

UGANDA:.....RESPONDENT

(Appeal from the decision of the High Court of Uganda sitting at Kabale
delivered by the Hon. Mr. Justice J.W Kwesiga on 6th September, 2011 in
15 Criminal Session Case No. 224 of 2010)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT

20 This appeal is against both conviction and sentence arising from the decision
of Kwesiga, J wherein the appellants were convicted of the offence of murder
contrary to sections 188 and 189 of the Penal Code Act and each sentenced
to 40 years imprisonment. A4 and A5 were acquitted. Being dissatisfied with
the decision of the trial Judge, the appellants appealed to this Court on the
25 following grounds:-

- 5 **1. The learned trial Judge erred both in law and fact when he convicted the appellants without evaluating the evidence properly.**
- 10 **2. The learned trial Judge erred both in law and fact when he did not consider the defence evidence hence reaching at a wrong decision.**
- 15 **3. That the sentence of 40 years was harsh and manifestly excessive.**

At the hearing of this appeal, Mr. Bwatota James appeared for the appellants while Ms. Ampaire Jennifer, Principal State Attorney represented the respondent.

On ground 1 of the appeal, counsel for the appellant submitted that the trial Judge convicted the appellants without properly evaluating the evidence. Counsel stated that the prosecution evidence was based on a single identifying witness, PW2, Asiimwe Scovia. Further that the conditions of identification were unfavourable as it was at night with only light of a torch that was being held by the attackers, and the time taken to identify the attackers was short since it was PW2 who met the attackers in the sitting room as she was getting out. Counsel added that PW2 was scared because she was also assaulted and injured by the attackers and her evidence as a single identifying witness needed to be corroborated which was not done.

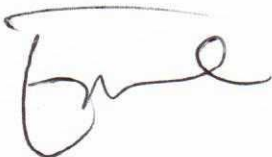
Counsel invited Court to look at the evidence of PW3, John Kahima, who testified that he heard Scovia making an alarm naming Mazuli and Kato as the attackers. He added that it was clear that this alarm had also been heard



5 by the deceased who was inside the house because the alarm was made from
outside the house and this could have influenced his dying declaration
because it was not mentioned anywhere in the prosecution evidence that the
deceased had seen the attackers but only stated that he had been attacked
by his children. Counsel pointed out PW2, Asiimwe Scovia had testified that
10 she raised an alarm and Kahima, PW3 who was the neighbour came and ran
after the assailants. However Kahima did not state anywhere in his evidence
that he had ran after the assailants. Counsel further submitted that the
evidence of a dying declaration needed to be corroborated, which was not done
in this case. He relied on **Kazarwa Henry V Uganda, Supreme Court**
15 **Criminal Appeal No.17 of 2015** for the proposition that evidence of a dying
declaration must be corroborated.

On ground 2 of the appeal, counsel submitted that the appellants raised an
alibi and the onus was on the prosecution to disprove it since none of the
appellants was placed at the scene of crime. Counsel submitted that in his
20 dying declaration, the deceased mentioned the 3rd appellant, Kesande Grace
yet PW3 and the 3rd appellant herself maintained she was at her home.

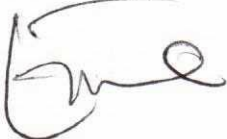
Further, although the trial Judge observed that the conduct of the 3rd
appellant, Kesande Grace pointed to her guilt because she did not respond to
the alarm that came from her step-mother yet her house was just an extension
25 of the deceased's homestead, this was in fact confirmation that the 3rd
appellant was at her place and not at the crime scene. Counsel added that
the trial Judge was wrong to solely rely on the evidence of PW2; Scovia
Asiimwe who testified that she had heard the 3rd appellant shouting that they



5 should finish him off yet the 3rd appellant was at her place. He relied on ***Watete alias Wakhoka and 3 ors V Uganda, Supreme Court Criminal Appeal No.10 of 2000*** for the proposition 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.

10 On ground 3 of the appeal, counsel faulted the learned trial Judge for imposing a harsh and excessive sentence of 40 years. He submitted that considering the facts of the case, the appellants were young people who would be useful to society and, they were first offenders. The learned trial Judge did not also take into account the period that the appellants had spent on
15 remand. Counsel added that in the event that this Court maintains the conviction, it be pleased to reduce the sentence to 17 years.

Counsel for the respondent opposed the appeal. She argued grounds 1 and 2 together and submitted that PW2 was a step-mother to the accused persons and they were well known to her. She further submitted that PW2 had seen
20 the appellants on that fateful day at around 8pm while removing her clothes from outside and on the night when the offence was committed, there was bright moonlight that enabled her to identify the appellants while they were in the 3rd appellant's house which was about 50 meters from PW2's house, the scene of crime. Further that at the time of the attack and upon hearing
25 the bang, PW2 met the 2nd appellant, Kato Godfrey and 1st appellant, Byaruhanga Julius in the sitting room with another person who was holding a torch. Counsel added that there were favourable conditions that enabled proper identification and PW2's evidence was corroborated by the deceased's

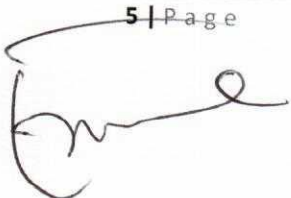


5 dying declaration. Counsel relied on **Kazwara Henry V Uganda, Supreme Court Criminal Appeal No.17 of 2015** for the proposition that Court can convict on a dying declaration if it is satisfied that there was corroboration.

Regarding the alibi, counsel submitted that the appellant's alibi was destroyed by PW2's testimony and the learned trial judge observed this at page 44 of the
10 Record of Appeal where he stated that the accused persons had set up the defence of alibi and Court had considered the defence as a whole. According to counsel, the trial Judge considered the alibi alongside the evidence of PW2, Asiimwe Scovia, PW3, John Kahima and PW4, Turinawe Wensi, and had rejected the defence of alibi.

15 Regarding sentence, counsel conceded to the fact that the period spent on remand had not been taken into account by the learned trial Judge hence rendering the sentence illegal. She added that the appellants had roughly spent 1 year in lawful custody but considering the circumstances of this case, the sentence of 40 years was neither harsh nor excessive because the
20 appellants killed their father in a cruel manner as the post-mortem report indicated that the deceased sustained very grave injuries, cut wounds on the back, abdomen and ribs. She prayed that Court maintains the sentence of 40 years.

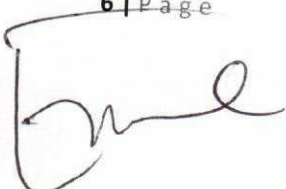
The facts as admitted by the Learned trial Judge were that the deceased, one
25 Tibugyemwa Francis then aged 60 years was a resident of Nyakijumba, Rugarama, Kyanamira Sub- County in Kabale District and was staying with Asiimwe Scovia, second wife to him and a step mother to the five accused persons who were all biological children of the deceased.



5 At the time of the incident, A1, A2, A4 and A5 were all residents of Omurutojo Village, Katokye Parish in Kabale District whereas A3, Kasande Grace was residing at Nyakijumba Cell, Kyanamira in Kabale District in the same homestead with the deceased. The accused persons and their mother had been having a long standing disagreement over land with the deceased, and
10 the fact that the deceased had married a second wife. Prior to the incident, the second appellant, Kato Godfrey, the 2nd appellant had sold a piece of land belonging to the deceased together with the 1st appellant, Byaruhanga Julius which sale the deceased had protested and vowed to recover the land.

At one time, the 2nd appellant, Kato Godfrey stole the deceased's cows and
15 sold them. The deceased went and recovered the cows. The 2nd appellant was threatening to kill the deceased and a few days later, the deceased met his death. Further the 3rd appellant, Kesande Grace had earlier on stolen the deceased's bunch of matooke and was sued by the deceased before the village council which fined the 3rd appellant 25,000/=. This created bitterness
20 between the 3rd appellant and the deceased thereafter.


On the fateful evening of 7th/2/2010 at about 7:00pm, all the 5 accused persons gathered at the house of the 3rd appellant; Kesande Grace and planned to attack the deceased. The 3rd appellant was heard telling the rest of the accused persons that if they feared to shed blood, they would not share
25 in the land. On the same night, 7th/2/2010 at about 12:30am, as the deceased and his wife, Asiimwe Scovia were sleeping in their house, they heard a bang on their door. The deceased and his wife woke up and raised an alarm. They managed to identify the 2nd appellant, Kato Godfrey who was



5 holding a panga and the 1st appellant, Byaruhanga Julius, the 2nd appellant used the panga to cut the deceased several times and also cut Asiimwe Scovia in the hand and the back.

The alarm attracted neighbours who came to their rescue. After the attack, the accused persons run away from the house leaving the deceased lying in a
10 pool of blood and the 2nd appellant, Kato Godfrey was still holding a panga leading the rest. They threatened the witness who saw them and told him not to interfere in their family matters. The deceased and his wife told their rescuers that their assailants were his children naming the accused persons. The rescuers knocked on the 3rd appellant's door, Kesande Grace to inform
15 her that her father had been attacked but she looked less concerned. The deceased was taken to Kabale Police Station to report the attack and at police; the deceased maintained that his assailants were his children. He requested police to arrest the 3rd appellant before she could escape. The third appellant was arrested and the following morning the rest of the accused persons were
20 arrested. The deceased and his wife were taken to Kabale Hospital where they were admitted as the deceased's condition was very critical. He died in Kabale hospital the following day.

A post mortem examination was carried out which revealed the cause of death as excessive bleeding and septicaemia. Asiimwe Scovia, the second victim was
25 also medically examined and was found with a blunt injury at the back and her 3rd, 4th and 5th fingers had been cut through. Each of the accused persons was examined and found to be of normal mental status.

Page


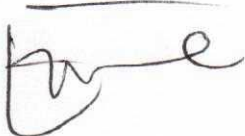


5 We have carefully studied the Court record and listened to the submissions
of both counsel. The duty of this Court as the first appellant Court is to re-
appraise the evidence adduced at trial and make our own inferences on all
issues of law and fact. **See rule 30(1) of the Rules of this Court, Pandya V**
R (1957) EA 336 and Oryem Richard V Uganda, Supreme Court Criminal
10 **Appeal No.22 of 2014.** We are alive to the standard of proof in criminal cases
being beyond reasonable doubt and the principle that an accused person
should be convicted on the strength of the prosecution case, and not on the
weakness of the defence. **See Kooky Sharma and another V U, Supreme**
Court Criminal Appeal No. 44 of 2000.

15 On ground 1 of the appeal, the learned trial Judge is faulted for convicting the
appellants without properly evaluating the evidence on record. First, the
appellants criticized the learned trial Judge for relying on evidence of a single
identifying witness PW2, Asiimwe Scovia when the circumstances she claimed
to have identified the appellants were not favourable. Secondly, he also had
20 issue with the deceased's dying declaration because it was not indicated in
the prosecution evidence that the deceased had seen the attackers but only
mentioned that he had been attacked by his children and the dying
declaration was not corroborated.

It was submitted for the appellants that the conviction was based on
25 identification by a single witness in difficult conditions to wit poor lighting
and short period taken to identify the perpetrators.

In finding that the appellants had been properly identified, the trial Judge
stated that;



5 *"Asiimwe Scovia knew each of the accused persons, she had seen them*
before the attack. The torch light helped her to see the attackers. She was
close enough; A1 Kato struggled with her, put her down and cut her arm
in the process. She was close enough to know who cut her. She was well
conversant with Kesande's voice. The conduct of Kesande that night
10 *corroborated the prosecution evidence in pointing at her guilt. Her house*
was just an extension of the deceased's homestead, she did not respond
to the alarm that came from her step-mother and immediate and close
neighbour. She instead disappeared until the time after the deceased
was taken to hospital. Her conduct following her calling that the victims
15 *be finished off legally puts her in association with the actual attackers*
that killed the deceased."

The Supreme Court has in ***Bogere Moses and another V Uganda, Criminal Appeal No.1 of 1997*** given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases as follows;

20 *"The starting point is that a Court ought to satisfy itself from the evidence*
whether the conditions under which the identification is claimed to have
been made were or were not difficult, and to warn itself of the possibility
of mistaken identity. The Court should then proceed to evaluate the
evidence cautiously so that it does not convict or uphold a conviction,
25 *unless it is satisfied that mistaken identity is ruled out. In so doing the*
Court must consider the evidence as a whole, namely the evidence if any
of factors favouring correct identification together with those rendering it
difficult."



5 In **Abdullah Nabulere & Anor V Uganda, Criminal Appeal No.9 of 1978;**

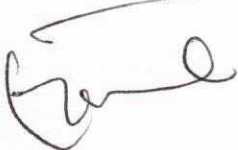
Court laid down the following conditions for proper identification:-

1. *Whether the accused was known to the witness at the time of the offence*
2. *The conditions of lighting*
- 10 3. *The distance between the accused and the witness at the time of identification and*
4. *The length of time the witness took to observe the accused.*

This Court has in **Okwang Peter V Uganda, Court of Appeal Criminal Appeal No.104 of 1999**, considered the law relating to a conviction based
15 on the evidence of a single identifying witness where it was held that:-

“Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the
20 conditions favoring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from
25 possibility of error.”

As to whether the appellants were known to the witness at the time of the offence, PW2, Asimwe Scovia testified that the appellants were well known to



5 her as they were her step- children and further the 3rd appellant's house,
Kesande Grace, was just an extension of hers.

On whether the conditions of lighting were favourable, PW2 testified that she
was sleeping and at around 12:30 am, she saw light through the ventilators.
She heard a loud bang on the door and on reaching the sitting room, she
10 identified Kato, Mazuli and the third person was holding a torch. PW2 testified
as follows;

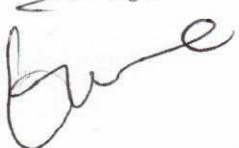
*"I know the accused persons; A1 is Kato Godfrey, A2 Byaruhanga Julius
Mazuli, Kesande Grace, Elias Mugenyi, and Saturday. I except
Saturday. I am a step wife of their father. On 7/2/2010, I was at home
15 with Francis Tibugyemwa at 8:00pm, I was getting clothes from outside.
Kato, Byaruhanga Julius and Saturday went to Kesande's place which
was a bar. I entered the house, my husband was Tibugyema, we went
to bed. At 12:30am I saw light coming from the ventilators. The deceased
told me it was a car light. I heard a big bang on the door. The door broke.
20 On reaching the sitting room I met Kato and Majiri. The third one was
holding a torch. Their torch had lit the whole room so I saw them. I told
them to take whatever was in the house and leave us. Kato held me by
the throat I fell down. He swang a panga, I held my hand and he cut the
hand. I escaped and ran away. I left them cutting my husband, Kesande
25 was shouting that they should finish him. I told them I had recognized
them. My neighbours were Kesande, Johyn, Turinawe Owensi.
Kesande's house was just an extension of mine, which was built for use
as a commercial house. Kahima was in a house, separated by a hedge.*



5 Turinaawe's house was about 30 metres apart. I jumped, I entered
Kahima's place, a panga was shown at me, it hit me in the back. I
reported to Kahima, I told Kahima the names. Kahima chased after the
attackers. He called other people. They found Francis crying saying he
had been killed by his children he named Kesande, Juri and Saturday.
10 A vehicle was brought, the intestines were out, he was tied up with a
piece of cloth. We reported at Kabale Police. The deceased said he had
been killed by his children Kato, Majuri and Kesande and others. I have
not seen the Police directed that the victim be taken to Hospital. The
doctor was taken to the theatre he died the next day, 8/2/2010. Kesande
15 was not one of the neighbours who gathered. Kesande had been in a
dispute over a banana she cut."

From the above evidence, the incident took place in the middle of the night at
12:30am in darkness. There was no light in the house when the attackers
broke the door, PW2, the only identifying witness moved from the bedroom to
20 the sitting room where the only light was a torch carried by one of the
attackers.

We find that while the torch may have favoured correct identification, if it was
being held by PW2 and pointing at the attackers. In this case, however, the
torch was held by the attackers and there is no evidence that it was pointed
25 at them. The fact that the attackers had the torch made it difficult for PW2 to
identify them because of the flash from the torch which would ordinarily be
pointed directly at her hence affecting her sight.



5 PW2 further testified that at around 8:00pm on that day, as she was getting her clothes from outside, she identified Kato, Byaruhanga Julius and Saturday inside Kesande's bar with the help of the moonlight. We find that this evidence was weak as the light from the moon could only enable one to recognize people who were outside but not inside the house. Therefore PW2
10 could not have identified the people in Kesande's bar in the night using only moonlight in the absence of other source of light.

Regarding the proximity between the appellants and the witness at the time of the identification, PW2, Asimwe Scovia testified that when the attackers entered the house, Kato held her by the throat and she fell down, and he
15 swang a panga, held her hand and cut her. She then escaped and run away. We find that the distance although between the witness and her attackers was very short since her attacker was able to hold her hand, the pain and shock accompanied with the bang at the door must have negatively affected her ability to properly identify the attackers.

20 It was not shown in the evidence how long PW2 took to observe the assailants; she merely stated in cross examination that she was able to escape and it took her 5 minutes to return from calling people to rescue them. She added that she did not look back but heard them cutting. We find that the duration of the encounter with the assailants could not be established so as to support
25 a finding of proper identification in darkness by a single witness.

PW2 further testified that when she reached the sitting room she met Kato, Majiri and a third person who was holding a torch. She further stated that




5 she escaped, ran away and left them cutting her husband while Kesande was shouting that they should finish him off.

We note that the witness did not identify who the third person holding the torch was neither did she state where Kesande was when uttering the words 'finish him off'. She further testified that PW3's house, John Kahima was
10 separated from her house by a hedge which she jumped and entered Kahima's place. A panga was showed to her and it hit her in the back. She reported to Kahima who ran after the attackers however in his testimony, PW3, John Kahima testified that he heard Scovia making an alarm that they had been attacked by Majuri and Kato. He found the deceased injured saying his
15 children had killed him so he proceeded to call people.

We find that PW2's testimony contradicted that of PW3 because according to PW2 she went and called Kahima who ran after the assailants while PW3 stated he heard an alarm by PW2 that they had been attacked by Majuri and Kato. He found the deceased injured and proceeded to call other people. She
20 further stated that a panga was showed to her and it hit her in the back as she was going to call PW3, John Kahima which took her 5 minutes. There was no evidence that there were more than one panga during the attack. It is doubtful that the same panga could have been used to injure the deceased and at the same time cut PW2 who was on the run to Kahima's house. We
25 find so because the witness testified that as she ran away, she did not look back but heard them cutting him.

The law is now well settled that inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be



5 resolved in favour of the accused. However, where they are minor, they should
be ignored if they do not affect the main substance of the prosecution's case,
save where there is a perception that they were deliberate untruths. See
Alfred Tajar V Uganda, EACA Crim. App. No.167 of 1969 and **Sarapio**
Tinkamalire V Uganda, Supreme Court Criminal Appeal No.027 of
10 **1989.**

We find that the inconsistency on the use of the panga was major as it related
to the identification of the 2nd appellant, Kato Godfrey who was identified as
having held the panga which was used to cut PW2, Asiimwe Scovia.

We are of the considered view that this being evidence of a single identifying
15 witness, there was need to treat her evidence with the greatest care to ensure
that such evidence is free from any possibility of error. **See Abdalla Nabulere**
and Anor V Uganda (supra).

Prosecution alleged that the appellants had been having a long standing
dispute over land and stolen cows with the deceased and also because the
20 deceased had married a second wife. Further that the 3rd appellant, Kesande
Grace had a dispute with the deceased over stolen matooke. Counsel
submitted that because of all these disputes, there was animosity between
the appellants and the deceased which formed the motive for the attack.

All the appellants denied ever having any grudge with the deceased nor their
25 step-mother. A3 testified in cross examination that she had never cut the
deceased matooke but learnt of the banana accusations at police when she
was arrested.

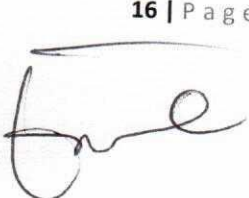
In **Waihi and anor V Uganda (1968) E.A 278**, Spry J held at page 280 thus:



5 ***"Evidence of a prior threat or of an announced intention to kill is
always admissible evidence against a person accused of Murder,
but its probative value varies greatly and may be very small or
even amount to nothing. Regard must be had to the manner in
which a threat is uttered, whether it is spoken bitterly or
10 impulsively in sudden anger or jokingly, and the reason for the
threat, if given and the length of time between the threat and the
killing are also material. Being admissible and being evidence
tending to connect the accused person with the offence charged,
a prior threat is we think capable of corroborating a confession."***

15 In other words evidence of a prior threat cannot stand on its own. It can only
corroborate other evidence for example had PW2, Asiimwe Scovia properly
identified the appellants, then her evidence would have been corroborated. It
is not in evidence when the threats were made to the deceased and there is
no evidence that threats from the 2nd appellant, Kato Godfrey where ever
20 reported to police. For this reason, we cannot rely on mere allegations by the
prosecution.

Regarding the evidence of the dying declaration, counsel for the appellant
further invited this Court to look at the evidence of PW3, John Kahima who
testified that he heard Scovia making an alarm that they had been attacked
25 by Majuri and Kato. According to counsel, it was clear that this alarm had
also been heard by the deceased who was inside the house because the alarm
was made from outside the house and this could have influenced his dying
declaration.



5 The law regarding dying declaration was stated by the Supreme Court in
Tindigwihura Mbahe V Uganda Cr. App. NO.9 of 1987. Court stated that:-

10 "Evidence of dying declaration must be received with caution because the
test of cross examination may be wholly wanting; and particulars of
violence may have occurred under circumstances of confusion and
surprise, the deceased may have stated his inference 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 the darkness when identification of the
assailant is usually more difficult than in daylight. The fact that the
15 deceased told different persons that the appellant was the assailant is
no guarantee of accuracy. It is not a rule of law that in order to support
conviction, there must be corroboration of a dying declaration as there
may be circumstances which go to show that the deceased could not have
been mistaken. But it is generally speaking very unsafe to base
20 conviction solely on the dying declaration of a deceased person made in
the absence of the accused and not subjected to cross examination unless
there is satisfactory corroboration"

Further **section 30 of the Evidence Act Cap 6** states that;

25 "Statements, written or verbal, of relevant facts made by a person who is
dead, or who cannot be found or who has become incapable of giving
evidence, or who cannot be found or who has become incapable of giving
evidence, or whose attendance cannot be procured without an amount of



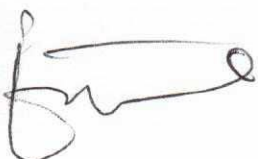
5 delay or expense which in the circumstances of the case appears to the Court
unreasonable, are themselves relevant in the following cases-

(a) when the statement is made by a person as to the cause of his or her
death, or as to any circumstances of the transaction which resulted in
his or her death, in cases in which the cause of that person's death
10 comes into question and the statements are relevant whether the
person who made them was or was not, at the time when they were
made, under expectation in which the cause of his or her death comes
into question."

The learned trial Judge stated that:-

15 "PW2, Asiimwe's evidence is adequately corroborated by the deceased's
dying declaration. PW3, John Kahima's evidence confirms that Asiimwe
at the earliest opportunity mentioned the attackers. He was the first
person to answer the alarm which he heard at 12:00 midnight and Scovia
Asiimwe was saying "Kato and Majuri have attacked us" Separately the
20 deceased told him that "Julius, Kato and Kesande have killed me" The
deceased repeated this to PW4 Turinawe and to the Policeman who
testified, PW5, D/CPL, Mushabe."

PW2, Asiimwe Scovia stated that when PW3, Kahima arrived at the scene of
crime, he found the deceased crying that he had been killed by his children
25 namely Kesande, Juri and Saturday. She further testified that the deceased
stated that he had been killed by his children Kato, Majuri and Kesande. PW
3, John Kahima, testified that he found the deceased injured and he stated
that his children namely Julius, Kato and Kesande had killed him. During



5 crossing examination, PW3 stated that Asiimwe Scovia, PW2 had told him that they had been attacked by Kato and Majuri.

We note that PW2, Asiimwe Scovia and PW3, John Kahima contradict themselves in what the deceased stated in his dying declaration. First, PW2 mentions Kesande, Juri and Saturday as the people the deceased had
10 mentioned to PW3 then she testified that the deceased had mentioned Kato, Majuri and Kesande.

We do not agree with the learned trial Judge's finding that the evidence of PW2, Asiimwe Scovia corroborated the deceased's dying declaration. We find that the contradiction in the deceased's dying declaration regarding the
15 names of his own children was major and the learned trial Judge should have taken it into account and thus not relied on the dying declaration in support of the prosecution case.

In so finding, we are mindful of the principle in ***Mdiu Mande V R (1965) EA 193***, that a dying declaration does not specifically require more than one
20 witness since repetition to different witnesses is not a guarantee of the accuracy of a dying declaration as it may amount to consistency on the part of the deceased.

According to the testimony of PW2, when she heard a loud bang at the door, she went to the sitting room and found the assailants who attacked her. She
25 made an alarm and ran to Kahima's place to inform him of the attackers.

We agree with counsel for the appellant's submission that the deceased's dying declaration must have been influenced by the alarm made by PW2,



5 Asiimwe Scovia that Kato and Majuri had attacked them. This is because the deceased did not identify the attackers as he was in darkness in the bedroom.

We are of the considered view that it was unsafe for the learned trial Judge to convict the appellants on the evidence of the dying declaration yet the evidence on record shows that the deceased did not even identify his

10 attackers. The Supreme Court in ***Mibulo Edward V Uganda, Criminal Appeal No.017 of 1995*** held that a Court may convict on the evidence of a dying declaration, if circumstances exist that show that the deceased was not mistaken. As we have pointed out earlier, the circumstances in the instant case point to the possibility of the deceased having been mistaken. His dying

15 declaration must have been influenced by the alarm that was made by PW2, Asiimwe Scovia that they had been attacked by Kato and Majuri.

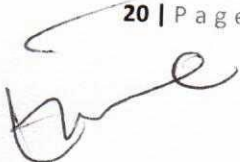
Further as indicated by PW2, Asiimwe Scovia that when PW3, Kahima arrived at the scene of crime, he found the deceased crying that he had been killed by his children namely Kesande, Juri and Saturday. We note that the trial

20 Judge stated that he had not found any evidence throughout the trial that incriminated Mugenyi Erias and Saturday Javilla and after acquitted them. However, he went ahead to find that PW2's evidence, Asiimwe Scovia corroborated the dying declaration.

Having carefully examined the dying declaration together with the evidence of

25 the single identifying witness, we find that the said evidence was too weak to sustain a conviction on its own. It was not sufficiently corroborated and neither could it corroborate the evidence of PW2, Asiimwe Scovia.

Therefore ground 1 of the appeal succeeds.



5 On ground 2 of the appeal, counsel for the appellant faulted the learned trial Judge for not considering the appellants alibi and yet the onus was on the prosecution to disprove the alibi.

In dealing with the alibi raised by the appellants, the learned trial Judge had this to say;

10 *"Accused persons have set up alibi in defence and the defence as a whole has been considered. I have not found any evidence throughout the trial that incriminates Mugyenzi Erias and Saturday Javilla. They were not identified at the scene of crime. I find that the alibi of A4 and A5 above mentioned remained intact because they were not placed at the scene of*
15 *crime by the prosecution evidence or any other evidence in the case. A1 Kato, A2 Byaruhanga Julius and A3 Kesande Grace were properly identified at the scene as I have analyzed above the defence of alibi is not available to any of the three accused persons."*

It is a general rule of law that if an accused puts forward an alibi as an answer
20 to a criminal charge, he does not thereby assume the burden of proving the defence, and that the burden of proving his guilt remains throughout with the prosecution. See ***Sekitoleko V U (1967) 1 EA 531 and R V Johnson (1961) 3 ALLER 969.***

From the record, the 1st appellant, Byaruhanga Julius stated that on the
25 material date at 7:00pm he was at home and he heard people waking him up at 6:30am the next morning. He stated that it was John Kahima who told him that his father had been attacked and injured and he had not been at Kesande's home.

5 The 2nd appellant, Kato Godfrey stated that on that fateful day, he spent the night at his home and at 6:00am he heard people demanding that he opens his door and on 7th January, 2001 at 7pm, he was at home working in a shop. He added that he did not go to Kasende's house that night.

The 3rd appellant, Kesande Grace stated that on that day she had been selling
10 local brew. She finished at 6pm, stayed home, cooked and they slept at 8pm. At midnight she heard John Kahima calling her that her father had been attacked. She added that her brothers never came to her bar that day.

Apart from rejecting the appellants alibi, the learned trial Judge also considered the 3rd appellant's conduct. He stated that the conduct of Kesande
15 that night corroborated the prosecution evidence pointing to her guilt. That although her house was just an extension of the deceased homestead, she did not respond to her step mother's alarm. She instead disappeared until the deceased was taken to hospital.

We have already found that the evidence of PW2 was weak and required
20 corroboration from other witnesses in order to rule out the possibility of mistaken identity. Had the learned trial Judge warned himself of this, he would have found the identification evidence inadequate. We find that none of the appellants was placed at the scene of crime. The defence of alibi succeeds.

25 Ground 2 succeeds.

We note that in the summary of the case, prosecution alleged that a panga was recovered from the deceased's compound which was believed to have been

5 used by the appellants to cut the deceased and the complainant. The Post-Mortem report revealed that the deceased suffered a cut wound on the face, the deep cut wound on the back, a cut wound into ribs and abdomen among others. However, there was no evidence of blood or injurious struggles established against the appellants. Medical form (PF 24) on examination of
10 the appellants did not reveal anything. Further, there was no explanation as to why what was found in the deceased's compound was not subjected to forensic examination.

In their joint opinion, the assessors found that PW2's evidence was not corroborated. Further that the dying declaration may have been influenced by
15 a grudge that existed before and there was no evidence of proper identification of the appellants. They advised the trial Judge to acquit the accused persons.

In conclusion and for the reasons advanced above, this appeal succeeds. We accordingly quash the sentence of 40 years imprisonment imposed by the learned trial Judge. We find no reason to resolve ground 3.

20 We hereby order for the immediate release of the appellants unless they are being detained for some other lawful charges.

We so order

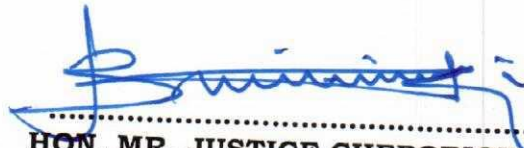
Dated at Mbarara this*2nd*.....day of*October*.....2018

[Signature]

.....
HON. LADY JUSTICE ELIZABETH MUSOKE
JUSTICE OF APPEAL

[Signature]

5



.....
HON. MR. JUSTICE CHEBORION BARISHAKI
JUSTICE OF APPEAL

10



.....
HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA
JUSTICE OF APPEAL

15

20

25