THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0086 OF 2004

UGANDA ……

PROSECUTOR

VERSUS

1. TUMWEBAZE DEO }

2. KYAMANYWA ADOLF

} :: ACCUSED

3. ASIIMWE EDWARD }

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO.

JUDGMENT

Tumwebaze Deo, hereinafter referred to as A1; and Kyamanywa Adolf, referred to as A2; and, together, referred to as the accused were, initially, together with one Asiimwe Edward – A3, jointly indicted for the offence of murder in contravention of sections 188 and 189 of the Penal Code Act. The particulars of the offence were that on the 27th day of June 2003, at Kajuma village, in Kyenjojo District, the three accused persons murdered Kiiza Deo.

The statement and particulars of the indictment were read out, and fully explained, to each of the accused; whose response were that they had each understood the indictment, but denied the allegations contained therein. The Court accordingly entered the plea of "Not Guilty" for each of them; and as a consequence of which a trial ensued as required by law. Murder is an offence comprising four ingredients; which are namely: –

(i) Death of a human being.

(ii) The said death having been unlawfully caused.

(iii) The said causation done with malice aforethought.

(iv) The participation of the accused in causing the said death.

The prosecution is under strict duty to prove each of these ingredients beyond reasonable doubt, before the trial Court can convict an accused person as charged. The standard of proof required in criminal cases, was stated in the case of ***Andrea Obonyo & Others vs. R. [1962] E.A. 542;*** where the Court reproduced at p. 550 (B – H), a passage from the judgment of DENNING, L.J. (as he then was), in ***Bater v. Bater [1950] 2 All E.R. 458*** at 459: as follows:

> *'In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.'*

The Court then continued that:

> *"That passage was approved in* ***Hornal v. Neuberger Products Ltd. [1956] 3 All E.R. 970, and in Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.).*** *In* ***Hornal v. Neuberger Products Ltd., HODSON, L.J.,*** *cited with approval the following passage from* ***KENNY'S OUTLINES OF CRIMINAL LAW*** *(16th Edn.), at p. 416:*
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> > *'A larger minimum of proof is necessary to support an accusation of crime … the more heinous the crime the higher will be this minimum … The progressive increase in the difficulty of proof, as the gravity of the accusation…increases, is vividly illustrated in …* ***LORD BROGUHAM'S*** *speech in defence of* ***Queen Caroline****:*
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> > *'The evidence before us … is inadequate even to prove a debt – impotent to deprive of a civil right – ridiculous for convicting of the pettiest offence – scandalous if brought forward to support a charge of any grave character – monstrous if to ruin the honour of an English Queen'."*

In a bid to discharge the burden of proof which lay on it in the instant case, the prosecution called 5 (five) witnesses. These were:

(i) Dr. Mucunguzi William – PW1; the medical officer who carried out the post mortem examination on a body identified to him, by PW3, as that of one Kiiza Deo; and made a report of his findings thereon;

(ii) Philipo Alibankoha – PW2; brother to A1, and village mate to A2; and an eye witness to the incident for which the accused stand indicted;

(iii) Kisembo Hasaba George – PW3; a teacher to whom both PW2 and the deceased fled following the fatal assault; and to whom the deceased made a dying declaration;

(iv) Kiiza Rehema Bright – PW4; the LC1 chairperson of the village where the fatal incident occurred; and was involved in the search for the accused, and arrest of A1;

(v) No. 32125 D/Constable Bachurana Methodius – PW5; a police officer who investigated the aforesaid death.

To prove that Kiiza Deo was dead, the prosecution relied on the testimonies of PW1 who had carried out the aforesaid post mortem examination; PW2, and as well PW3, both of whom had seen the dead body and had participated in the burial of the deceased. Their evidence meet the requirements in ***Kimweri vs. Republic [1968] E.A. 452***; namely that proof of death may be established, inter alia, by an eye witness to the corpse. This ingredient, and the defence conceded, the prosecution has proved beyond reasonable doubt.

On the causation of that death, the presumption in law is that any incident of homicide is unlawful. However, this presumption is rebuttable by the accused providing proof that the homicide was committed under some excusable circumstance; which can be either that it was accidental, in defence of person or property, or upon provocation, or done in execution of a lawful order; (See ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65; Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991, [1992 – 1993] H.C.B. 68; Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995, [1994 – 1995] H.C.B. 16).***

It is open to an accused person, to raise the said rebuttal; and the standard of proof therefor, as pointed out in the case of ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454,*** is however on the balance of probabilities. In the case of ***Dafasi Magayi and Others vs. Uganda [1965] E.A. 667,*** where the appellants' defence was that their participation in the assault resulting in the death in issue, had been in obedience to the orders of a local administration Chief, the Court held at p. 670 (H), that:

"…the appellants cannot shelter behind the invitation or order of the Chief. It was not a lawful order which they were bound to obey… The fact that the Chief said that he would

'face the case' is itself an indication that he and they knew that what they were doing was wrong."

On the circumstance of the death of Kiiza Deo, herein, PW2 testified that A1 had attacked the deceased, cutting him on the head; after which, A1:

"…then told the two other accused that they should also cut me dead … Deo Tumwebaze said: 'you also get him and cut him so that there is no evidence'."

PW2 stated that he himself had to flee from the scene. If this testimony of PW2 is true, and I shall advert to it later in this judgment, then it is clear that the assailants who inflicted the ghastly injuries on Kiiza Deo were aware that what they were doing was unlawful; hence the move to do away with PW2 as well, and thereby get rid of someone who would implicate them in the culpable deed. PW3 examined Kiiza Deo just before the latter died; and found cut wounds on the fingers of the right hand, on the face, and the back of the head which had been cut off.

Further corroboration of the aforesaid evidence that the deceased had been cut with a panga, is contained in the medical evidence which opined that the fatal injury had been caused by a sharp instrument. PW1, through the post mortem examination, corroborated the findings of PW3. At the scene of the attack, he recovered a piece of the bone which had been sliced off the skull of the deceased. He established the cause of death to have been:

(i). Excessive haemorrhage (bleeding) due to open head injury; he stated: *'simply put, the deceased was cut to death'*. He had found the body lying in a pool of blood.

(ii). Cerebral sinuses from the deep cut on the scalp (skull). And that the weapon used to inflict such injury must have been a sharp object like a panga.

Kiiza Deo died less than an hour from the fatal assault. The nature of the injuries, and the circumstance under which they were inflicted, rule out any possibility that the said injuries were inflicted under any of the excusable circumstances pointed out above; or any other. They serve to strengthen the presumption of unlawful causation of that death. The defence – as with the ingredient of fact of death – conceded the irrefutable proof of the unlawful causation of the said death.

As for malice aforethought in the causation of any death, section 191 of the Penal Code Act defines malice aforethought as follows:

"191. Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances-

(a) an intention to cause the death of any person, whether that person is the person 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."

In the combined appeals by ***R. v. Sharmal Singh s/o Pritam Singh; & Sharmal Singh s/o Pritam Singh v. R. [1962] E.A. 13,*** the Privy Council, citing with approval the principle enunciated in ***D.P.P. v. Smith [1961] A.C. 290,*** that the knowledge required for establishing malice aforethought is the knowledge that a reasonable man would have of the probable consequences of his acts and omissions, held at p. 16 (G – H) that malice aforethought is established where, inter alia, there is:

'knowledge that the act or omission causing the death will probably cause the death of or grievous harm to another person."

Therefore, except for instances in which the perpetrator of the homicide has expressly declared the intention to cause the death of a person, malice aforethought remains a mental element; the proof of which can only be established by inference, drawn from the facts or circumstances surrounding the homicide. The Court has to look at the entire circumstance surrounding the cause of the injury, and determine whether or not there were any excusable factors, before making a conclusive inference that malice aforethought existed at the time.

Factors from which such inference can be drawn, were laid out in the case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63****;* where the deceased had been beaten to death with a stick. Justice Sir SHERIDAN stated that:-

"With regard to the use of a stick in cases of homicide, this Court has not attempted to lay down a hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used, and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the use of say, a spear or knife than from the use of a stick; that is not to say that the Court take a lenient view where a stick is used. Every case has of course to be judged on its own facts."

A number of other cases, such as ***Uganda vs. Fabian Senzah [1975] H.C.B. 136; Lutwama & Others vs.Uganda, S.C. Crim. Appeal No. 38 of 1989; Uganda vs. John Ochieng [1992 –1993] H.C.B. 80, Uganda vs Turwomwe [1978] H.C.B.16,*** have re–echoed and recast this principle as follows: whether or not the weapon used was lethal, vulnerable parts of the victim were targeted, injuries were intended to cause grave damage, and the conduct of the accused before, during, and after the attack, points to guilt.

In ***Siduwa Were v. Uganda [1964] E.A. 596,*** where the medical evidence had not ruled out but opened up the possibility of a co–existing circumstance of the death, consistent with either accident or manslaughter as with murder, the Court placed a high premium on the onus of proof of malice aforethought, and at p. 598 (I) to p. 599 (A), quoted from a passage in ***Sharmpal Singh v. R. [1960] E.A.*** at p.799 as follows:

"… murder … is [when the act is] *done with the intention of killing or doing grievous harm or with knowledge that the act will probably cause death or grievous harm."*

In the instant case, the assault weapon was a panga. It did not only cause grievous harm, but was actually fatal. This therefore placed it in the category of the phrase 'deadly weapon' as assigned to it by s. 273 of the Penal Code Act then in force, in June 2003, when the crime was committed. The said Act had defined a deadly weapon as follows:

"S. 273 (3). *In sub section (2), "deadly weapon" includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death."*

In view of the weapon used, the force applied in inflicting the injury, and the parts of the body targeted, and as well the numerous times the victim was assaulted, it was clear that the assailant did not only intend that the victim should suffer grievous harm, but it was so done in the knowledge that such grievous harm would probably, if not actually, occasion death. The ingredient of malice aforethought herein, as also conceded by the defence, was proved beyond reasonable doubt.

For proof that the accused were the perpetrators of the said malicious causation of death, the prosecution relied on the direct evidence of identification adduced by PW2, and the dying declaration of the deceased Kiiza Deo; in which the deceased, only minutes after being assaulted; and just before his death, named A1 and A2 as the assailants. The prosecution also urged Court to make the necessary inference from the conducts of the accused soon after the death of Kiiza Deo, as further proof of their guilt.

Section 30 of the Evidence Act (Cap 6 Laws of Uganda Revised Edition 2000) provides as follows for the admission, in evidence, of a dying declaration as to the cause of the maker's death:

"***30. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.***

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 produced 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;

…"

There is a huge corpus of authorities, in our jurisdiction, on dying declarations; dating back to the decisions of the Court of Appeal for Eastern Africa. In ***Kabateleine s/o Nchwamba (1946) 13 E.A.C.A. 164***, the appellant had earlier threatened to burn the deceased who had reported the threat to the assistant headman. The complainant was indeed later burnt in her hut. The issue was the admissibility of the evidence of the complaint to the assistant headman. The Court held at p. 165, that it could only be admissible under section 32 (1) of the Indian Evidence Act (whose provision was similar to the provision of section 30 of the Uganda Evidence Act, cited above).

It quoted a passage from the decision of the Privy Council in ***Pakala Narayana Swami v. Emperor (1939) A.I.R. 47*** at p.50, where the Privy Council, deciding on the effect of that section, had held that:

> *'The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction'.*

In ***Pius Jasunga s/o Akumu v. Reginam (1954) E.A.C.A. 331;*** the Court of Appeal for Eastern Africa in a passage at p. 333, which I have to quote extensively, said:

> *"In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having, at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.*
>
> *In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this Court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England.* ***(R. Muyovya bin Msuma (1939) 6 E.A.C.A. 128.*** *See also* ***R. v. Premananda (1925) 52 Cal. 987.)*** *"*

"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from ***FIELD ON EVIDENCE (7th Edn.)*** *has repeatedly been cited with approval:*

> *'The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting; and … the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed … The deceased may have stated his inferences from facts concerning which he may have omitted important particulars from not having his attention called to them.'* ***(Ramazani bin Mirandu (1934) 1 E.A.C.A. 107; R. v. Okulu s/o Eloku (1938) 5 E.A.C.A. 39; R. v. Muyovya bin Msuma*** *(supra).)*

*Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is usually, more difficult than in daylight (****R. v. Ramazani bin Mirandu*** *(supra);* ***R. v. Muyovya bin Msuma*** *(supra)). 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 no guarantee of accuracy.*

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration ***(R. v. Eligu Odel (1943) 10 E.A.C.A. 90; re Guruswami (1940) Mad. 158),*** *and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. (See, for instance the case of the second accused in* ***R. v. Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 E.A.C.A. 90).***

*But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross – examination, unless there is satisfactory corroboration. (****R. v. Said Abdulla (1945) 12 E.A.C.A. 67; R. v. Mgundulwa s/o Jalo and others (1946) 13 E.A.C.A. 169, 171.****)*

In addition to the cases cited above, we have examined the decisions of this Court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without

*satisfactory corroboration, unless, as in **Epongu's** case (supra), where there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused. … We should be running counter to a long line of authority if we were to support this conviction."*

In ***Okethi Okale and Others v. Republic [1965] E.A. 555,*** at p. 558 (E) to p. 559 (A): the Court cited with approval the judgment of the Court in ***Jasunga Akumu v. R. (1954) 21 E.A.C.A***. and pointed out that the circumstance under which the statement (dying declaration) was made, was not so done in immediate expectation of death, and therefore the Court had to approach that statement:

"…with that circumspection that the law enjoins with regard to dying declarations."

The case of ***Tuwamoi vs. Uganda [1967] E.A. 84, Tindigwihura Mbahe vs. Uganda, Crim. Appeal No. 9 of 1987,*** and that of ***Constantino Okwel vs. Uganda Crim. Appeal No. 12 of 1990,*** restated the principles of law laid out above. The more recent decision of the Supreme Court of Uganda, in ***Uganda vs. George Wilson Simbwa, S.C. Crim. Appeal No. 37 of 1995,*** has however apparently settled the matter. The Court, on this issue, stated as follows:

"The general principle on which the evidence of a dying declaration is admitted is that they are declarations made in extremity when the party is at the point of death, and when every hope of this world has gone, when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful which is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered by a Court of justice.

*The result of the principle is that there must be settled hopelessness and expectation of imminent death i.e. the declarant must have abandoned all hope of living. It must be shown for the prosecution that the deceased, when he made the statement was under the impression that death was impending not merely that he had received an injury from which death must ensue, but that he then believed that he was at the point of death (See **R. v. Woodcock (1789) 1 Leah 500**; **R. v. Penny (1909) 2 K.B. 697** at p. **701**; **Archibold's Criminal Pleading, Evidence and Practice**; 13th Ed. Paragraph 1294).*

…The deceased died within an hour after he had been stabbed with a spear in the ribs. When he named the appellant as his assailant he did so in extremity when he was at the point of death, and when every hope of this world had gone. On his (the deceased's) part, every motive to falsehood was silenced and his mind induced by the most powerful consideration to speak the truth. In short, the deceased's statement that it was the appellant who pierced him was a dying declaration which fulfils the requirement of the provisions of section 30(a) of the Evidence Act and decided cases. In the circumstances the corroboration of the dying declaration was not required.

Much as in the circumstances of the case, the corroboration of the dying declaration was not required, the dying declaration of the deceased was in fact, corroborated. Such corroboration was provided by the evidence of PW1 who knew the appellant and was able to recognise him and his clothes by the torch light. Secondly, the medical evidence was consistent with the deceased's dying declaration … amounted to circumstantial evidence which corroborated PW1's evidence as to the manner in which the deceased met his death.

The doctor's general observation was that a sharp instrument was used to cut through the spleen. This was consistent with PW1's evidence that the deceased was pierced with a spear. Another piece of circumstantial evidence which provided corroboration to PW1's evidence was the fact that the respondent disappeared from his home and village soon after the incident in which the deceased was killed."

It is noteworthy that while the Court of Appeal for Eastern Africa which decided the ***Kabateleine*** and ***Pius Jasunga*** cases, was interpreting the provisions of the Indian Evidence Act (then applicable in East Africa), the Supreme Court of Uganda which decided the ***George Wilson Simbwa*** case was construing the provisions of the Uganda Evidence Act; and the relevant provisions of the two legislations are textually the same.

And yet the Ugandan Supreme Court, unlike its aforesaid predecessor Court of Appeal, has held that a dying declaration made in a condition of extremity, when all hope of life is gone, has the same force as evidence given on oath; and therefore enjoys equal force with a similar declaration made in England and governed by common law. Hence, in Uganda, for Court to found a conviction on such declaration, corroboration of such evidence is not a necessity.

In the case before me now, Kiiza Deo died within minutes only – something like half an hour – of being assaulted. He had a ghastly fatal injury at the back of his head. Thus, when he made the declaration naming A1 and A2 as his assailants, he was indisputably in the gravest condition of extremity, and was at the point of death; with all hope of further life gone. He certainly could not and did not, at that time, have within him any motive or capacity to contrive any falsehood or mischief. All that must have dwelt in his mind were only powerful considerations to speak the truth.

For a case founded on evidence of identification, such as this one, the law is that the inculpatory facts of identification adduced by the victim of the act complained of, offers the best evidence – see ***Badru Mwindu vs Uganda; C.A. Crim. Appeal No. 1 of 1997.*** In the instant case before this Court, however, the inculpatory facts of identification were not adduced in Court by the victim, Kiiza Deo, who is long since dead. His evidence of identification was only indirectly adduced as a dying declaration. It was instead the direct evidence of PW2, as an eye witness, which the prosecution adduced as the best evidence. The evidence of PW2 is that of a single identification witness.

Court must proceed with caution before reaching the conclusion that the accused were indeed correctly identified and placed at the scene of the crime. The list of authorities on this is almost inexhaustible; and includes such cases as ***Roria vs. Republic [1967] E.A. 583.*** A passage from the **Roria** case was reproduced by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997;*** where the Court of Appeal for East Africa had stated at p. 584 as follows:-

> *"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as* ***Lord Gardner L.C.*** *said recently in the House of Lords in the course of a debate:*
>
> > *'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of the ten – if they are as many as ten – it is on a question of identity.'*
>
> *That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on*

such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

In the ***Bogere*** case (supra), the Court reproduced a passage from the judgment in ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77***; where that Court had stressed that the need to exercise care applies with equal force both to situations of single and multiple identification witnesses. It said:

"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken.

The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…..

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

This position of the law was re–affirmed in the case of ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997;*** where the Court stated that:-

"The law with regard to identification has been stated on numerous occasions. The Courts have been guided by ***Abdulla bin Wendo & Another v. R (1953) 20 E.AC.A. 166*** *and* ***Roria v. Republic [1967] E.A. 583*** *to the effect that although a fact can be proved by the testimony of a single witness this does not lessen the need of testing with greatest care the*

evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."

In a situation where the conditions for correct identification are difficult, the Court in ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93]H.C.B. 47***; in a passage at p. 48, and reproduced in the ***Bogere*** case (supra), stated as follows:-

"Where the conditions favouring correct identifications are difficult, there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and of fabricated alibi."

In the ***George Wilson Simbwa*** case (supra), the Court held that while the testimony of a single witness can suffice to prove identification, there is need to test such evidence with the greatest care, especially where the conditions favouring identification are difficult. The Court restated the guiding principles as being the nature of light, familiarities of the parties, the length of time and the distance between them for observation; and added:

"The true test is not whether the evidence of such a witness is reliable. A witness may be truthful and his evidence apparently reliable and yet there is still the risk of an honest mistake particularly in identification. The true test as laid down by the authorities is whether the evidence can be accepted as free from the possibility of error."

In ***Yowana Sserunkuma vs Uganda, S.C. Crim. Appeal No. 8 of 1989,*** the Court emphasised the need for the most careful scrutiny of the evidence of a single witness, regarding night identification, before accepting it. The Court however clarified that a careful scrutiny should not lead to acceptance of dubious evidence. Such scrutiny should focus, for instance, on comparison of a first report on identification, with evidence in Court; testing the nature, and effect of illumination by the light, on the scene.

I therefore accordingly warned the assessors on the need in this case, before advising me on whether to accept or reject the evidence of identification, to exercise caution, as laid down by the authorities; this being the evidence of a single witness. I myself have proceeded with the requisite caution and care, in my evaluation of the evidence of identification adduced in this case, before making any findings and reaching appropriate conclusions thereon.

In his testimony PW2 revealed that both accused are persons not only well known to him but are very close to him. A1 is in fact his own brother from the same parents; and A2 hails from the same village of Kihamba as does PW2. The assailants had positioned themselves by the side of the pathway, at only an arm's length from PW2 and the deceased as the latter two passed by before the attack. Further, A1 urged the other to attack PW2 as well; thereby affording PW2 and the deceased to make audial identification as well.

He further testified – and this was corroborated by PW3 – that at the time of the fatal assault there was sufficient moonlight available, it being early evening – around 8.00 p.m. The evidence adduced by PW2 and PW3, has satisfied me that favourable conditions did exist, for correct identification; and I am satisfied that this greatly minimised, if not ruled out altogether, any possibility of mistaken identity or error in the identification.

There is nonetheless need to deal with the issue of the credibility of PW2 which was the subject of a focused and unrelenting attack by Cosma Kateeba, the learned defence counsel; and determine conclusively whether, despite the favourable conditions which I have found did exist for identification, PW2 can be relied on with regard to the identity of the persons who assaulted and caused the death of Kiiza Deo that evening. In his testimony, PW2 named A3 alongside A1 and A2 as the assailants of the deceased Kiiza Deo.

PW3 to who, within only minutes of the incident, both PW2 and the deceased Deo Kiiza fled and made the first report, however, in his testimony made a categoric refutal of that part of PW2's testimony implicating A3. He was explicit and convincing in his testimony that PW2 had not named A3 at all amongst the assailants; but had named only A1 and A2 as the assailants. His further testimony was that the deceased himself had also implicated only A1 and A2 as his assailants. PW3 then revealed that PW2 had in fact, later, confided to him that he (PW2) had falsely implicated A3 as an act of reprisal against A3 because of an earlier conflict between the two; a conflict PW3 had also been aware of.

This revelation, the truth of which this Court believes, exposes PW2 as having blatantly fabricated and borne false witness against A3. This is more so in the light of the fact that the persons implicated by the deceased in the dying declaration herein did not include A3. In the course of cross examination, PW2 was forced to concede that his account in Court, of the incident that evening, was in several parts inconsistent with the statement he had given to police immediately after the incident. It therefore follows that his evidence regarding the incident, must be taken with a pinch of salt.

The issue for determination, therefore, is whether the whole of that evidence is to be considered false and unworthy of acceptance; or the worthless parts can safely be severed from, and leaving the credible one intact. There are numerous authorities laying down the principles on how Courts should approach contradictions, inconsistencies, and falsities in the evidence of witnesses. In ***Khatijabai Jiwa Hasham v. Zenab d/o Chandu Nansi [1957] E.A. 38,*** at p. 49 (B – C), Sir R. SINCLAIR, V.P. held as follows:

> "[The judge's] *failure to appreciate that the respondent told a deliberate untruth on a material point or, if he did appreciate it, his failure to attach any importance to it, must detract from the favourable view which he took of the respondent's credibility."*

At p. 54 (C – D – F), CONNELL J., stated as follows:

> *"A useful test in the assessment of this type of evidence is laid down in* ***FIELD'S INTRODUCTION TO THE LAW OF EVIDENCE,*** *p. 37, quoting* ***NORTON on Evidence****:*
>
> > *'The falsehood should be considered in weighing the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But if there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of want of veracity on perhaps some very minor point.' "*

In ***Siduwa Were v. Uganda [1964] E.A. 596;*** which dealt with the issue of a confession which turned out to be partly true and partly false, the Court said, at p. 601 (D – G) as follows:

"While it is clear law that a confession must be taken as a whole, it is also clear law that it need not be believed or disbelieved as a whole. It is open to a trial judge to accept a part of a statement and to reject another part. Where however the part which is rejected is so inextricably interwoven with another part that such other part would become something quite different if it were divorced from the rejected part, then we consider that it is not open to a judge to accept such other part save in the most exceptional circumstances... which, require[s] *the exercise of the greatest caution before any part of the confession* [is] *accepted."*

In the case of ***Alfred Tajar v. Uganda, E.A.C.A. Crim. Appeal. No. 167 of 1969*** (unreported), the Court said:

"In assessing the evidence of a witness … it is open to a trial Judge to find that a witness has been substantially truthful, even though he lied in some particular respect."

In ***Gabula Bright Africa vs. Uganda, S.C. Crim. Appeal No. 19 of 1993,*** the Court held that the trial judge was entitled to rely on the portion of the evidence he believed to be true, even if he disbelieved other aspects of the witness' evidence as untrue. The Court reproduced with approval, the following passage from the decision of the Court of Appeal for East Africa in ***Mattaka and Others vs. Republic, [1971] E.A. 495*** at p. 504; where the Court had dealt with the evidence of a witness who had lied in Court:

"… the Chief justice was satisfied that the main portion of Labello's evidence was true … but the Chief Justice found that he would not accept any portion of his evidence as involving any of the appellants except where that evidence was shown by other evidence or by sequence of events, to be true."

In the case now before me, PW2's false testimony against A3, was intended to settle scores with A3, thereby achieving his personal end. To this extent, he was a witness with an ulterior purpose of his own. It is apparent that the evil that drove him to conjure up that vile mischief to manipulate this incident to his advantage only possessed him later, when reporting the incident to police the following day. Nonetheless, that worthless part of PW2's evidence is severable from that which is credible, and worthy of acceptance. The reasons therefore are contained hereunder.

A1 and A2 gave sworn evidence and raised the defence of alibi. A1 testified that at the time of the incident, he was some 10 (ten) miles away from the scene of the crime, and only returned to his village the following day; and that it was only then that he learnt from his mother of the death of Kiiza Deo; and that his brother – PW2, had implicated him in that homicide. His mother, he testified, had warned him of one Byabona, an in law to the deceased, who had sworn to kill him in revenge. He denied any involvement in the incident.

He contended that his brother had implicated him due to an unresolved land dispute between the two of them; and for which his brother had earlier declared he would have him arrested. He therefore attributed his present tribulation to the aforesaid bad blood between them. He however contended that despite what his mother had revealed to him, he stayed put at his home; and that it was from there that, four days after the event, he was arrested by the said Byabona, and tortured, before being arraigned in Court.

For his part, A2 testified that the evening Kiiza Deo was killed, he was in a bar at a neighbouring trading centre with friends; and on learning at around 9:00 p.m., of the assault on Kiiza Deo, the bar was closed and he went home to sleep. He never heard any emergency alarm drum that night. Two days later, a village mate notified him of being implicated in the killing of Kiiza Deo; and that Byabona was looking for him. On learning that his village mates were also looking for him intending to lynch him, he reported to a local Councillor who handed him over to the police.

I find no merit in the account given by the accused, inclusive of the alibi raised by them; they are mere fabrications and I therefore reject them. It is rather hard to believe that A1 who had learnt from his mother that he was implicated in the foul murder of Kiiza Deo, and of the threat allegedly uttered by Byabona, would have chosen to stay at home to wait for any eventuality as he unconvincingly asserts. Instead, any innocent person would have taken every opportunity to report to the local leaders, protest their innocence, and seek protection.

The heinous assault took place a mere 300 (three hundred) metres only, or put differently only a few minutes, from the home of PW3, to which PW2 fled, and where, in the very heat of the moment, PW2, according to PW3, named A1 and A2 as the assailants. A few minutes later, Kiiza Deo himself came and made a dying declaration naming A1 and A2 as his assailants. In reporting to PW3, certainly neither PW2 nor the then gravely injured Kiiza Deo had the time or the state of mind to fabricate the identities of A1 and A2 as the assailants.

In the light of the aforesaid dying declaration, independently naming A1 and A2, whom from A3's testimony PW2 had earlier, in the heat of the moment, named as the culprits, I am inclined to believe the correctness of the evidence of identification adduced by PW2; and sever it from the false one in which he had maliciously named A3 amongst the villains of the evening, and which I have rejected. Therefore, if there were need to corroborate the dying declaration in the instant case, then PW2's direct evidence identifying A1 and A2 as the villains, offers sufficient corroboration.

Finally, the conduct of the accused subsequent to the death of Kiiza Deo as shown hereunder, point to culpability. Both A1 and A2 failed to respond to the traditional emergency alarm–drum sounded in the village following the death of Kiiza Deo. Both were uncharacteristically conspicuously absent at the burial of the deceased. They both strangely vanished from the village following that death. A1 was arrested from the forest where he had sojourned in hiding for some days. A2 was, much later, delivered to the police, not by a local leader of the area, but by a District Councillor.

In the same vein, the allegation that Byabona was a deadly and fearsome gun–wielding operative, breathing fire of revenge on the two suspects, collapsed. It turned out to be an unfounded, baseless concoction. If it was not for the timely intervention by Byabona, who rescued A1 from the village mates who had captured him – a commendable act of an otherwise law abiding person, whose good deed A1 is now shamelessly spitting on – the incensed village mates, baying for A1's blood would certainly have, at the very least, harmed if not lynched him.

The plea by A1 that PW2 had fabricated evidence against him due to their land dispute does not hold. His own evidence is that for the five years he has been on remand, this land has lain fallow and no one, not even PW2, has tilled it. This goes counter to the alleged ill–motive attributed to PW2 by A1. It would take a very evil and callous heart indeed for PW2, owing only to a land dispute, and nothing more, to bear false witness in Court against his blood brother, as is the case here; knowing that this could result in the brother being sent to the gallows.

The interval of time within which PW2 named A1 and A2 to PW3 as the perpetrators of the crime that night, as pointed out above, was too little for PW2 with his state of apprehension, to have had time to conjure up such mischief. It is for this reason that his mischief against A3 came

as an afterthought; cultivated in his mind much later – sometime in the period between first reporting the assault on Kiiza Deo to PW3, and reporting to police – when the heat of the moment had cooled and he had, had sufficient time to reflect on the incident and conjure up that vile mischief.

Further to this, whereas PW2 had, of his own volition, confessed to PW3 that he had framed A3 in an act of reprisal, there is no intimation that he had equally framed any of the other accused persons. Kiiza Deo, who named A1 and A2 in his dying declaration as his assailants, has not been shown to have had any dispute or any form of misunderstanding with A1; while A2 for his part clearly stated that he had no dispute or misunderstanding with the late Kiiza Deo.

The conduct of both accused, as set out herein above, is utterly incompatible with innocence; and leads me to nothing else but to make the logical adverse inference of their culpability in the vile murder of Kiiza Deo. This serves to corroborate the dying declaration, and the cogent evidence of PW2 which names the two accused as the assailants of Kiiza Deo, now deceased. The conduct of the accused above, from which I have drawn the adverse inference, is circumstantial evidence.

The principle upon which evidence which is exclusively circumstantial is approached is that the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt; and further, that there are no co-existing circumstances that would negative the inference of guilt. However, in the instant case, in the light of the evidence of PW2 and the dying declaration, identifying the accused as the perpetrators, this inference is not founded exclusively on circumstantial evidence. It therefore stands out as an exception to the principle enunciated above.

In ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209;*** the circumstantial evidence on which the trial Court had convicted the appellant, had not wholly been inconsistent with the innocence of the appellant; nevertheless, the Court of Appeal held at p. 211, that:

> *"…circumstantial evidence, although not wholly inconsistent with innocence, may be of great value as corroboration of other evidence. It is only when it stands alone that it must be inconsistent with any other hypothesis other than guilt."*

In the ***Bogere*** case (supra), the Court made qualifications on the nature of the 'other evidence' as follows:-

> *"We have to point out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences (See* ***George William Kalyesubula vs. Uganda*** *(supra)). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose."*

Further to the above is the fabricated alibi raised by the accused which I have roundly rejected; and which on the authority of the ***Moses Kasana*** case (supra), is also 'other evidence' in support of the dying declaration. Therefore, I find that there is ample evidence to support the case that the accused were correctly identified by PW2 and Kiiza Deo and placed at the scene of crime as the persons who committed the fatal assault on Kiiza Deo. I am bolstered in my contention by the aptly worded advice the Court sounded in the ***Abudalla Nabulere*** case (supra), as follows:-

> *"If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."*

I am satisfied that the evidence supporting the dying declaration that A1 and A2 were the perpetrators of the fatal assault on Kiiza Deo that fateful night, is well established. I am further satisfied that the weight of evidence in support of evidence of identification, has greatly minimised if not removed altogether, any possible danger of error of identification or mistaken identity, that would have otherwise rendered it unsafe to found a conviction basing thereon.

One last issue I must resolve before I take leave of this involved case is the apportioning of culpability on the heads of the two accused. The evidence adduced by PW2 was that each of the accused carried a panga. Upon cutting his victim, A1 advised A2 to cut PW2 too; and PW2 survived only because he fled the scene in time. Kiiza Deo stated in his dying declaration that he had been attacked by A1 and A2, with a panga. The Penal Code Act of Uganda, (Cap 120 – Revised Ed. 2000) provides as follows:

"20. ***Joint offenders in prosecution of common purpose.***

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

In ***Abdi Alli v. R (1956) 23 E.A.C.A. 573;*** where the Court of Appeal, in a case from British Somaliland, construed the import of the provision of the section in the Indian Evidence Act on common intention, declined to find that there was evidence of common intention, and held at p. 575 that:

"…the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of common intention must not be too readily applied or pushed too far. … It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with other in order to bring about that result that this section [of the Penal Code] *can be applied."*

In ***Lekishon ole Sang'are alias Lakamondo ole Sang'are & Others v. Reginam (1956) 23 E.A.C.A. 626;*** a Maasai band had no expressed common intention to cause death, but the party was armed with spears, arrows and swords; and one of the raiders fatally pierced a member of the invaded family with a sword. All the seven members of the raiding party were convicted of murder on the basis of common intention. On appeal, the Court held at pp. 629 – 630, that: –

"The evidence, however, is that … this party of moran carried a complete set of arms, including spears and arrows, which they would not have had if their intentions had been wholly pacific. …having regard to the lethal nature of the weapons they carried, they were clearly prepared to cause grievous hurt …

In those circumstances, one of them having directly caused the death …, … it is found that the appellants had formed 'a common intention to prosecute an unlawful purpose in

conjunction with one another', and it is also found that 'in the prosecution of such purpose' the offence of murder was committed by the first appellant.

… whether all the appellants should be 'deemed to have committed' that offence depends on …whether the murder of the deceased 'was a probable consequence of the prosecution of such purpose'. … It is, however, necessary for a conviction of murder … that the accused should at least have been present, aiding and abetting the person actually causing death.

In ***Ezera Kyabanamaizi v. R. [1962] E.A. 309,*** a gang conducted a raid resulting in the killing of some people; the Court held at p. 317 (F – G) as follows:

"…in view of the nature of the raid it is to be inferred that the participants had the common intent to carry out robbery with violence, that murder was committed in the prosecution of that purpose, and that murder was a probable consequence of the prosecution of that purpose. In the circumstances, all the members of the gang are equally guilty of the murder, and the details as to the individual or individuals who actually inflicted the wounds on the deceased are of comparatively minor importance. What is necessary … is evidence tending to show that the individual appellants were in fact active members of the gang."

In ***Andrea Obonyo & Others v. R. [1962] E.A. 542,*** also a case of raids conducted by a gang on a trading centre, targeting the Asian community, and resulting in the death of some persons, the Court held at p. 546 [G – H] as follows:

"… in a charge of this nature the essential issues which had to be determined were:

(1) whether the murder of the deceased was committed in the prosecution of a common unlawful purpose of the gang and was a probable consequence of the prosecution of that purpose and
(2) whether the individual appellants have been shown to have been members of that gang sharing the common purpose. …that murder was a probable consequence of the prosecution of that common purpose … and that the deceased was murdered in the prosecution of such purpose … In those circumstances each member of the gang was guilty of murder."

In ***R. v. John s/o Njiwa Samwedi [1962] E.A. 552*** the Court held at p. 554 [C] as follows:

> *"If two persons together steal, and one of them employs violence, …with a weapon, particularly if such a weapon is carried openly by one of the thieves, there would be grounds for holding that violence was, at lowest, contemplated, and therefore agreed to by the other thief as well."*

In ***Dafasi Magayi and Others v. Uganda [1965] E.A. 667,*** the Court, at p. 670 [D – E], quoted with approval, a passage from the judgment of the trial court as follows:

> *"The inference, from the actions of all the accused persons in taking part in this unmerciful beating, is irresistible – not only did none of the accused persons disassociate himself from the assault but they each prosecuted it with vigour. Not only was the deceased's death the probable consequence of the prosecution of their common purpose but the inevitable one. No one could have survived such a beating and no one could have suspected that he might. A clearer case for the application of s.22 of the Penal Code is difficult to imagine. "*

In the instant case before me, both accused stood by the pathway, each armed with a panga. When A1 struck the deceased and asked his companion, A2 to do the same with PW2, there was no act of dissociation by A2. On the evidence, had PW2 not fled the scene, he too would have been cut. On the strength of the authorities cited above the inference is irresistible that both accused were in the pursuit of a common intention to cause grievous harm if not outright death to their victims.

Their conduct each, following the death of the victim of the attack, was further pointer to their knowledge that both of them were guilty of having acted in concert in pursuit of that culpable enterprise. I find that the prosecution has proved each and every element of the offence charged; and therefore in full agreement with the gentlemen assessors, I convict each of the accused of the offence of murder as indicted.

Chigamoy Owiny – Dollo

JUDGE

15 – 10 – 2008

Cosma Kateeba for the accused.

Both accused in Court for judgment.

Ann Kabajungu for the State.

Clerk **– Irumba Atwoki.**

Judgment delivered in open Court

Chigamoy Owiny – Dollo

Judge.

15–10–2008

Ann Kabajungu: The first convict has spent on remand 5 years, 3 months, and 14 days to date. The second convict has spent 5 years 3 months and 9 days on remand. The first convict is 33 years old; and the second convict is 32 years old. Both are first offenders as far as can be established. They have been convicted on charge of murder which according to the section 189 of the Penal Code Act earns the mandatory death sentence; but according to the Constitutional Court decision in the Kigula case it is to be left to the discretion of the trial Court. The homicide was committed under deliberate gruesome and cruel circumstance leading to taking the life of Kiiza Deo. This case deserves the maximum sentence.

Cosma Kateeba: both convicts are young men and first offenders. One of the cardinal aim of punishment is to reform the offender. Each of the convicts can reform if given the chance. The first convict has two wives and eight children. The second convict though not married, was looking after two children of his late brother. The Court has the discretion to impose deserving sentence. Death sentence does not deter. The family members of the convict will instead suffer. It s conceded that the offence was gruesome and cruel; but Court to consider the circumstances pleaded above, with leniency and give a sentence less than the maximum.

First Convict: I plead that you consider the period I have spent in jail as being enough and you allow me to go home.
Second Convict: I suffer from various ailments such as ulcers and constant fever, so I pray for lesser punishment.

Court: Kiiza Deo will never walk the face of the earth again. He is dead; his life here cut short by the vile and wanton murder for which the accused have been convicted. The circumstance of the murder is such that I am compelled to impose the maximum sentence. I therefore condemn each of the convicts to suffer death in the manner provided for by the law. Right of appeal explained to the convicts.

Chigamoy Owiny – Dollo
Judge.
15–10–2008