IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: MANYINDO, D.C.J., ODER, J.S.C. & PLATT, J.S.C.

CRIMINAL APPEAL NO. 11 OF 1992

BETWEEN

MOSES KAYONDO ... ... APPELLANT

A N D

UGANDA ... ... RESPONDENT

(Appeal against conviction and sentence of the High Court decision holden at Masaka - (Mrs. Justice L.E.M. Kikonyogo) dated 29th November, 1991)

I N

HIGH COURT CR. SS. CASE NO.71/91

JUDGMENT OF THE COURT:

The Appellant was convicted of murder contrary to Section 183 of the Penal Code Act and sentenced to death. It was a family matter in that the deceased Mariam Suna lived in Kamenyamigo village with her children and step-son Damiano Muchuguzi, while her husband worked in Tanzania. The Appellant was related to her. The Appellant's father Edward Buteraba (D.W.2) was the brother of Suna, the deceased's husband and the Appellant is the son of Edward Buteraba. The deceased's husband had suddenly died. It may be that Suna's death had not yet been known generally on the 21st August, 1989 the day that the deceased herself died. It was said that the deceased was selling parcels of land which belonged to Suna and that the Appellant and one Madi were involved in these dealings. At any rate on the night in question the

Appellant had come to the house of the deceased and he had advised them to eat their supper early because this man Madi was coming to visit them. The deceased cooked food for the children and retired to bed early as she had fever. It seems that the eldest of the children was Damiano Muchuguzi and he remained awake.

The man Madi did not come but at around mid-night Muchuguzi (P.W.3) heard some-one try to open the door. This door led into a sitting-room on one side of which the deceased and the baby slept, while on the other side Muchuguzi and the other children slept. There was a tadoba lamp left burning in the bedroom of the deceased and as the door to the deceased's bedroom was opened some light was passed into the sitting room. Muchuguzi went to the deceased and called her twice but she did not answer. He heard a voice outside saying:-

"do not call her, you just open for me,
I am your uncle Kayondo".

Muchuguzi said that he recognised the voice as that of the Appellant and so he opened the door, the Appellant entered and Muchuguzi asked whether he should close the door. However the Appellant said he would do it himself. The Appellant did not bring anything with him but he entered the deceased's bedroom and he seemed to be checking on something then he put out the light and said:-

"let me go".

The deceased was still sleeping as the Appellant left. Almost at once a person entered carrying a torch. This person waved the torch around and Muchuguzi recognised that it was the

Appellant who had entered a second time. Muchuguzi recognized the clothes and the manner in which the Appellant was walking. He described the faded blue trousers and the blueish stripped "azaro" shirt with long sleeves. The Appellant went to the suitcase and Muchuguzi saw him removing some things which he put in the pockets of his trouchers. Muchuguzi was in his room but he was able to see into the bedroom of the deceased. After the Appellant had removed the things from the suitcase he Muchuguzi heard a sort of bang expressed by a sound like "du". The deceased called out "Oh mama I am dead" and then Muchuguzi heard somebody running out of the house wearing shoes.

Muchuguzi was afraid; he closed the door to his bedroom, leaving the front door open and he did not go to the deceased's room. The baby awoke at about 2 a.m. and Muchuguzi's brother awoke and suggested that the baby should be collected. But when the brothers tried to remove her the child refused and was left and eventually fell asleep. The boys slept until morning, and this time the deceased did not wake them up as she always used to do. The boys went into the deceased's room and they found a big open wound on the back and side of the deceased. When they touched her and tried to shake her they found that she was dead. One boy Ssaula went to the home of one Makanga and Muchuguzi went to the home of Kisubika. In time the village gathered. For instance, Wilson Mukasa Lukeera (P.W.4) the Treasurer of the R.C.I. having heard the news went to the scene where Muchuguzi told them what had happened. The father of the Accused D.W.2 also went to the scene at 7 a.m. and found the Appellant

4...../tied

tied up. Then the Appellant first got there according to Lukeen he expressed shock, but nevertheless he was arrested. A report was sent to the police and a policeman came and took the Appellant away. His house was searched and Shs. 19,000/= was found in the ceiling. On 24th August, 1989 Dr. Tomasi Pukondo carried out a post mortem at the scene. He saw the deep cut wound below the left shoulder blade cut wounds through three ribs, a penetrating wound and a cut wound on the cheek. The deceased had died from heavy haemorrhage. It was his opinion that the deceased had died in the bed without causing any resistance.

On the other hand, the Appellant who gave his age as 20 years gave sworn testimony to the effect that he had not returned to the deceased's house after his first visit at 7.00 p.m. He had indeed met Madi at Buyoga and the Appellant had told him that the deceased was expecting him. The deceased was waiting for Madi. It seems that Madi was taking money to Suna in Tanzania. The radio, the bicycle and the corrugated iron sheets had been sold and the money given to Madi who was supposed to have taken it to Tanzania. Then Madi had come back and told them to sell the motor cycle and the vehicle because the money was not enough. Madi again returned and said that Suna had been released, but that the kibanja should be sold so that the family could move to Tanzania. That was done. Then it turned out that Suna had died, according to a friend of Suna, one Wasswa. The deceased met Madi and there was an argument in which the deceased accused Madi of telling her lies, but Madi assured her that Suna was

5...../still

still alive. The deceased however, said that she would report the matter to the officials, and when they went back for him Madi had gone. The deceased was waiting for the last instalment of payment for the kibanja so that she could go to Tanzania to check on her husband. The Appellant did not see Madi again until the 20th August, 1989 at Buyoga. He returned and informed the deceased that he had met Madi, who was coming to see the deceased.

The Appellant admitted that he had gone to the house of the deceased at about 7.00 p.m. He confirmed that she had fever and was in her bedroom. The Appellant was asked to buy some tablets for her which he did. Muchunguzi was in the kitchen cooking and the Appellant returned home. He went to his father's house left his bicycle there. He stayed with his father from 8 to 9 p.m. and then went home and had supper with his wife. He slept at home until he was awakened at 8 a.m., with the accusation that he had murdered the deceased. He went to the scene with his father and although he had expressed shock he was arrested. He denied the allegation against him. He was beaten. He denied Muchuguzi's story. He alleged that he had been on good terms with the deceased. He was alao on good terms with Muchuguzi but it must be that the people there had talked him into implicating the Appellant.

The learned Judge having recited the evidence from both sides, directed herself on the burden of proof; on the approach to the alibi defence; and on the fact that there

6/.....was

was no eye-witness to the killing of the deceased. She called the situation one of circumstantial evidence, and she correctly directed hereself that the Court must be satisfied that there were no other co-existing circumstances which could weaken or destroy the inference of guilt. Then she directed herself that in the present case the Court must exercise extreme caution for two further reasons. Firstly, apart from the case being based on circumstantial evidence, it also hinged on the evidence of a single identifying witness namely Damiano Muchuguzi. Secondly, although the Court had found Muchuguzi intelligent enough and capable of taking the oath, it had to be remembered that he was only 14 years old at the time when he gave evidence, and therefore only 12 when these events had occurred. On the other hand Section 132 of the Evidence Act did not specify any particular number of witnesses required to prove a fact. A single identifying witness could be relied upon, and as his evidence stood, it did not necessitate corroboration.

Having thus directed herself the learned Judge considered both sides of the case, and accepted the advice of the Assessors, that it was the Appellant who had killed the deceased and was guilty of murder.. Infact the Assessor Mayanja came to the conclusion, that the Appellant and the man Madi had conspired to cheat the deceased, so that the Appellant was part and parcel of the theft of the property of the deceased and her late husband Suna.

On appeal the directions of the learned Judge were

taken...../7

taken to task, and it is right to state that in a case of this nature the evidence of Muchunguzi (P.W.3) should be examined with the greatest care, and , if possible, there should be corroboration. When the learned Judge commented that the evidence of Muchunguzi "did not necessitate corroboration", that gave a false impression of the approach of the learned Judge. A fair reading of her judgments shows that she was mindful of all the legal aspects relating to the danger of accepting the evidence in this case, and what the learned Judge must have meant was, that there was no legal requirement that the Appellant could only be convicted if there was corroboration of his evidence. For instance, if the Appellant had been a child of tender years and unable to give his evidence, as a matter of law, if there was corroboration. (See Section 38(3) of the Trial on Indictments Decree). On the hand, it is obvious that a young boy of 14 years of age, testifying as to the events when he was 12 years of age, should have his evidence corroborated, if possible, as a matter of prudence. Again, if there is only one witness as to identification it is only sensible to look for corroboration. It is dangerous to accept that evidence without corroboration. As it turns out, the learned Judge said that the Court in the present case must exercise extreme caution, not only because it was a case of circumstantial evidence, but also one which hinged on the evidence of a single identifying witness who was 12 years old at the time of the incident with

8...../an

an extremely critical eye to rule out mistaken identity. When one looks at the warnings with the learned Judge addressed to the Assessors, and herself it is clear that she was expressing the pratical guidance which was needed in this case, because of the dangers which the evidence presented. It is a pity perhaps that she did not recite the hallowed directions set out in the leading auth rities that she cited. We think that the learned Judge realized that there was only one witness and that tnere was no corroborative evidence to be had. The Appellant was not found with any incriminating objects or papers. He was not conducting himself in a way which could afford corroboration. The issue was whether Muchuguzi's evidence alone would be safe to rely upon. There was possibly the suggestion that the ill-feeling between the deceased and Madi might have let to the conclusion that it was Madi rather than the Accused who killed the deceased.

It is the duty of this Court on first appeal, to review the evidence again in the light of the findings of the trial Court, (See Pandy vr.R. 1967 E.A. 336), and having in mind the directions that must be given in this case (See Oloo s/o Gai V. R (1960) E.A. 86, Musoke V. R (1958) E.A. 73, Roria V R (1967) E.A. 583, Leonard Aniseth V R (1963) E.A. 206 & R V Turnbull (1977) 2QB225). In so doing we have been asked by the Appellant to hold that he had not been properly identified. We have been urged to hold that the Appellant's alibi must have raised a doubt.

On...../9

On the first point we can only repeat what the learned Judge so clearly emphasized, that Muchunguzi, the deceased and the Appellant, had been on good terms. They were very well known to each other as being of the same family in a general sense. The Appellant's cloting, his voice and his manner of walking, were all factors which the witness Muchunguzi recognised. There was the light of the tadoba at first and the torch on the second visit. Muchunguzi related all that had happened at the first opportunity. Nobody could have coached him in that short time. The Appellant testified that he had been at home but that home was not far away from the scene. It was not impossible for him to have come back to the deceased's house. Muchunguzi was found to be a very impressive witness, clear and reliable.

On the second point, we have weighed the alibi defence with the rest of the evidence. It seems to us, after careful and anxious thought, that the trial Court could well have concluded that it was safe to rely upon the evidence of Muchunguzi. From that evidence, the only possible inference was that the Appellant had killed his Aunt. It may well be that there was an element of motive, but it is not sufficiently clear for us to say that this was corroboration of the evidence of the witness Muchuguzi. Yet there is no doubt from the wounds that the intention was to kill Muchuguzi. Judging from the record we cannot find any reason why Muchuguzi's evidence should not have been relied upon, despite the dangers of doing so.

10...../According

Accordingly we have come to the conclusion that the appeal against conviction must be dismissed.

The Appellant stated that he was 20 years of age at the time of giving his defence, which was 21st October 1991. The incident was over two years before that date namely 21st August 1989. The Appellant's age was not put in evidence. It may be that the Appellant was under 18 at the time of the offence. It may also be that he has under-stated his age. We therefore adjourn the appeal for the Appellant's age to be considered so that Section 104 of the Trial On Indictments Decree may be complied with. The Registrar shall have the Appellant examined and brought back before us when the examination is completed on 2nd January 1991.

Dated at Mengo this..... day of ....., 1992.

CORAM: MANYINDO, D.C.J.

ODER, J.S.C.

PLATT, J.S.C.

27th January 1993.

Order: In view of the medical evidence which shows that the Appellant might have been under 18 years of age at the time the offence was committed, we set aside the sentence of death. It is ordered that the Appellant be detained in Upper Prison, Luzira pending the order of the Minister under Section 104 of the Trial on Indictments Decree.

11...../Dated

Dated at Mengo this 27th day of January, 1993.

S.T. Manyindo
DEPUTY CHIEF JUSTICE

A.H.O. Oder
JUSTICE OF THE SUPREME COURT

H.G. Platt
JUSTICE OF THE SUPREME COURT.

I certify that this is a
true copy of the original.

B.F.B. Babigumira
REGISTRAR, SUPREME COURT.

IN THE SUPREME COURT OF UGANDA