THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 0419 OF 2015

1. KASODE JULIUS
2. KICONCO FRED ::APPELLANTS

VERSUS

UGANDA:::RESPONDENT

(An appeal from the decision of the High Court of Uganda at Rukungiri before Elubu, J. dated the 15th day of January, 2015 (Conviction) and the 16th day of January, 2015 (sentence) in Criminal Session Case No. 0015 of 2013.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF THE COURT.

Background

The High Court (Elubu, J.) sentenced the 1st appellant to 20 years imprisonment; and the 2nd appellant to 22 years, having convicted the two of the offence of Murder of the same person, Ahabwomugisha Caleb. In arriving at his decision to convict the appellants, the learned trial Judge accepted the case for the prosecution as set out in the relevant indictment that Kasode Julius and Kiconco Fred, the 1st and 2nd appellants, respectively, had on the 20th day of June 2011 at Mashenya Village in Kanungu District, unlawfully caused the death of Ahabwomugisha Caleb.

Being dissatisfied with the decision of the trial Court with respect to both conviction and sentence, the appellants have appealed to this court on the following grounds:

> "1. **The Learned Trial Judge erred both in law and fact to solely relying (sic) on the evidence of a dying declaration without enough corroborative evidence.**

2. **The Learned Trial Judge erred in law to sentence the Appellants to 20 and 22years imprisonment respectively without considering the period spent on remand.**

3. **The Learned Trial Judge erred in fact to sentence the Appellants to 20 years and 22 years respectively which were harsh sentences."**

Representation.

At the hearing of the appeal, Ms. Kentaro Specioza, learned Counsel represented the appellants on state brief; on the other side, Ms. Vicky Nabisenke, learned Assistant Director of Public Prosecutions, represented the respondent. Due to the fact that the Country was dealing with a Public Health Emergency aimed at reducing the transmission of COVID-19, and the Government had put in place restrictions on movement, at the time this appeal was heard, it was not possible for the two appellants to be physically in Court. Thus, the two appellants remained confined at Mbarara Government Prison Facility. Each appellant was, however, able to follow the appeal and to keep in touch with his lawyer remotely from the Prison Facility via Zoom Video Conferencing Technology;

Written submissions for the parties, which had been filed prior to the date of the hearing, were, with leave of this Court, adopted in support of the respective cases for the parties at the date of the hearing.

Appellant's case.

Ground 1

In his written submissions on ground 1, counsel for the appellants contended that it was the learned trial Judge erred to base the decision to convict the appellants solely on the deceased's uncorroborated dying declaration.

Counsel submitted that the deceased had told PW1 Rukundo Christine, his wife, as well as PW2 Tukamwesigwa Edson, shortly before he passed away, that it was the appellants who had assaulted him. PW1 had also said in evidence that the deceased had told him about the appellant's participation in the assault in question in the presence of one Reverend Kanyankole. Counsel submitted that the statements attributed to the deceased were

dying declarations, which ought to have been corroborated before they could be relied on to convict the appellants.

Counsel cited **Oyee George vs. Uganda, Court of Appeal Criminal Appeal No. 0159 of 2003,** where the need for corroboration of a dying declaration was emphasized, with the court laying down the following conditions before any weight can be attached to a dying declaration:

> "1. **Whether the deceased was certain about the identity of the attackers.**
>
> 2. **If the attack occurred at night when visibility is difficult the court must be certain that there was no mistaken identity.**
>
> 3. **The fact that the deceased may have told different people that the Appellant was his attacker does not necessarily mean that the deceased was accurate."**

Counsel submitted that in the present case, the conditions prevailing at the time when the deceased was assaulted raise doubt as to whether the deceased was certain about his attackers. The evidence of PW1 shows that the deceased had been assaulted by the appellants as he left the bar, at a nearby place. The appellants were not with the deceased in the bar so that he could be said to have properly identified them. Moreover, it was highly likely that the deceased was assaulted at night after 6.00 p.m. Yet, according to counsel, the prosecution did not lead evidence to establish the conditions prevailing at the time nor whether the deceased had identified the appellants visually or by voice. It was also not established whether the appellants were known to the deceased prior to the attack.

Counsel further submitted that the possibility of mistaken identification could not be ruled out in the circumstances. Counsel relied on **Bogere Moses & Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997** for the proposition that in dealing with evidence of identification by eye witnesses in criminal cases, the court ought to satisfy itself from the evidence whether the conditions and 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 must then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction unless it is

satisfied that mistaken identity is ruled out. Counsel contended that the possibility of mistaken identity in the present case could not be ruled out.

It was further the contention of counsel for the appellants, that the evidence relied on by the learned trial Judge as providing corroboration of the evidence of the dying declaration was incapable of offering such corroboration. Counsel was particularly critical of the learned trial Judge' conclusion that because the 2nd appellant did not show up when other villagers gathered at the deceased's home for a vigil after learning of the death of the deceased, for that reason alone, the 2nd appellant had exhibited conduct of a guilty person, which was capable of offering corroboration of the dying declaration. Counsel submitted that the conduct of the 2nd appellant could be given an innocent interpretation that his being found in a banana plantation near the deceased's home showed that he had nothing to hide. Secondly, that when the 2nd appellant saw a gang of people running towards him in the aftermath of the assaulting of the deceased, he did not run away. Counsel thus argued that the conduct of the second appellant pointed to the conduct of an innocent person.

In conclusion, counsel prayed the Court to allow ground 1 of the appeal because there was no evidence to corroborate the dying declaration of the deceased.

Ground 2.

With respect to ground 2, counsel submitted that the sentence imposed on the appellants by the learned trial Judge was imposed without due consideration of the period spent by the appellants on remand. The learned trial Judge merely mentioned that the appellants had spent 3 ½ years on remand, but in passing the sentence, he did not deduct the exact period from the sentence he imposed. Citing **Tukamuhebwa David Junior & Another vs. Uganda, Supreme Court Criminal Appeal No. 0059 of 2016** where the Supreme Court set aside a sentence of 18 years imprisonment because the trial Court had not deducted the period of 3 years and 7 months from the sentence it eventually imposed, counsel prayed this Court to set aside the sentence of the learned trial Judge for offending the requirement to deduct the period of remand from the final sentence.

Ground 3.

In regard to ground 3, counsel contended that the respective sentences of 20 years and 22 years imprisonment, imposed on the respective appellants were harsh and ought to be set aside. Counsel invited the Court to consider the mitigating factors submitted for the appellants in the trial Court, as well as his submissions now on appeal that the appellants are still young men, who have had time to repent while in prison. Counsel further asked Court to have regard to the fact that the 2nd appellant's house was demolished leaving his 4 children with no home.

Counsel proposed a sentence of 12 years imprisonment for each appellant excluding the period spent on remand, as appropriate in the circumstances.

Respondent's case.

Ground 1.

In the written submissions, counsel for the respondent with respect to ground 1, supported the findings and conclusions of the trial Court. She contended that contrary to the assertions by the appellants, the dying declaration was corroborated by the evidence on record. Moreover, prior to convicting the appellants, the learned trial Judge had warned himself and the assessors, as was appropriate in the circumstances.

Counsel pointed out that in his dying declaration, the deceased told PW1 and PW2 that it was the appellants who had assaulted him before taking his money. The deceased further stated that the 1st appellant had slapped him on the face causing him to fall down, at which point the 2nd appellant and another unknown assailant had assaulted the deceased. According to PW1 the wife of the deceased, the appellants were well-known to the deceased because they were his neighbours.

Counsel cited **Tindigwihura Mbahe vs. Uganda, Supreme Court Criminal Appeal No. 009 of 1987** where it was held that:

> **"Evidence of a dying declaration must be received with caution because the test of the cross examination may be wholly wanting; and may have occurred under circumstances of confusion and surprised; 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 darkness when identification of the assailant is usually more difficult than day light.

The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case. It is not a 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 go 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 deceased and not subject to cross examination unless there is satisfactory corroboration."

Referring to the principles in the above case, counsel for the respondent submitted that the deceased had mentioned the names of the appellants as his assailants to different persons; the deceased had given details of the assault saying that the 1st appellant had slapped him on the face causing him to fall down; the deceased had mentioned going to a bar where he stayed with his friends just before he was assaulted. All this showed that the deceased had correctly identified the appellants.

Counsel for the respondent disagreed with the submission by counsel for the appellants that there was an issue with regards to the difficult conditions at the time the deceased alleged to have identified the appellants, and submitted that the deceased never mentioned any such difficult conditions when he identified the appellants.

Counsel submitted that the appellants were well-known to the deceased, a fact which the learned trial Judge considered.

With respect to corroboration of the dying declaration, counsel for the respondents submitted that the learned trial Judge was right to take the view that the conduct of the 2nd appellant in failing to join other village mates who had congregated at the home of the deceased for a vigil was conduct of a guilty person, which served to corroborate the dying declaration of the deceased. Counsel further submitted that there was evidence that the 2nd appellant had lied on oath, telling the trial Court that he attended the deceased's vigil yet he was arrested from a banana plantation away from the place where the vigil for the deceased was being held, according to the

evidence of PW3. Counsel cited **Juma s/o Ramadhani vs. Republic, Court of Appeal Criminal Appeal No. 1 of 1993** for the proposition that lies told by an accused person can offer corroborative evidence in appropriate circumstances.

For the above submissions, counsel asked this Court to be pleased to find that ground 1 of the appeal fails, and to uphold the conviction of the appellants by the learned trial Judge.

Grounds 2 and 3.

Counsel for the respondent submitted on these two grounds together. Counsel conceded that the learned trial Judge did not state whether he had taken into account the period spent by the appellants on remand while they attended trial. This contravened **Article 23 (8)** of the **1995 Constitution** and rendered the sentence of the trial Court illegal.

Counsel made a prayer to this Court to have the illegal sentence imposed by the trial Court set aside, and for this Court to use its powers pursuant to **Section 11** of the **Judicature Act, Cap. 13** to set the sentence aside and then proceed to re-sentence the appellants.

In arriving at an appropriate sentence, counsel asked this court to have regard to the seriousness of the offence of murder of which the appellants were convicted as it carries the maximum sentence of death; to consider the brutal manner in which the appellants murdered the deceased, who was their friend by savagely assaulting him to death.

Counsel concluded by making a prayer to this Court to consider a sentence of 22 years imprisonment after the remand period has been deducted, as appropriate for both of the appellants for the offence of murder of which they were convicted.

Resolution of the Appeal.

We have read the court record, carefully considered the submissions for both sides, the law applicable, and the authorities cited and those not cited but relevant to the determination of this appeal.

This is a first appeal, and we shall bear in mind the following principles:

According to **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**, on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, this Court may re-appraise the evidence and draw inferences of fact.

In **Kifamunte Henry vs. Uganda Criminal Appeal No. 10 of 1997**, the Supreme Court stated that:

> **"We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of 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. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire vs Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5."**

After reviewing the evidence on record, we are satisfied that the following facts are established:

On the 21st day of June, 2011, the deceased left his home but he had not returned by the time his wife and children went to bed after having supper. The next day at about 6:00 am, his wife was informed by a village mate that her husband was lying unconscious at the roadside along Kanungu-Kabale Road and was in a bad physical condition.

The deceased's wife PW1 Rukundo Christine, together with PW2 Tukamwesigwa Edson the deceased's brother, went to the spot they had been directed to, and indeed found the deceased lying there injured. Arrangements were made, and PW1 and PW2 took the deceased to Kambuga

Hospital for medical attention. At the hospital, the deceased could not talk, he was vomiting blood. So, he was given emergency medical attention.

At about 12 noon after having received treatment for about 5 hours, the deceased was able to speak, and when he spoke, he stated that he had suffered the critical injuries after being assaulted by three assailants, two of whom he had been able to identify as the two appellants.

The deceased further told PW1 that on his way home on the night in question, he passed through Rwemengo Cell and went to a bar there. At the bar, he ordered for and took a glass of waragi. He was at the bar with his friends. After enjoying his drink, he left to go home.

On his way home, after he had walked away from the bar for a short distance, he met three persons out of whom he could only identify two. As stated earlier, the appellants were those two persons the deceased said to have identified. He repeated the statements made to PW1 to PW2 Tukamwesiga Edson, and one Reverend Kanyankore who was not called as a witness.

The deceased later succumbed to his injuries and died. The report from the deceased's post mortem examination indicated that the cause of his death was close head injury after assault with severe shock and both internal and external hemorrhage.

People from the village gathered for a vigil at the home of the deceased but the 2nd appellant never showed up.

On 21st June, 2011, the 2nd appellant was arrested by PW3 Ephraim Kimunyu in a banana plantation where he was seated. PW3 said in evidence that he participated in a search at the 2nd appellant's home from where blood stained and wet jean trousers were recovered. The trousers were forwarded for examination at the Government Laboratory but the results were not tendered in Court.

There was hearsay evidence of PW4 Detective Inspector of Police Karanzi Rauben, the investigating officer, that he had been told by one Alex Tumukwasibwe that the appellants were seen leaving the bar where the

deceased had gone for a drink just before he was attacked, along with the deceased. However, Alex Tumukwasibwe was not called as a witness.

Therefore, apart from being mentioned in the dying declaration of the deceased, the 1st appellant got connected to the killing of the deceased because he was arrested over the killing at his home on 22nd June, 2011. The 1st appellant told Court in his defence that on the night the deceased was murdered, he was at his home. On the next day, he had gone about his two business as a lumber jack and as a photographer until he was arrested later that day.

The 2nd appellant also denied any involvement in the killing of the deceased.

After having re-evaluated the evidence, it is clear to us that the main piece of evidence linking the two appellants with the offence in question is the dying declaration of the deceased.

In that dying declaration, according to PW1 who heard it, the deceased stated that it was the appellants who had assaulted him inflicting the injuries from which he died. The deceased said that it was the 1st appellant who had slapped him on the face; and that the both appellants had assaulted him under the impression that he had money on him, only to discover that he had only Ug. Shs. 3,000/=.

It was established by the prosecution evidence that the deceased was assaulted by the two appellants and he lost consciousness. The deceased was then left in the unconscious state at a spot along the Kabale-Kanungu main road.

The two appellants lived in the same area as the deceased, and so the learned trial Judge concluded that they were well known to him.

We shall first determine whether the deceased's dying declaration was rightly relied upon by the learned trial Judge in convicting the appellants. The law on dying declarations is as follows:

Section 30 (a) of the **Evidence Act, Cap. 6** provides that statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts when the statements are made by a person as to the cause of his or her death, or as to any of the circumstances of the

transaction which resulted in his or her death, in cases in which the cause of that person's death 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 of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question;

In **Mibulo Edward vs. Uganda, Supreme Court Criminal Appeal No.17 Of 1995,** the Court relied upon the case of **Tindihigwihura Mbahe vs. Uganda, Supreme Court Criminal Appeal No. 09 of 1987** as correctly restating the law on dying declarations. It was observed that:

> **"The law relating to dying declarations is now well settled. It has been stated in a number of cases including R. v Eligu S/O Odel and Epangu S/O Ewunya (1943) 10 EACA 90, Pius Jasunga V. R. (1954) 21 EACA 331 and Mande v. R. (1965) EA 193. The learned trial judge correctly addressed himself to the law when he stated,**
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> **"The law regarding dying declarations was restated by the Supreme Court recently in the case of Tindigwihura Mbahe v. Uganda Cr. App. NO. 9 of 1987. Briefly the law is that 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 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 conviction sorely 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"**

As stated in the above cases, it is not a rule of law that a conviction cannot be based solely on the evidence of a dying declaration. Where the evidence relating to the dying declaration was so cogent as to exclude any possibility of doubt or mistaken identification, that evidence would be sufficient to

support the conviction. This is because, under the Evidence Act, Cap. 6, evidence of dying declarations is relevant.

In the present case, after reviewing the evidence on record, we have noted that the deceased repeatedly mentioned the appellants as his assailants when he spoke to PW1 and PW2. The deceased described the circumstances by which he came to be assaulted by the appellants. PW1 said in evidence at page 10 of the record that the deceased said that it was Kasode (1st appellant) and Fred (2nd appellant), who assaulted him.

Further, according to PW1, the deceased narrated his movements before he was assaulted, stating in his dying declarations that he was on his way home from the bar where he had gone to have a drink; that he met three persons including the two appellants who assaulted him; that the 1st appellant had slapped him in the face where after the 2nd appellant and another unidentified person had also severely assaulted him. The fact that the appellants were well known to the deceased served to lessen the possibility of mistaken identification of the appellants.

We have also considered the submissions of counsel for the appellants that there were difficult conditions for correct identification, and the counter submissions for the respondent that such difficult conditions were not established in evidence. We are convinced on appreciating all the evidence that the deceased was able to identify the appellants as two of his assailants. The deceased made the statements from the hospital where he was taken for treatment having been there for more than 5 hours. It cannot be said that the deceased was in a state of confusion about those who had attacked him.

On this point, the learned trial Judge stated in his judgment at page 39 of the record that:

> **"I warn myself now as I warned the assessors to treat this evidence with utmost caution. The accused (sic) named the two persons and the evidence of PW1 and PW2 is that the accused was not drank at the time although PW1 he had drank waragi. This rings true because the accused person had been drinking the previous night and started speaking at 12:00 p.m noon (sic) the next day. If there had been any effect of alcohol it had passed. Secondly, he mentions he only bought a glass worth**

2000/- which this court finds could not have made him too drank to identify the assailants.

The accused persons are well known to the PW1 and PW2. PW2 stated they are the only ones with the names Kasode and Fred in their village. Considering that the two are well known to PW1 and PW2 then they must have been equally well known to the deceased who lived in the same village with PW1 and closely associated with PW2. Bearing this in mind I find that the accused (sic) must have properly recognized A1 and A2 as his assailants."

From the reasoning in the above passage, it is clear that the learned trial Judge believed the evidence of the dying declaration for the following reasons; 1) The deceased had a clear mind when he made the dying declaration and was not confused about what he was saying when he stated that the appellants were his assailants; 2) The dying declaration was cogent because the deceased identified the respective appellants by name as Kasode and Fred in the dying declaration; 3)The fact that the appellants were well-known to the deceased made the dying declaration more cogent. We have no reason to fault the learned trial Judge's conclusions.

We further find that it was helpful to the prosecution case that the deceased was able to narrate his movements on the night he was assaulted. We have already set this evidence out, but we summarize by saying that it was crucial to the cogency of the dying declaration that the deceased narrated how he had gone to the bar for a drink; after taking the drink he began to walk home before he was attacked, by the two appellants, after he had walked some distance away from the bar.

Therefore, because the dying declaration was cogent enough, and because on the authority of the **Mibulo case (supra)**, a cogent dying declaration may be relied on even without its being corroborated. We would thus maintain the conviction of the appellants basing only on the dying declaration.

We shall, however, make some comments on the contentions for the appellants about the evidence relied on by the learned trial Judge as corroboration. In **Ntambala Fred vs. Uganda, Supreme Court Criminal Appeal No. 0034 of 2015**, the Supreme Court after reviewing the observations in **Uganda vs. George Wilson Simbwa Supreme Court**

Criminal Appeal No. 37 of 1995 about the definition of corroboration, define corroboration as follows:

> **"...corroboration is evidence from other sources which supports the testimony of the complainant and connects or tends to connect the accused person to the commission of the crime."**

The learned trial Judge was alive to the practice by courts in looking for evidence which can corroborate a dying declaration, and he found two pieces of evidence which corroborated the dying declaration. Firstly, the evidence that the 2nd appellant was conspicuously missing from the vigil organized at the deceased's home following his death. The learned trial Judge took the view at page 40 of the record that somehow by being absent from the vigil, the 2nd appellant had conducted himself in a way that proved his guilt and the truth of the dying declaration. The learned trial Judge also had regard to the fact that the 2nd appellant had told Court that he had attended the vigil and that is where he was arrested from, which was false considering that the prosecution had established beyond reasonable doubt by the evidence of PW3 and PW4 that the 2nd appellant was arrested in his garden and not at the vigil.

In **Chesakit Matayo v Uganda Court of Appeal Criminal Appeal No. 95 of 2004**, this Court approved the following observations by the learned trial Judge from whose decision the appeal had been preferred, as correct:

> **"In evaluating evidence concerning this issue, the trial judge stated;**
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> **"Lies are inconsistent with innocence. Proved lies can be used to corroborate prosecution evidence. See Juma Ramadhan Vs Republic Cr. App. No. 1 of 1973 (unreported). I am aware that an accused person cannot be convicted on the basis of the lies he tells court. I found that the numerous lies which the accused told court were inconsistent with his innocence. They corroborated the prosecution evidence that he was a participant in the death of the two deceased persons."**

The case of **Juma Ramadan vs. Republic, Court of Appeal Criminal Appeal No. 1 of 1973** referred to in the above passage was cited in the submissions of counsel for the respondent in this case.

Therefore, after evaluating the evidence on record which establishes that the 2nd appellant told lies on oath in the trial Court about attending the

deceased's vigil, we are satisfied that his act of telling lies was inconsistent with innocence and corroborated the dying declaration of the deceased in this case. We therefore conclude that the learned trial Judge was right to conclude that the said evidence corroborated the dying declaration.

In regard to the 1st appellant, the learned trial Judge took the view that because the dying declaration of the deceased had been corroborated in respect of the 2nd appellant, that by extension the said declaration had been corroborated for the 1st appellant. The learned trial Judge reasoned that the legal principle articulated in **Susan Kigula vs. Uganda, Supreme Court Criminal Appeal No. 1 of 2004**, is that corroboration in part corroborates the whole.

We have read the **Susan Kigula case (supra),** the relevant passage is that:

> **"Corroboration in part corroborates the whole. Therefore, if a material part of the child's evidence is corroborated, not only may that part of his evidence be relied upon but also that part which is not corroborated, the corroboration of a material part being a guarantee of the truth of this evidence as a whole: See R V Tarbhai Mohamedbhai (1943) 10 EACA 60."**

It is important to understand the context in which the Supreme Court made the above observations. The Supreme Court was discussing corroboration in relation to the requirement under the law that the evidence of a child of tender years must be corroborated before it can be relied on. The Supreme Court stated that where the material part of the evidence of a child of tender years is corroborated leaving another part of the child's evidence uncorroborated, then the corroboration as to the material part would guarantee the truth of the evidence as a whole including the uncorroborated part of the evidence. This was because corroboration of the material part, corroborates the evidence as a whole.

Clearly, the Supreme Court did not mean to say or establish a legal proposition that in a case involving two accused persons; and where the deceased makes a dying declaration implicating both of the accused persons, that corroboration in regard to one accused person can be used as corroboration for the other co-accused. We find that there is no such principle of law. Therefore, the learned trial Judge was wrong to find that

the deceased's dying declaration was corroborated in regard to the 1st appellant merely because the said declaration had been corroborated in regard to the 2nd appellant.

Having said that, we find that the deceased's dying declaration was cogent, and, in it, he referred to the 1st appellant with certainty in such a manner that showed that he was not confused when he identified the 1st appellant as one of his attackers. Like the learned trial Judge, we are satisfied after warning ourselves, of the truth of the said dying declaration. This is, despite the said dying declaration not having been corroborated in respect to the 1st appellant. We are fortified in our decision by the authority of the **Mibulo case (Supra)** where the Supreme Court stated that:

> **"In the present case the circumstances show that the deceased was really certain of the identity of the assailant as being the appellant. In our view, the evidence relating to the dying declaration was so cogent as to exclude any possibility of doubt or mistaken identification. In these circumstances we think that the evidence of dying declaration would have been sufficient to support the conviction."**

In the present case, too, we hold the view that the deceased was really certain of the identity of the 1st appellant rendering his dying declaration cogent so as to exclude any possibility of doubt or mistaken identification. The deceased said that on leaving the bar on the night in question, it was the 1st appellant who slapped him on the face which started the assault meted on him by the trio of his assailants.

For the above reasons, we conclude that the learned trial Judge rightly relied on the deceased's dying declaration in convicting both the appellants. Ground 1 of this appeal, must therefore fail.

Grounds 2 and 3.

These grounds of appeal relate to the sentences imposed on the appellants by the trial Court.

The reasons given by the learned trial Judge in arriving at the sentences imposed on the appellants are at page 31 of the record of appeal. The learned trial Judge only mentions the period which the appellants spent on remand, but he did not show explicitly that he had taken the same into account in arriving at his sentence.

It is now trite law that a sentence reached without taking into consideration the period spent by the convict on remand in respect of the offence prior to his/her conviction is illegal for contravening **Article 23 (8) of the 1995 Constitution.** Counsel for the respondent rightfully conceded to the illegality of the sentences imposed by the trial Court.

We shall therefore set aside the said sentences for being illegal. Pursuant to **Section 11 of the Judicature Act, 2013**, which gives this Court the powers of the High Court while determining any appeal, and specifically, in the instant case, the power to impose a sentence where the circumstances require this Court to do so, we shall proceed to determine the appropriate sentences for the appellants in this case. We shall consider the relevant aggravating factors and mitigating factors.

In the trial Court, Mr. Kyomuhendo, learned counsel for the state asked the Court to consider the following aggravating factors. The offence of which the appellants were convicted was a very serious offence, and upon conviction the appellants were liable to be sentenced to the maximum death sentence. Although no weapon was used when assaulting the deceased, the appellants had somehow managed to inflict serious injuries on the deceased. The post mortem report at page 43 of the record revealed that the deceased's internal organs were damaged due to the assault he received at the hands of the appellants. Further, it was submitted that the offence of murder was prevalent in the region, which meant that although the appellants were youthful, the Court had to consider imposing deterrent sentences on them. It was further submitted that the fact that the appellants had killed the deceased, an innocent person without provocation was a further aggravating factor. Moreover, that the deceased's family for whom he was the sole bread winner were left without his care following his murder by the appellants.

Mr. Bwagi Jonathan, learned counsel for the accused persons submitted the following mitigating factors for the appellants, which we have considered. The appellants were first offenders; they had been on remand for 3 ½ years; the appellants are young men capable of reforming if given a chance by court.

We have also considered the statements given by the appellants in their allocutus in the trial Court. The 1st appellant said that he had a family,

comprising of a wife and 5 children, as well as 6 other orphans in his care, who needed his care; that he needed to back and look after his family. The 1st appellant also said that he had repented while in prison. The 2nd appellant requested for a lenient sentence to go and look after his family.

We have also considered the sentencing range of murder, by looking at the sentences imposed in previous cases of murder by the Supreme Court and this Court.

In **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015**, the Court substituted a sentence of 30 years, which it considered appropriate in a case of murder, for the sentence of death which had been passed by the trial Court and upheld by the Court of Appeal. The appellant had brutally murdered her husband and cut off his body parts.

In **Muganga Richard & 5 others vs. Uganda, Court of Appeal Criminal Appeal No. 153 of 2012**, the 6 appellants had each been sentenced to 60 years imprisonment. This Court, after observing that the said sentence was beyond the range sentencing in murder cases approved by the Court of Appeal and the Supreme Court, proceeded to impose various sentences of 20 years imprisonment and 30 years imprisonment, which it deemed appropriate in murder cases.

Sentences imposed by the Supreme Court and this Court in previously decided murder cases, save for exceptional cases, are usually in the range of between 20 years to 30 years imprisonment. In keeping with the principle of maintaining consistency in sentencing, and after taking into account all the relevant factors in the present case, we are of the view that a sentence of 25 years imprisonment is appropriate for each appellant. From that sentence we shall deduct the period of 3 ½ years, each appellant spent in lawful custody while attending trial. The appellants shall, each serve a sentence of 21 ½ years imprisonment for their conviction of murder contrary to **sections 188** and **189** of the **Penal Code Act, Cap. 120**.

Therefore, this appeal is allowed in part as follows: ground 1 of the appeal relating to conviction of the appellants fails, while both grounds 2 and 3

relating to the sentences imposed by the trial Court, succeed. The sentences imposed on the appellants are varied accordingly.

We so order.

Dated at Mbarara this.....13th Day of....October..... 2020.

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Elizabeth Musoke

Justice of Appeal.

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Stephen Musota

Justice of Appeal.

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Remmy Kasule

Ag. Justice of Appeal.