THE REPUBLIC OF UGANDA
IN THE COURT OF APEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0824 OF 2015

JACKLINE UWERA NSENGA :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(*An appeal from the decision of the High Court at Kampala before Gaswaga, J. dated the 8th day of April, 2016 in Criminal Case No. 0312 of 2013)*

CORAM: HON. MR. JUSTICE ALFONSE OWINY-DOLLO, DCJ.
HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE CHEBORION BARISHAKI, JA.

JUDGMENT OF THE COURT.

This appeal is from the decision of the High Court (Gaswaga, J.) in which the appellant was convicted of the offence of Murder contrary to **Section 188** and **189 of the Penal Code Act, Cap. 120** and sentenced to 20 years imprisonment.

Background.

The appellant was indicted with the offence of murder. She pleaded not guilty and the matter proceeded to trial. The facts as accepted by the trial Court upon conclusion of the trial were that the appellant had, on the 10th day of January 2013 at Plot 6 Muzindalo Road, Bugolobi Nakawa Division in Kampala District, with malice aforethought, caused the death of Mr. Nsenga Juvenal. On the basis of the acceptance of the said facts, the appellant was convicted and sentence accordingly. Being dissatisfied with the decision of the trial Court, the appellant now appeals to this Court, on grounds, set forth in her memorandum of appeal as follows:

"1. **That the Learned Trial Judge erred in law and fact when he relied on an equivocal out of court statement of the deceased to convict the Appellant.**

2. **That the Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence adduced at the trial and apply it**

to the law of the offence of murder c/s 188 of the Penal Code Act Cap 120.

3. **That the Learned Trial Judge erred in law and fact when he shifted the burden of proof from the Prosecution and placed it on the Appellant.**

4. **That the Learned Trial Judge erred in law and fact when he unduly relied on circumstantial evidence to infer guilt of the Appellant."**

Representation

At the hearing of this appeal, learned Counsel Mr. David F.K. Mpanga, Mr. Isaac Walukaga and Ms. Sophie Nyombi jointly appeared for the appellant, while Ms. Josephine Namatovu, Assistant Director of Public Prosecutions appeared for the respondent. The appellant was present in Court.

Counsel with leave of Court, were allowed to proceed by way of written submissions which they highlighted at the hearing of the appeal

Submissions

Counsel for the appellant argued ground 1 first, grounds 2 and 4 together and finally ground 3. Counsel for the respondent replied to the submissions in the same order that they were argued.

On ground 1, it was counsel for the appellant's submission that the learned trial Judge erred when he relied on the evidence of the dying declarations in finding that the deceased's death was caused with malice aforethought. Counsel referred Court to **Section 30** of the **Evidence Act Cap 6** and the case of **Mibulo Edward v Uganda, Criminal Appeal No. 17 of 1995** for the legal proposition that whereas corroboration is not mandatory to fortify a dying declaration, it is unsafe to base a conviction on a dying declaration without corroboration.

Counsel for the appellant conceded that the admissibility of a dying declaration has its origins in the general belief that a dying man is unlikely to tell a lie. Counsel for the appellant, however, further submitted that a person in the face of imminent death might be overcome with fear and anxiety rendering him prone to confusion. Counsel for the appellant referred Court to **Tindigwihura Mbahe v Uganda, Criminal Appeal No. 009 of**

1987 which was upheld by the Supreme Court in **Kazarwa Henry v Uganda, Supreme Court Criminal Appeal No. 017 of 2015** for the proposition that evidence of a dying declaration must be received with caution because the test of cross-examination is wanting and the act might have occurred under circumstances of confusion and surprise.

It was counsel for the appellant's further submission that the alleged dying declarations made variously to PW3, PW4, PW5 and PW6 were equivocal and open to an infinite range of interpretations. Counsel for the appellant referred Court to the evidence of the said witnesses who testified that the statements were made by the deceased in Kinyarwanda. Counsel pointed out that there had been no certified translation of the statements made in Kinyarwanda to English, which is the language of Court. Thus, it was an error for the learned trial Judge to accept relevant witnesses' personal and subjective interpretations of the statements which were colored by emotions at the time of the deceased's death. The fact that the relevant witnesses were family members of the deceased meant that they had been prone to giving biased interpretation of the statements made by the deceased.

Counsel for the appellant further contended that the learned trial Judge erred when he relied on speculation in holding that the deceased, by his dying declarations, had meant that his wife had caused his death with malice aforethought whereas not. According to Counsel for the appellant, the deceased was a lay man and the learned Judge erred when he made out unproven estimations of a lay man as confirmation of murder.

Counsel for the appellant further contended that the learned Judge ignored the inconsistency in the evidence of the alleged dying declarations. Counsel for the appellant pointed out that to some witnesses, the deceased stated that, "his wife had killed him" and to others that, "his own car had killed him." In Counsel for the appellant's view, the dying declaration was good evidence for identification of the appellant but was neither relevant nor cogent in proving malice aforethought to the required standard of proof. Furthermore, since the damning statements were made whilst the deceased was receiving emergency medical care, in the presence of medical personnel,

it was necessary for those witnesses for those witnesses to be called as witnesses in the trial Court.

Counsel for the appellant further submitted that because the learned trial Judge made a highly speculative decision when he found that since the statements were made in Kinyarwanda, it was difficult to ascertain whether the medical personnel were able to comprehend any part of the relevant dying declarations.

Counsel for the appellant further argued that the learned trial Judge erred in his application of the law to the facts when he found that the evidence of the troubled marriage of the deceased and the appellant had satisfactorily corroborated the relevant dying declarations. In Counsel's view, the couple's alleged marital troubles merely informed the supposed dying declarations rather than confirmed them. He concluded that the supposed dying declarations were not a safe basis for the conviction because they were equivocal, uncorroborated and irrelevant for proving manslaughter to the required standard of proof.

In reply, to the appellant's submissions on ground 1, the learned Assistant DPP submitted for the respondent that the learned trial Judge was alive to the delicate nature of the evidence of dying declarations throughout his Judgment, had cautioned the assessors on the dangers of relying on this evidence, and had found several pieces of evidence to corroborate the dying declaration. The corroborating evidence included the appellant's bad marital relationship, the threats the appellant had made to the deceased and PW7 just before the fateful day, the appellant's conduct before, during and after she had run over her husband, the evidence recovered from the scene of crime, and the mechanical condition of the motor vehicle.

Counsel for the respondent further submitted that the appellant's criticism of the learned trial Judge's handling of the evidence of the supposed sore marital relationship of the appellant and the deceased, and the reliance on that evidence to corroborate the relevant dying declarations was misconceived. In counsel's view, this argument was premised on the appellant's untrue allegations that her marriage with the deceased was rosy meaning that she had no reason to kill her deceased husband.

Counsel for the respondent referred to the evidence of PW2, PW3, PW4, PW5 and PW7 (the deceased's relatives) who all testified to the effect that the deceased and the Appellant had a distressed marriage characterized by absence of communication; sleeping in separate rooms, frustration and mistrust which had lasted for about 10 years.

Counsel for the respondent further pointed out that on 29/12/2012, just two weeks before the fateful day, the appellant had confronted the deceased and PW7 in an angry tone and warned them of her capacity to do many things to the pair. According to Counsel, this evidence was unchallenged by the Appellant during cross-examination. Counsel also referred to the evidence of PW2 who testified that the deceased had complained to him about his marital problems during that same period, and it was, therefore, not a coincidence that after the threats were issued, the deceased was run over by his wife.

Regarding the Appellant's contention that the prosecution did not submit any certified translation of the dying declaration to justify the Judge's reliance on unofficial translation, Counsel for the respondent submitted that such argument was unfounded. In her view, save for PW6 who testified in Luganda, all the other witnesses (PW3, PW4, and PW5) were fluent in both Kinyarwanda and English and they ably testified in English.

Counsel for the respondent further submitted that the appellant's contention that the learned trial Judge had erred to accept the personal and subjective interpretations of the relevant dying declarations by the relevant witnesses, who were all relatives of the deceased was wrong. Counsel argued that the relevant witnesses, despite the trauma and pain of losing their relative chose to forgive the appellant. Further, that they did not report the appellant to police and the learned trial Judge who had the opportunity to see their demeanor found their evidence credible, reliable and truthful.

Counsel for the respondent submitted that it was true that the deceased was a lay man who may not have been able to appreciate the legal meaning of the words 'caused my death' and 'murdered me' but nonetheless in the circumstances, the deceased intended to say that the appellant had murdered him. Counsel referred court to the evidence of PW4, who testified that whilst at the hospital he told their father that the gate had hit the

deceased but later was quick to clarify that it was his wife who had hit him at their home. In Counsel's view, this showed that the deceased's declaration showed that the Appellant's actions were not accidental but rather intended.

It was further argued for the Respondent that the nature of injuries inflicted on the deceased showed that the appellant's actions were intentional and not accidental. Counsel referred court to the evidence of PW1, the medical doctor who examined the deceased, and the relatives who testified that he suffered extensive injuries, his left ear had fallen off and remained at the scene; his arm and left leg were broken; the car run over his body and left tire marks; his ribs were fractured; his lungs were damaged; his skin had peeled off because he was drugged over a rough surface and there was internal bleeding in his chest.

Counsel for the respondent further argued that when a demonstration conducted by PW10 at the scene of the crime, using a police speed gun and the appellant's car, had shown that the appellant's car was being driven at a high speed of 45 to 61 Kilometres per hour, in the moment just after she knocked down the appellant yet the car had already been driven through the gate and was inside the drive way. Counsel for the respondent contended that because the terrain was flat, there was no justification for such high speed, and the inference to be taken from such circumstances was that the car had been deliberately driven at a high speed so as to kill the deceased.

Counsel for the respondent disagreed with the appellant's submission that the car she was driving when she knocked the deceased had jerked forward as a result of un-intended acceleration. Counsel referred court to the testimony of PW11, the Inspector of Motor Vehicles, who stated that the car was in a good mechanical condition with an electric powered steering, anti-locking braking system, obstacle sensors and a generally improved efficiency. PW11 also personally drove the car and found it very responsive. Further, PW6, had also driven the car a few hours after the incident and testified that it was in a fine state. Moreover, the appellant had the confidence to drive the same car when taking the deceased for medical attention after the incident, yet there were seven other cars in the compound which she could have used.

Counsel for the respondent concluded that the dying declarations were unequivocal regarding the manner in which the deceased's death occurred. The dying declarations were corroborated by the deceased's hostility to the appellant at the hospital which was exhibited when the deceased chased the appellant out of his room. Further relevant was the calmness exhibited by the appellant when at the hospital where her husband was being treated and in a bad medical shape following the accident.

On grounds 2 and 4, it was Counsel for the appellant's submission that the prosecution case was built on circumstantial evidence to prove that the appellant had caused the death of the deceased with malice aforethought. Counsel cited **Jackson Namunya Tali v Republic, Criminal Appeal No. 173 of 2016 (Court of Appeal of Kenya)** where it was stated that before circumstantial evidence is relied on, the circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established. It was further stated in the same case that the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, and that such circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed.

Counsel for the appellant submitted that the learned trial Judge had based his decision to convict the appellant on the circumstantial evidence of the bad marital relationship of the appellant and the deceased yet there was no evidence to show that any woes in the said marriage were so unique as to corroborate and/or prove evidence of malice aforethought. Moreover, given that the Appellant and the deceased were living in the same house, and the deceased was providing for the family, it could be argued that their marital relationship was not bad at all.

Counsel for the appellant pointed out that the evidence of PW2 was to the effect that the Appellant had never been involved in a physical fight with the deceased; and that DW4 had testified that when she lived with them, she had never seen the appellant and the deceased have a verbal or physical fight. Counsel contended that the prosecution evidence's vague notion of the existence of marital woes in the appellant's marriage with the deceased could

not be relied upon as satisfactory proof of the appellant's intention to kill her husband. Counsel therefore, faulted the learned trial Judge for disregarding the Appellant's evidence that her marriage was not violent.

Counsel for the appellant cited **Bogere & Another vs. Uganda, Supreme Court Criminal Appeal No. 001 of 1997,** where the learned trial Judge had summarily accepted the prosecution evidence and rejected the defence evidence. On appeal, the Supreme Court held that the said approach was a grave misdirection by the learned trial Judge, and stated that where there was a failure of the lower court to duly consider the evidence as a whole, it would be unsafe to hold that the appellants were proved to have committed the offences beyond reasonable doubt.

Counsel for the appellant contended that the threats allegedly made by the appellant in this case had been made to PW7 about her conduct in the presence of the deceased, but not directly to the deceased. Counsel argued that for threats to be considered as part of the circumstantial evidence, they ought to have been made either directly or indirectly to the deceased, which was not the case in the present case. Furthermore, that in any case, the alleged threats did not amount to murder threats given that they were prone to various interpretations, some of which could not be deemed to express an intention to murder.

Counsel for the appellant submitted that the fact that the appellant's behaviour in the aftermath of the incident was hysterical which could be discerned when she made a telephone call to PW2 in a distraught state to inform him of the incident. She sought help from DW4 and PW12 to take the deceased to the hospital and even apologised to him on the road to the hospital.

It was the appellant's further submission that the learned trial Judge erred when he disregarded crucial scientific evidence which pointed towards absence of malice aforethought in this case and could have exonerated the appellant. Counsel for the appellant argued that there was sudden involuntary acceleration of the car caused by a manufacturer defect in the car. Counsel relied on the evidence of PW11 the Inspector of Vehicles, who testified to the effect that the accelerator pedal was covered by an

aftermarket floor mat which was not to the manufacturer design when the car was purchased. Counsel further argued that the respondent ought to have established whether a person entering a car whose accelerator was covered by a flow mat could accidentally trigger the accelerator and jam it forward thus causing an involuntary movement of the car which is out of the driver's control.

Counsel for the appellant further referred Court to the evidence of PW10, the head of the team of engineers and PW8, the crime scene forensic examiner who both testified that the car rammed into a closed gate and as a result, and that it was impossible for the driver to see the person behind the gate. Counsel also referred to DW1's testimony that the deceased had never opened the gate during the 20 years of their marriage. Further that PW4 also testified that the deceased informed him that it was his first time to open the gate. In Counsel's mind, there was no evidence of any previous plan by the Appellant to kill her husband as found by the trial Judge.

Counsel for the appellant also referred Court to the evidence of DW2, Senior Commissioner of Police who was the designated Deputy Director of the Criminal Investigations Department in charge of investigations at that time. He testified that the police had opined to the DPP and advised that the Appellant be charged with the offence of causing death by a rush and negligent act since there was insufficient evidence on record to prove malice aforethought and sufficiently charge the Appellant with murder which information was ignored.

Counsel for the appellant faulted the learned trial Judge for his application of the 11th of September,2011 incident in United States of America to this case and submitted that it would take a special murderous and suicidal intent for a person to run into a closed gate. In the American incident, terrorists used aircrafts as a weapon of death to crash into buildings thereby killing passengers on board and people on ground. In Counsel's view this analogy was inapplicable to the facts of this case as there was no evidence on record to show that the Appellant was suicidal.

Counsel for the appellant also faulted the learned trial Judge for ignoring the real discord between several prosecution witnesses and the appellant over

the deceased's estate, a factor which influenced the evidence they gave in the trial Court. Counsel argued that the appellant had testified that upon lodging a caveat on the application for letters of administration, the in-laws started threatening to kill her. Further that her lawyer in the family case had reliably informed her that PW2, PW3 and PW4 had approached him and offered to stop pursuing murder charges against the Appellant if she withdrew the caveat.

Counsel for the appellant cited **Katende Semakula v Uganda, Supreme Court Criminal Appeal No. 011 of 1994** for the legal proposition that circumstantial evidence must be narrowly examined because evidence of this kind may be fabricated to cast suspicion on another; and that therefore, before inferring guilt on an accused person, the Court ought to be sure that there are no other co-existing circumstances which would destroy such an inference. Counsel concluded that the learned Judge was alive to the law and principles in this case but failed to apply them to the facts correctly by weighing the evidence subjectively rather than objectively.

In reply to the appellant's submissions on grounds 2 and 4, it was submitted for the respondent that the learned trial Judge considered the circumstantial evidence elaborately and meticulously in his findings by setting out all the evidence presented before him, reviewing it against each ingredient of the offence, and in so doing the learned trial Judge applied the correct burden and standard of proof.

Counsel for the respondent submitted that the fact the deceased had continued providing for his family did not rule out the existence of marital acrimony with the appellant. In Counsel's view, the prosecution satisfactorily proved the existence of the marital problems between the Appellant and the deceased for over 10 years.

Counsel for the respondent further submitted that the fact that the learned Judge did not agree with the defence case should not be taken to mean that he had not considered the defence evidence. She argued that the learned trial Judge considered all the evidence as a whole as adduced by both sides and summarized the same.

Regarding the contention that the learned Judge erred in relying on PW7's testimony to corroborate the dying declaration and to prove evidence of malice aforethought, Counsel for the respondent contended that there was evidence that the appellant confronted PW7 and the deceased in the sitting room, chased the children away and angrily told them how she was capable of doing many things, some of which, she herself, was scared of. Counsel submitted that this Court ought to find that these were not idle words to a husband and his suspected mistress.

Counsel for the respondent further urged this Court to consider the proximity of time from when the threats were uttered against the deceased and the fateful day when the deceased was knocked down. Counsel cited **Section 7** of the **Evidence Act, Cap 6** as providing the basis for the legal proposition that any fact which shows or constitutes a motive for any act in issue is relevant, and concluded that the appellant's threats; the marital woes in her marriage with the deceased; and the occurrence of the incident ten days after the threats in issue, constituted evidence of her motive to kill her husband whom she suspected of having an extra-marital affair.

Counsel for the respondent submitted that the threats in issue were uttered in the presence of both the deceased and PW7, and were uttered against the deceased as well. Counsel for the respondent submitted that the appellant's submission that the threats, if any, were solely meant for PW7, were misconceived. In counsel's view, if the appellant had not intended to threaten the deceased, too, she would not have asked the children to leave the room where the threats were uttered. Further, that there was no speculation and even if she had intended the threats solely for PW7, there is a possibility that killing the deceased who was her sole care taker and guardian was one of the things she threatened to do.

Regarding the evidence of the appellant's behaviour on realizing that the deceased husband had been severely injured in the incident, counsel for the respondent submitted that the appellant's worried and distraught behaviour may have been down to her realization that she would face the law for murdering her husband. Counsel pointed out that PW2's testimony was to the effect that in the telephone call made to him, the appellant exhibited

anxiety due to her concern that she would be accused of murdering her husband and yet her husband was still alive at that time. Counsel contended that the appellant was not distressed about her husband's probable death but rather about being charged for murdering him. Further, that the evidence of all witnesses who went to Paragon Hospital where the deceased was taken for medical attention testified that the appellant was calm and normal and never exhibited any affection about her husband's medical condition. Further that the appellant never went to her husband's room. Further still, that the Appellant had refused to hand over the deceased's car keys and phone until PW5 was sent by deceased to reclaim the same from her, which items were later found in her hand bag and yet she had denied having them. In Counsel's view, this was not evidence of a distressed wife whose husband was fighting for his life.

Counsel for the appellant further submitted that the learned Judge considered all the scientific evidence in this case and related it to the facts and evidence before court. Further, that the learned trial Judge had analysed the evidence of the possible discord between the relatives of the deceased who testified against the appellant, and concluded that the relatives had forgiven the appellant prior to the trial. This was brought out by evidence that the said relatives never reported the killing of the appellant to the police. Counsel for the respondent thus asked the Court to find that the said relatives gave relevant and credible evidence in the trial Court and to reject the assertions by the appellant that the witnesses had lied to Court.

On ground 3, it was submitted for the appellant that it could be inferred from several instances in the judgment of the learned trial Judge that he had shifted the burden of proof to the appellant to prove her innocence yet the said burden lay on the prosecution to prove the guilt of the appellant beyond reasonable doubt. Counsel for the appellant submitted that it was for the prosecution to prove its case that the appellant had murdered the deceased with malice aforethought, and in doing so rule out the defence of accident raised by the appellant.

In the instant case, however, counsel for the appellant submitted that the learned trial Judge based his decision to convict the appellant on her failure

to offer an explanation and on the absence from the record of any further explanation or any explanation at all as to how exactly the car driven by the appellant had jerked before knocking the deceased. Counsel submitted that this was erroneous, and that the weakness of the appellant's defence should not have been used as the basis of establishing malice aforethought.

Counsel for the appellant cited **Euchu Michael vs. Uganda, Supreme Court Criminal Appeal No. 030 of 1994**, for the legal proposition that it is a gross misdirection for a trial court to decide that an accused person is guilty after considering the prosecution evidence alone without considering the defence evidence, an approach which shifts the burden of proof where the defence is looked at merely to consider if it casts doubt on the prosecution case.

In reply to the appellant's submissions on ground 2, counsel for the respondent submitted that the appellant's contention that DW2's opinion ought to have been considered was misguided since DW2 was not a legal expert to offer binding insight on whether the evidence on record was sufficient to support the conviction of the appellant. DW2 was an investigator and his opinion on the sufficiency of evidence were personal opinions which the Court had rightfully rejected.

Counsel for the respondent further submitted that there was nothing accidental about the circumstances under which the Appellant knocked down her husband. To established such the alleged accident, the car in issue had to be in motion before the incident, which was not the case. Further, it was submitted by counsel for the respondent that the evidence of PW10 and PW11 had established that the car in issue was in a good mechanical condition at the material time. In counsel's view, the car in issue was unlikely to accelerate accidentally as alleged for the appellant.

Counsel for the respondent submitted that the contentions of the appellant that the learned trial Judge had shifted the burden of proof to the appellant were made while reading some parts of the Judgment of the trial Court in isolation from others. Counsel pointed out that by singling out the excerpt where the learned trial Judge stated that there was no explanation as to how

the car being driven by the appellant, counsel for the appellant had levelled unfair criticism on the judgment of the learned trial Judge.

Counsel for the respondent submitted that the criticism by counsel for the appellant had ignored the fact that in his Judgment, the learned trial Judge had considered the evidence in regard to the mechanical condition of the motor vehicle in issue, and the other surrounding expert evidence.

Counsel for the respondent therefore submitted that when the excerpt of the Judgment of the learned trial Judge dwelt on by the appellant is considered in the context of the rest of the judgment, it becomes clear that the learned Judge was alive to the law on burden and standard of proof in criminal cases, and that he had applied the same to the facts of this case. In the view of the submissions for the respondent, counsel for the respondent prayed to this Court to find that all the grounds of the appeal have no merit, and to dismiss the appeal and uphold the decision of the learned trial Judge.

In rejoining to the submissions of the respondent, it was submitted for the Appellant that this Court should take into account the fact that, although the learned trial Judge visited the scene of crime, he did not record his findings from his visit to the locus as the same are not part of the record of the proceedings before the trial Court. Furthermore, that during the summing up to the assessors, the Judge did not informed them of his findings at locus and did not make reference to DW2's evidence.

Counsel for the appellant reiterated the earlier submissions and prayed to this Court to allow this appeal and quash the appellant's conviction by the trial Court and set aside the sentence imposed on the appellant.

Resolution of the court

We have carefully reviewed the trial court's record and considered the submissions of all Counsel. We are alive to the fact that this Court has a duty as the first appellate Court to re-appraise the evidence and come up with its own conclusions. **See: Rule 30(1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10; Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses v Uganda, Supreme Court Criminal Appeal No. 1 of 1997.**

In **Pandya v Republic [1957] EA 335**, the East African Court of Appeal pointed out that:

> **"This being the first appeal, it is our duty to re-evaluate the evidence ourselves and determine whether the conclusions reached by the trial court should be allowed to stand or not, bearing in mind that we have neither seen nor heard the witnesses."**

Bearing the above principles in mind, we shall proceed to determine this appeal. We shall consider each ground of appeal separately in the manner below.

Ground 2.

We observe that the appellant was indicted of the offence of Murder contrary to **Section 188** and **189** of the **Penal Code Act, Cap. 120**. We also observe that the appellant set up the defence of accident to the indictment. We note that **Section 4** of the **Evidence Act, Cap. 6**, is to the effect that in any proceedings, evidence is given of every fact in issue, and the relevant facts and no other facts.

Section 2 (1) (f) of the **Evidence Act, Cap. 6** stipulates as follows:

> **""fact in issue" means and includes any fact from which, either by itself or in connection with other facts, the existence, nonexistence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows."**

Applying the definitions above to the instant case, we observe that the facts in issue in the trial Court were as follows: 1)Related to the defence of accident, with the appellant asserting and the prosecution denying that the death of the deceased was caused by an accidental act; 2) Related to proving malice aforethought, with the prosecution asserting and the appellant denying that the death of the deceased was caused with malice aforethought on the part of the appellant.

In his judgment, the learned trial Judge rejected the appellant's assertion that the death of the deceased was caused by accident, and accepted the prosecution's assertion that the appellant had caused the death of the appellant with malice aforethought.

We have been called upon by the appellant to review the evidence on record and we do so now, so as to ascertain whether the learned trial Judge appropriately evaluated the facts in issue.

The defence of accident.

According to the Black's Law Dictionary, 8th Edition, accident may be defined as "an unintended and unforeseen injurious occurrence". Typically, in the criminal law, an accident may offer a defence to a criminal charge if successfully established. The exact impact of the defence of accident may vary, in some cases, the defence is aimed at negating the actus reus and other case the mensrea. **Laskin, JA** of the **Court of Appeal for Ontario, Canada** in **R vs. Peter Jens Mathisen** stated as follows:

> **"In the criminal law "accident" is used in two senses: it refers either to an unintended act (accident as to the actus reus) or to unintended consequences. Mr. Mathisen relies on both senses of accident.**
>
> **...**
>
> **The trial judge instructed the jury on accident in the sense of unintended consequences, but he did not instruct on accident in the sense of an unintended act. Mr. Mathisen submits that his failure to do so amounts to an error of law requiring a new trial.**
>
> **...**
>
> **Moreover, our case law has emphasized that accident in the sense of an unintended act and accident in the sense of unintended consequences are distinct defences. Where both are viable, both must be put to the jury: see, for example, R. v. Culliton, 2000 CanLII 1093 (Ont. C.A.) at para. 8."**

Further, **Vancise, JA.,** of the **Court of Appeal for Saskatchewan, Canada** stated in **Darrold Lance Sutherland vs. R**, that the defence of accident in law relates to the absence of the mens rea element of an offence. He said that the defence could, if proved, successfully negate mens rea.

In Uganda, the defence of accident can, in certain appropriate circumstances negate both mensrea or even the actus reus elements of the offence itself. The circumstances when the defence of accident may negate the actus reus

of an offence are envisaged in **Section 8 (1)** of the **Penal Code Act, Cap. 120**, which provides, in relevant part, that:

> **"...a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident."**

The circumstances when the defence of accident will negate the mens rea element of an offence is stated in the very definition of Malice aforethought which is laid down in **Section 191 of the Penal Code Act, Cap. 120**. The effect a successful defence of accident is that the accused person will be deemed not to have caused the death of the deceased with malice aforethought.

We must stress that in each case, before deciding whether the defence of accident negates the actus reus or the mens rea elements of an offence, the credibility of the defence of accident must be established. We emphasize that the burden of proof with respect to the defence of accident lies on the prosecution to prove that the defence of accident should not succeed.

While giving evidence in the trial Court, the appellant testified to the effect that although she was driving the motor vehicle which knocked down the deceased on the fateful day, the motor vehicle had jerked without her willful involvement. After the jerking the motor vehicle had rammed into the gate and knocked the deceased who was standing just behind the gate when opening it. It is because of those facts that the appellant asserted that the death of the deceased was caused by accident.

The learned trial Judge did not believe the defence as raised by the appellant. It has been contended on appeal that the learned trial Judge was wrong to disbelieve the defence raised by the appellant. Specifically, the counsel for the appellant have faulted the learned trial Judge for disregarding crucial scientific evidence which he submitted proved that there could have been sudden involuntary acceleration of the relevant car caused by a manufacturer defect in the car.

Counsel for the appellant referred to the evidence of PW11 to the effect that the accelerator pedal of the relevant car was covered by an aftermarket floor mat which was not to the manufacturer design when the car was purchased.

Further, that the respondent failed to discharge her burden beyond doubt by failing to adduce evidence to exclude the reasonable possibility of unintended acceleration.

The respondent's case was that in order for the car to have accidentally accelerated as alleged by the Appellant, it had to be in motion which was not the case here. Moreover, counsel contended that the evidence of PW10 and PW11 established that the relevant car was in a very good mechanical condition as evidenced by

We observe that in evaluating the evidence on accident, the learned trial Judge had this to say:

> **"This court is not inclined to believe this version of the story for the following reasons. One does not even have to be an expert on motor vehicles to know that a car with a low suspension like the Mark X which the accused was driving cannot knock, let alone overrun an object the size of an adult human being and the driver fails to detect the object. She saw the gate being opened and therefore knew that somebody was in the middle of the driveway, still in the process of opening the gate. She was familiar with the manner in which that gate opens. In his report PE8 (at P.16), Prof. Mwakali and his team noted that from the literature available, although there have been reports of unintended acceleration in selected Toyota models such as Camry, Avalon, Corolla etc. in the United States of America, the Toyota Mark X 300 G premium is not amongst the reported cases of unintended acceleration. This was not contradicted by the defence.**
>
> **It cannot be that the car jerked on its own without the accused doing anything to it. Why couldn't it jerk the first time the accused returned from ringing the bell and sat in it waiting for the gate to be opened? Moreover, the lights were on and the engine was running. Generally, the vehicle was still in the same condition. Though in not very straight terms, the defence put across a case of a faulty or mechanically defective vehicle that could accelerate on its own. This version of the accused's story is unsustainable. Had the car jerked on its own, the accused would not have trusted it and drive Nsenga in it to hospital immediately after the incident when she clearly had options of other vehicles at her disposal parked in the compound. As was submitted by the prosecution, she could have called for help from Bisangwa's home located just nearby along Bandari Rise. Further, given the force and speed at which the car**

jerked off and continued moving with the door not yet closed and one leg still outside, the accused would have inevitably been ejected from the car upon knocking the gate or sustained some injuries. Surprisingly this never happened." (Emphasis added.)"

We have also reviewed the evidence of PW8 Munaku John Bosco, the scene of crimes officer, and PW10 Professor Mwakali, who were both involved in the reconstruction of the relevant incident at the scene of crime. PW10 testified that the terrain was flat both on the inside and outside of the gate. PW8 testified that the horizontal bolt of the gate was bent and there were blue paint marks on the gate as a result of the car hitting the gate. When the court visited the locus in quo, PW8 made further illustrations on this aspect of the case.

We further observe that at page 360 of the record, PW11 testified as follows:

"...The non-damage observations number 5, accelerator pedal covered with aftermarket floor mat/carpet placed on top of the manufacturer's floor market...

During the observations we were trying to make, we found that this vehicle under the driver seat had a carpet which was not the one originally imported in it. These are plastic carpets, I think you have seen them on the road when hawkers have them. Normally people put them to avoid mud entering into the carpet. So it is plastic and white. It was overlapping and on top of the original one.

It is a light carpet by itself so when you press it yourself, the vehicle would perform."

PW11's evidence was not seriously shaken in cross-examination. It is a well-established principle that, in general, a party must challenge in cross-examination the evidence of any witness of the opposing party if he/she wishes to argue that evidence given on a particular issue should not be accepted. **See Browne v Dunn (1894) 6 R. 67, HL.**

We note that the failure to cross-examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness' evidence, and it would be difficult to suggest that the evidence should be rejected. Foskett J, while analyzing expert evidence in the **Brown v Dunn case (supra)** noted that, as in any case, it is not the duty of the Judge either to accept the whole of a reputable expert's opinion, or not to accept it at all

because 'as with any witness, an expert can be right about most things but wrong on others.'

We have reviewed the evidence of PW11 Mugimba Andrew, the Inspector of Vehicles who found that none of the vehicle systems at the time of inspection were found defective. In his view, the said floor mat/carpet could not have caused any accidental acceleration. The vehicle was in good mechanical condition after the collision and was fitted with modern gadgets, including obstacle sensors and automatic braking system. There is no evidence to suggest that the vehicle was defective in any way before the incident. The above evidence, therefore, remained uncontested.

We find that the motor vehicle used was in a proper mechanical condition; the deceased had various bodily injuries and the Appellant used the said motor vehicle to knock and move the deceased's body for a distance of approximately 17.3 meters.

We note that counsel for the appellant's submission to the effect that PW10 and PW8, both testified that the car rammed into a closed gate and as a result, it was impossible for the appellant (driver) to see the person behind the gate. The appellant also testified that the deceased had never opened the gate during the 20 years of their marriage. Counsel for the appellant argued that the prosecution ought to have proved beyond reasonable doubt that the appellant knew that it was her husband going to open the gate and then that she had knowingly and intentionally run over him.

The Learned trial Judge while evaluating this evidence found that the Appellant saw the gate being opened and therefore knew that somebody was in the middle of the driveway, still in the process of opening the gate. We have reviewed PW10's evidence that the Appellant rammed into the gate at a very high speed of between 45 to 61 Km/hr and yet she was already in her home's drive way where the terrain was flat. There was no justification for such speed, and her car was in a good working mechanical condition with sensors and yet she continued to drag the deceased's body over a rough surface over a distance of 17.3 metres before she could stop.

After re-evaluating the evidence on record, we observe that the only evidence on record as discussed above showed that the car which knocked

the deceased when being driven by the appellant was in perfect mechanical condition and could not jerk in the manner alleged by the appellant in her evidence. We are unpersuaded by the attempts of counsel for the appellant to adduce evidence at the bar attempting to show that there was unintended acceleration.

We would observe that in other jurisdictions, the Courts have allowed an accused person who relies on the defence of accident to bring her own expert witnesses to assist the Court in determining the matter, especially where they give evidence which departs from the prosecution expert evidence in the matter. This is in no way shifting of the burden of proof from the prosecution but is a way of rebutting the assertions of the prosecution expert evidence. In this case, the prosecution evidence stood unrebutted and the learned trial Judge was right to rely on it.

In view of the unrebutted prosecution evidence, we take the view that the appellant's conduct in ramming into the gate which the deceased was opening for her was not accidental. It is immaterial that the appellant did not know that it was the deceased who was opening the gate, as we would still have found her guilty of murder, if it had been the gateman who had been killed instead of the deceased. This is because the car, which she was driving was in a proper mechanical condition, and yet she deliberately rammed into the gate.

We have also considered the assertions by counsel for the appellant that the fact that DW2 had testified in Court that he had written to the Office of the DPP advising that the appellant be charged with the offence of causing death by a rash and negligent act since there was insufficient evidence on record to prove malice aforethought so as to justify charging the appellant of murder, tended to prove that the death of the deceased was caused by accident. We are unpersuaded by the said submissions; it is not the place of the police to tell the DPP how to do his job. The learned trial Judge rightfully rejected the evidence of DW2 since the Police cannot advise the DPP, considering that **Article 120** of the **Constitution of Uganda, 1995** stipulates that no one can direct the DPP on how to go about his job.

To round off our discussions on ground two, we state that the learned trial Judge was alive to the law on malice aforethought, he considered the facts in issue in the present case, and addressed the evidence on each of the facts in issue before coming up to the correct decision to convict the appellant.

Ground 2 of this appeal, must therefore, fail.

Ground 1.

The essence of the Appellant's submission in ground 1 was that the learned trial Judge erred by relying on un-translated statements as dying declarations and concluding that the same proved malice aforethought. On the other hand, the Respondent contended that the witnesses who testified about the dying declarations were fluent in both Kinyarwanda and English and that the Judge correctly evaluated the law on dying declarations and applied it to the facts of this case.

The law on dying declarations in Uganda is settled. **Section 30 of the Evidence Act Cap 6**, provides for situations in which statements by a person who is dead can be admitted as evidence in a criminal trial. The section provides:

> **"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 whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts 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 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." (Emphasis, ours.)**

Several principles have been developed by the Courts in previously decided cases on dying declarations. In **Tindigwihura Mbahe vs. Uganda, Supreme Court Criminal Appeal No. 009 of 1998**, it was stated that:

"... 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. As a result, 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 day light. The fact that the deceased told different persons that the Appellant was the assailant is no guarantee for 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 have been mistaken. But generally speaking, it is very unsafe to base 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." (Emphasis, Ours.)

From perusal of the Record of Proceedings, we that that four prosecution witnesses PW3, PW4, PW5 and PW6 testified regarding the dying declarations made by the deceased. At page 51 of the Record, PW3 Donat Kananura, testified that:

"PW3: Nsenga told me that Jackie had knocked him down and it was not the gate.

Counsel: After he told you that, is there anything else he told you?

PW3: No, there is nothing else he told me since he had told me that the wife had knocked him down."

At page 87 of the Record, Joseph Kananura testified thus:

"PW4: Nsenga told me that my wife has killed me in my own home then from there the pain started again and that is all we talked about in the room as the other doctor came and tried to take him because they told us that they should change him to another room and they began processing to change his room.

Counsel: Can you just state exactly what your brother said?

PW4: My brother told me after that 'my wife has killed me in my own home.'

Counsel: In what language?

PW4: Kinyarwanda."

At page 121 of the Record of Appeal, PW5, Moses Ndizeye Kananura testified that:

> **"PW5: I asked him Nsenga what happened? Then he went on saying that in fact he said in Kinyarwanda 'mugole anyikyemulogo' which means that my wife has killed me from my own home."**

At page 123 he stated:

> **"He said in Kinyarwanda (Emotoka yanje) that his own vehicle has killed him from home."**

At page 170 of the Record, PW6 Santo Bulangizi Saad testified thus:

> **"PW6: Nsenga told me that the wife had knocked him. He said see what my wife has done to me."**

While dealing with the evidence of the dying declaration, the learned trial Judge found that:

> **"... The admissibility of a dying declaration in evidence is founded on the principle of necessity. A dying declaration is not given on oath nor subjected to cross examination. But as a piece of evidence, it stands on the same footing as any other piece of evidence. If found reliable, a dying declaration can form the basis of a conviction.**
>
> **Generally, a dying declaration would require no corroboration as it has to be judged and appreciated in light of the surrounding circumstances and its weight. In addition, murders are usually committed in secrecy, with no third person present to be an eye-witness to the fact. As such, the court is cognizant of the fact that dying declarations are not always true vide Carver v United States, 164 US. 694, 697 (1897), and in some cases have been found to be contradictory See. Moore v State, 12 Ala. 764, 46 AM. Dec. 276 (1848) or even unsafe to be relied upon on the ground of incompleteness. See: Pius Jasunga s/o Akum v R [1954] 21 EACA. Dying declarations have, however, been admitted as an exception to the hearsay rule because of a historical belief in their reliability, and because of necessity.**
>
> **Having assessed the evidence herein the court hereby takes caution by generally examining the circumstances under which the dying declarations were made. See: Sabiti Vincent and Others v Uganda Criminal Appeal No. 140 of 2001 (reported in [2001-2005] HCB 46, at 47). The Court will also**

establish whether the evidence on record could be used to offer corroboration to these dying declarations."

It is clear from perusal of the Judgement of the trial court that the learned trial Judge was alive to the need to exercise caution in admitting evidence of the dying declaration. It is clear to us from the evidence of PW3, PW5 and PW6 that the deceased was consistent in his dying declaration, having told PW3, PW4 and PW6 who arrived at different times at the hospital that the appellant had knocked him down.

Our finding upon re-evaluation of the evidence which the prosecution presented regarding the dying declaration is that, the trial Court rightly found that the dying declaration was reliable evidence that the Appellant participated in the incident which ultimately led to the death of the deceased. The evidence of the dying declaration was relevant in supporting the prosecution evidence that the death of the deceased was not accidental.

We are alive to the fact that the only persons who had direct perception of the circumstances that led to the killing of the deceased were the deceased and the appellant. Of course, the deceased could not come to testify in the trial Court, but his dying declarations, specifically, the tone with which he spoke about the appellant tend to show that the deceased meant to say that his being knocked down was not accidental. The dying declaration supported the prosecution evidence.

Regarding counsel for the appellant's contention that the learned trial Judge erred by relying on unofficial translations of the deceased's dying declarations, we note that PW3, PW4, PW5, and PW6 testified that the said statements were made in Kinyarwanda. Save for PW6 who testified in Luganda, the other witnesses restated the dying declarations verbatim and translated the same to English. In our view, any further certified translation of the said statements was unnecessary since the said witnesses were fluent in both Kinyarwanda and English and they were cross examined on the same and their evidence remained consistent and unchallenged.

In **Mariko Lokoya v Uganda [1968] EACA 1**, Spry J.A held that an interpreter was only necessary where the evidence of the dying declaration was given by a person who was unable to understand the words spoken by

the deceased. From our review of the evidence, the deceased was in a fit condition of mind to make the statement, and the witnesses ably understood his statements which he made in Kinyarwanda. We agree with the trial Judge's finding that there was no need to call the medical personnel as further witnesses to the statements. Four persons testified to this fact and their evidence was found to be cogent and satisfactory. We, therefore, find that the learned judge rightly concluded that the evidence of the dying declarations was given by persons who ably understood the words spoken by the deceased and there was no need to employ an interpreter.

Additionally, it was counsel for the appellant's submission that there was inconsistency in the evidence of the alleged dying declarations. Counsel referred Court to the evidence of PW5, who testified that the deceased told him that his wife had killed him and later stated that his own car had killed him.

The law governing inconsistencies in evidence is settled. In **Alfred Tajar v Uganda Criminal Appeal No. 167 of 1969**, Court held that any minor inconsistency, unless the trial judge thinks it points to a deliberate untruthfulness, does not result in evidence being rejected.

In our view, the inconsistencies in PW5's testimony were minor. According to the evidence of PW5, when PW3 arrived in the deceased's room inquiring as to what had happened, he told him that the gate had hit the deceased but the deceased had quickly clarified that it was the Appellant who had killed him. The deceased told PW3, PW4 and PW6 that the Appellant had knocked him in his own home. We find that even though the deceased stated that his car had killed him, the same was being driven by the appellant and its not unreasonable to infer that he meant that the appellant had deliberately knocked him down.

Counsel for the appellant criticized the learned Trial Judge for relying on the evidence of the dying declaration to conclude that the deceased's death was caused by malice aforethought and by doing so, literally translated the deceased's statement to mean that his wife had murdered him. The respondent conceded that the deceased was a lay man who may not have been able to appreciate the legal meaning of the words 'caused my death'

and 'murdered me' but, nonetheless, was sure of what he meant when he stated that his wife had killed him.

Section 191 of the Penal Code Act Cap 120 defines "malice aforethought" as follows:

> **"Malice aforethought shall be deemed to be established by evidence proving either of the following circumstances: -**
>
> **a) An intention to cause the death of any person, whether such person is the person actually killed or not; or**
> **b) Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused." (Emphasis, Ours.)**

It is clear from the above provisions that malice aforethought being a mental element, is difficult to prove by direct evidence, because what is in one's mind, is difficult for another person to discern. Malice aforethought, may, however, be inferred from the surrounding circumstances of the incident under investigation. In **R v Tubere [1945] 12 EACA 63**, Court held that malice aforethought can be inferred from:

> **"a) the nature of the weapon used (whether lethal or not);**
> **b) the part of the body targeted (whether vulnerable or not);**
> **c) the manner in which the weapon was used (whether repeatedly or not); and**
> **d) The conduct of the accused before, during and after the incident (whether with impunity)."**

There is no doubt that the injuries the deceased sustained were those from which he died. It is a key issue in this appeal as to whether malice aforethought of the appellant was proved.

In analysing the point on malice aforethought, the learned Judge based on a number of factors including the dying declarations, the threats to PW7 and the deceased, marital acrimony in the appellant's marriage with the deceased, the conduct of the Appellant before, during and after the commission of the crime and the manner in which the deceased was repeatedly overran with a vehicle which resulted in his death.

The learned Judge was alive to the law on proof of malice aforethought as an ingredient for murder. At paragraphs 101 to 105 of his Judgment, the learned Judge held that:

> **"Direct evidence creating a link between the incident, accused's conduct, and the marital acrimony and threats from which to infer malice aforethought may not always be easy to come by. As I have already stated, homicide is often a secret crime with the dying declarant as often the only witness and the guilty person may easily escape punishment... Since direct evidence of intent (for example, an admission from the accused) is very rare, in the vast majority of cases, litigants must attempt to prove intent by inference through circumstantial evidence. Circumstantial evidence is about the cumulative effect of the totality of the evidence and therefore the different pieces of evidence should not be looked at in isolation of each other. See Criminal Evidence by Richard May, 4thEdition (1999).**
>
> **...This leaves the court with various pieces of evidence which on their own or individually cannot stand to offer a basis for an inference of malice aforethought or guilt. In R vs. Kipkering Arap Koske and Another (1949) 16 EACA. 135 that "in order to justify, on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."**
>
> **Proving intent is usually a matter of piecing together different tidbits of evidence. An amalgamation of all the above factors as discussed herein forms a solid foundation of circumstantial evidence from which the court can infer that the accused person knocked down and killed Nsenga with malice aforethought. It was not accidental, she intended it. I see no other co-existing circumstances which would weaken or destroy this inference."**

We find no reason to fault the learned trial Judge on his analysis of the law and the facts, and the conclusion he reached.

Regarding corroboration of the dying declarations, it was argued for the Appellant that the learned trial Judge erred in his application of the law to the facts when he found that the evidence of a troubled marriage satisfactorily corroborated the deceased's said declarations. He argued that the alleged dying declarations were in themselves equivocal and open to an infinite range of possibilities. In reply, it was submitted that the Judge relied on several pieces of evidence to corroborate the dying declarations to wit,

the Appellant's bad marital relationship; the earlier threats issued to PW7 and the deceased; the Appellant's conduct before, during and after running over her husband as well as evidence from the scene of crime and the mechanical condition of the motor vehicle.

We noted earlier that it was not mandatory in law, that the dying declaration of the deceased had to be corroborated. The evidence of corroboration merely strengthens the prosecution evidence on this.

In view of the above analysis, we find no merit in ground 1 of the appeal, which, too must fail.

Ground 4.

From the submissions of counsel and evidence adduced in this matter, it is clear that there were no eye witnesses to the gruesome incident. It was only the Appellant and the deceased who witnessed the incident. The evidence implicating the Appellant was, therefore, based on a chain of circumstantial evidence.

The law on circumstantial evidence is well settled. Ssekandi J.A (as he then was) in his lead judgment in **Amisi Dhatemwa Alias Waibi v Uganda, Criminal Appeal No. 23 of 1977,** stated that:

> **"... It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately, it is no derogation of evidence to say that it is circumstantial. However, it is trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances, which would weaken or destroy the inference. ... The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of circumstantial evidence is only as strong as its weakest link."**

Additionally, in **Janet Mureeba and 2 Others v Uganda, Supreme Court Criminal Appeal No. 13 of 2003**, the Court reaffirmed the above position of the law whilst stating that:

> **"There are many decided cases which set out tests to be applied in relying on circumstantial evidence to sustain a conviction; the circumstantial evidence must point irresistibly to the guilt of the accused. In R v Kipkering Arap Koske and Another [1949] 16 EACA 135, it was stated that in order to justify, on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That statement of the law was approved by the East African court of Appeal in Simon Musoke v R [1958] EA 715."**

Further still, in **Bogere Charles v Uganda Supreme Court Criminal Appeal No. 10 of 1996**, (Un reported), the court observed that:

> **"... the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."**

In our view, the above authorities clearly set out the guidelines that may be relied upon by Courts while dealing with circumstantial evidence. We shall now proceed to appraise the evidence on record.

The circumstantial evidence relied upon by the trial Court to convict the appellant consisted alleged threats made by the appellant to do harm to PW7 and the deceased. In paragraphs 78 to 83 of the Judgment, the learned trial Judge found that the appellant's threats were not idle and could not be disregarded when evaluating her state of mind before and during the incident more so, given the proximity in time of their utterance on 29th December 2012 and the unfortunate events of 10th January 2013 (12 days later). In his view, the manner in which the accused drove the vehicle was also indicative of a depraved indifference to human life yet she was in full control of her mental faculties. Therefore, the only deduction the court could find was that the Appellant intended to execute the threats earlier issued by running over the deceased immediately an occasion to do so availed itself.

We understand the law on past threats made to the deceased by his or her assailant to be to the effect that such threats can be good evidence to support the conviction of the appellant. However, there must be sufficient proximity between the threats and the occurrence of the death in order to form a transaction. As stated in the **Janet Mureeba case (supra)**, where

the threat is too remote in terms of time and transaction, then it would not constitute circumstances of the transaction leading to the death of the deceased. According to the Supreme Court in that case, the circumstances must be circumstances of a transaction and general expression indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of the death was held not to be admissible.

The value to be attached to evidence of a prior threat was discussed in **Waihi and Another v Uganda (1968) E.A. 278** where the East African Court of Appeal held that:

> **"...The evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, even if it may amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or if impulsively in sudden anger or jokingly, and 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 ..."**

From our review of the trial Court's record, the alleged threats made by the appellant were brought in the evidence of PW7 who testified as follows:

> **"... I went to Nsenga's home in Bugolobi and when I got there I sat in the living room with him and the children.**
>
> **It was in the evening.**
>
> **When I got there, I sat and we were talking normally and a few minutes later Jackie came from her bedroom and asked to speak to us. She also asked the children to leave.**
>
> **Nsenga and I remained in the living room. She was speaking to us in an angry tone and she said she wanted to speak to us together because she said I wasn't listening to her and Nsenga as well and she said that I was being disrespectful to her that I would come to her home and not greet her and I would ignore her in her own house.**
>
> **So, she said I was being disrespectful. Then after she said, the last words she said to me were that, 'And by the way, I am capable of doing very many things that I myself I am scared of what I can do and the length I can go to.'**

I did not respond to her, I just looked at Nsenga and continued looking at Jackie. (Emphasis, Ours).

We agree with the Respondent's case that the alleged threat was made in front of both PW7 and the deceased. The Appellant denied making this statement. The intention to intimidate or threaten may be garnered from the utterance, conduct, and surrounding circumstances. The Appellant in her evidence accused PW7 of having an extra-marital affair with her husband, the deceased. She confirmed that when PW7 had come on vacation and visited their home, she confronted her and the deceased and stated that she was not comfortable with her coming to their home.

The learned trial Judge in evaluating this evidence found that:

> **"I had the opportunity of observing the demeanor of PW7, Lorreta Mutoni and also assessing her testimony. In Jonathan Barinda v Uganda Supreme Court Criminal Appeal No. 005 of 1989, it was observed that 'evidence of likelihood of a grudge ought to be weighed and taken into consideration.' Therefore, caution must be taken while evaluating the evidence of PW7, given that by the time she left Nsenga's home, she was not on good terms with the accused. As such, one could easily be tempted not to expect her to speak the truth or favourably about the accused. Be that as it may, I found her to be a credible and reliable witness. She testified truthfully and confidently and was not shaken by the vigorous cross examination mounted by defence counsel, Mr. Walukaga. On a consideration of the entire evidence on record, especially that of DW1, the accused, who stated that Lorreta had lied about the threats, I believed Lorreta's testimony. It was cogent. I did not see any reason for her to lie when she denied having an intimate affair with Nsenga. Moreover, the evidence shows that Nsenga was not only her guardian but also her cousin."**

Accordingly, there was a grudge arising from allegations of an extra marital affair. The Appellant confronted the deceased and PW7 and angrily issued the statement and the incident in which the deceased was killed happened only twelve days later. We thus agree with the learned trial Judge's finding that this statement amounted to a threat.

The trial Court also considered marital acrimony as one of the pieces of circumstantial evidence offering corroboration to the dying declaration and the

threat. The learned Judge held that credible evidence had been adduced to the satisfaction of the court by prosecution witnesses PW2, PW3, PW4, PW5 and PW7 that the couple had lived an estranged life, slept in separate bedrooms, neither greeted each other nor discussed or did things together as husband and wife although the deceased provided for the accused and the family. Further, that the accused merely tried to paint a very good and rosy picture of the marriage that they slept in the same bedroom, save for when the deceased was drunk and communicated to each other as husband and wife. In choosing to believe the prosecution witnesses the learned Judge found:

> **"...The accused, while acknowledging the existence of tensions and problems in the marriage, down-played the seriousness of the situation by referring to these problems as mere challenges. For sure, this was an under-statement as the evidence does not support her view. It cannot be said that this was a manifestation of the ordinary wear and tear typical in marriages. In my opinion, these were very grim marital problems that had gone on for over ten years, had become chronic and life-changing, leading the accused to search for solutions including counselling with family members and prayer.**
>
> **... From the foregoing, it is very clear that the marriage in question was characterized by mistrust, hatred, frustration and threats just like in the case of see Uganda vs. Dr. Aggrey Kiyingi, High Court Criminal Session Case No. 0030 of 2006. An accumulation of these elements over a long period of ten years resulted in the formation of a tinderbox, which constituted the bedrock of the accused's intention or malice aforethought to kill Nsenga. Given the evidence on record, what was pending at this point in time was an event (Lorreta's unwelcome visit as it turned out) and the opportunity (the incident at the gate) to ignite the tinderbox. The court believes that the deceased's insistence on identifying the accused as his assailant was based on his awareness of the state of affairs between them. His repetition that the accused, his wife, had killed him, in his compound, with his car, in addition to the suspicious and hostile treatment immediately after the incident point to Nsenga's belief in the accused's ill-intention. Nsenga could not therefore have been accidentally run over by his wife. Even the accused herself was aware of this situation and the plausible conclusion to follow therefrom when she told Bisangwa that given their marital relationship, the world would think she tried to kill her husband."**

In our view, the Appellant and deceased developed protracted misunderstandings and differences in their marriage. Their marriage was characterized by blaming each other, such as the alleged extra-marital affair. There were efforts by family members and leading personalities to reconcile the marriage as testified to by PW2, PW3, PW4, PW5 and PW7. The couple remained on bad terms until the death of the deceased. We note that the Appellant drove the deceased to hospital after the accident. However, prior to that she called PW2 and told him that because of the marital misunderstanding, people would think that she tried to kill her husband. We are inclined to believe the respondent's case that the appellant made this call to cover her trucks.

We have also noted counsel for the Appellant's contention that there were no Judge's notes upon visiting the locus because the same were neither part of the record and nor were they granted to the assessors before they made their opinion.

In our view, this was not fatal to the proceedings. According to Sir Udo Udoma CJ. (R.I.P) in **Mukasa v Uganda (1964) EA 698**, a visit to a locus in-quo is to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings.

In **Badru Kabalega v Sepriano Mugangu (1992) KALR 265**, court stated that:

> **"The purpose of visiting locus in quo is for each party to indicate what he is claiming and each party must testify on oath and be cross examined."**

Furthermore, in **Bale and 2 Others v Okumu, High Court Civil Appeal No. 21 of 2005**, it was stated that:

> **"It is clear that the view of a locus in - quo is in addition to; and cannot be a substitute for evidence already given in court. It would follow that visiting locus in-quo by court is not mandatory and court reserves the right to visit locus in-quo in deserving cases, which is its discretion to exercise".**

We note the Appellant's contention that the learned trial Judge in summing up to the assessors and in his judgment did not refer to his findings as obtained

during the locus visit. We find that there was no miscarriage of justice occasioned to the either appellant or the respondent in the manner of the conducting of the disputed locus visits.

in view of our findings above, we find no merit in ground 4 of the appeal as well, which here by fails.

Ground 3.

With respect to ground 3, it was contended that the learned trial Judge had in his judgment shifted the burden of proof to the appellant to prove matters which should have been proven by the respondent. Counsel for the appellant pointed out a passage from the Judgment of the learned trial Judge at page 47 of the record where the learned trial Judge stated that he believed the prosecution case because of the absence of further explanation or any explanation at all from the appellant, as to how exactly the car she was driving had jerked before knocking the deceased. In counsel's view, this exemplified the discouraged practice of basing a conviction on the weakness of the accused's evidence.

It is trite law that the burden of proof in criminal cases lies on the prosecution to prove the charges against the accused person, and not on the accused person to prove his or her innocence. It is also trite law that where there is a reasonable doubt created by the evidence given by either the prosecution or the accused person, the only conclusion which ought to be drawn is that the prosecution has not made out the case and the accused is entitled to acquittal. It is however instructive to observe that beyond reasonable doubt does not mean proof beyond shadow of doubt or absolute certainty.

After reading the judgment of the learned trial Judge, we are accept the submissions of the counsel for the respondent to the effect that counsel for the respondent submitted that the learned Judge's finding that the absence of further explanation or any explanation as to how the car jerked and knocked the deceased was an excerpt of the Judgment. We must state that judgments of the Courts must be read in their totality for one to gain an appreciation of the reasoning of the Judicial Officer who wrote the decision.

A fair reading of the Judgment of the Learned trial Judge reveals that he was alive to the law on burden and standard of proof in criminal cases which he rightly applied to the facts of the case.

The learned trial Judge had regard to several aspects of the prosecution and the defence evidence, namely; the evidence at the scene of crime; the evidence of the mechanical condition of the car which knocked the deceased; the evidence of the bad relationship in the marriage of the appellant and the deceased; the evidence of threats uttered against the deceased by the appellant; and the evidence of the conduct of the appellant before, during and after the crime.

The learned trial Judge also considered the evidence of the defence, as follows: the evidence of the appellant that the knocking down of the deceased was caused by the accidental jerking of the car; the evidence of DW2 tending to support the appellant's version of events.

In the end, the learned trial Judge chose to believe the prosecution evidence. After reading the judgment of the learned trial Judge, we are unable to accept the criticism levelled by counsel for the appellant that the learned trial Judge shifted the burden of proof on the appellant. We therefore find no merit in ground 3 of the appeal as well, which is hereby disallowed.

All the grounds of appeal having failed, this appeal is hereby dismissed.

Before we conclude, we would like to state that we have read some aspects of the submissions of counsel for the appellant, such as the contention that it was erroneous for the learned trial Judge to make reference to the analogy relating to the terrorists involved in the bombing incident of 9th September, 2001 when reaching his decision, because such reference implied that the learned trial Judge was imputing a suicidal intent to kill the deceased, which was not the case. We make no comment on those submissions, except to say that even if the submissions are taken to be true, we would still uphold the decision of the trial Court as the comments did not occasion a miscarriage of justice.

Section 34 (1) of the **Criminal Procedure Code Act, Cap. 116** is in relevant part, to the effect that an appeal may still be dismissed,

notwithstanding the fact that the appellate Court is of the opinion that a point raised in the appeal should be decided in favour of the appellant, the Court will dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. Our analysis has shown that the offence of which the appellant was charged was proved against her beyond reasonable doubt. We therefore conclude that any point which was wrongly decided by the trial Judge did not occasion a miscarriage of justice.

Accordingly, the trial Court's decision to convict the appellant of the offence of Murder contrary to **Section 188** and **189** of the **Penal Code Act, Cap. 120**, and to sentence her to 20 years imprisonment for that conviction is affirmed.

We so order.

Dated at Kampala this ..... day of 2020

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Alfonse Owiny-Dollo, DCJ

Justice of Appeal.

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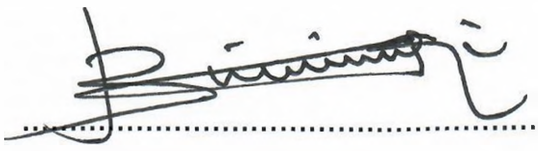
Elizabeth Musoke

Justice of Appeal.



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Cheborion Barishaki

Justice of Appeal.