IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODOKI, J.S.C. AND TSEKOOKO, J.S.C.)

CRIMINAL APPEAL NO.17 OF 1995

BETWEEN

MIBULO EDWARD ====================== APPELLANT

AND

UGANDA ======================== RESPONDENT

(Appeal from Conviction and sentence of the High

Court at Masaka(Berko, J) dated 29 May 1995

IN

CRIMINAL SESSION CASE NO. 256 OF 1994)

JUDGMENT OF THE COURT:

The appellant was convicted of murder contrary to section 183 of the Penal Code and sentenced to death. He now appeals against both the conviction and sentence.

The brief facts of the case were that on 16.9.93 at about 8 p.m., the deceased, Lozaliya Namaganda, was attacked in her house by the appellant who assaulted her by cutting her with a panga on the head, right forearm and shoulder. The deceased who was aged about 70 years was living alone in her house. With help of a tadoba lamp she managed to identify the appellant and mentioned his name to her son Moses Serunjogi (PW3) and the R.CJ Chairman Dens Banadda (PW4) soon after the attack. The deceased was taken to Lwengo Dispensary from where she was transferred to Masaka Hospital where she died of the wounds inflicted by the appellant two weeks later.

When PW4 and others went to arrest the appellant from his home, his wife informed them that he had gone to Tanzania and would return the following Saturday. The appellant returned on that day and reported himself to PW4 where upon he was arrested and taken to the Police.

In his defence, the appellant denied the offence. He set up an alibi that between 14/9/ 93 and 18/9/93 he was in Tanzania where he had gone to visit his uncle, Nicodemu Kakooza (DW2). He called Kakooza to support his alibi.

The learned trial judge accepted the prosecution evidence and rejected the defence as being riddled with contradictions and lies. The learned judge found that the appellant was properly identified by the deceased and that her dying declaration was corroborated by the appellant's disappearance from his home after the commission of the offence. He therefore convicted the appellant as charged. Hence this appeal.

Four grounds of appeal were filed on behalf of the appellant but his learned counsel, Mr. Akampurira, abandoned, rightly in our view, the fourth ground which had criticised the learned judge for sentencing the appellant without ascertaining his age, because the appellant had infact stated in his evidence in court that lie was 37 years old.

In the remaining three grounds of appeal the appellant complains that the learned judge erred in convicting him without evidence of identification, in relying on a dying declaration without sufficient corroboration, and in rejecting his defence of alibi.

Arguing the first two grounds together Mr. Akampurira, for the appellant, submitted that the conditions under which the attack took place did not favour correct identification because it was at night and the deceased could have been mistaken in her identification of the appellant.

Learned Counsel contended that although the learned judge correctly directed himself on the law governing dying declarations, he did not correctly apply it to the facts of this case. Counsel also criticised the learned judge for relying on the disappearance of the appellant from his home as sufficient corroboration of the dying declaration because that evidence only supported his defence of alibi.

There is no doubt that the main evidence in this case was the dying declaration made by the deceased to two witnesses namely PW3 and PW4. The relevant part of the evidence of PW3, who was the deceased's son, states,

> ***"My mother told me that she was sleeping when she heard a person calling her. She said she asked the person to push the door as it was not locked. When the person entered, the person asked her to come to the sitting room and she did with tadoba lamp. She said she knelt down and saw the accused. She said she asked accused why lie had come to the house at such an hour with a panga. She said that accused replied that "Yes I have and I know why I have come with a panga." My mother said that when she wanted to give a mat to accused, accused replied that he had not come as a visitor. Then accused cut her on the scalp with a panga. She told me that she asked accused "My son have you come to kill me?" She said accused asked her, "Have you known me now?" My mother said that she replied, "I have known you, you are Mibulo." Accused then advised her to say her last prayers and added that "this is the end of your life. "She kept on repeating up to the time of her death at Masaka Hospital that it was Mibulo who had killed her."***

Later in cross - examination, PW3 said,

> ***"My mother said Mibulo had assaulted her. She only said Mibulo of Busalana but did not know his Christian name."***

The evidence of PW4 who was the R.C.I Chairman was similar to that of PW3 as far as the dying declaration of the deceased was concerned except In two additional respects. The first addition is that PW4 testified that the deceased told him as she was being taken to hospital, that it was her eldest son of Janeroza, Edward Mibulo who had attacked her. The second addition is that she told him that when she asked the appellant why he wanted to kill her, he replied that she had bewitched his aunt Tereza Nabukalu.

The law relating to dying declarations is now well settled. It has been stated in a number of cases including ***R. v Eligu S/O Odel*** and ***Epangu S/O Ewunya*** (1943) 10 EACA 90, ***Pius Jasunga V. R.*** *(1954)* 21 EACA 331 and ***Mande v. R.*** *(1965)* EA 193. The learned trial judge

correctly addressed himself to the law when he stated,

> ***"The law regarding dying declaration was restated by the Supreme Court recently in the case of Tindigwihura Mbahe v. Uganda Cr. App. NO. 9 of 1987. Briefly the law is that evidence of dying declaration must be received with caution because the test of cross examination may be wholly wanting; and particulars of violence may have occurred under circumstances of confusion and surprise, the deceased may have stated his inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in the darkness when identification of the assailant is usually more difficult than in daylight. The fact that the deceased told different persons that the appellant was the assailant is no guarantee of accuracy. It is not a rule of law that in order to support conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is generally speaking very unsafe to base conviction sorely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration"***

In the instant case the learned judge warned himself and the assessors of the need to accept the dying declaration with caution and the need for testing its reliability He considered the circumstances under which the dying declaration was made and held that the conditions favouring correct identification were present. These were that the appellant was known to the deceased before. There was a tadoba light and therefore the attack did not take place in the dark. The attack was not carried out in circumstances of confusion and surprise. There was an exchange of words between the deceased and the appellant wherein the deceased even told the appellant that he had recognised him and mentioned his name and the appellant acknowledged that the deceased had recognised him. The deceased also pleaded for mercy from the appellant. The deceased mentioned the name of the appellant as her assailant soon after the attack to PW3 and PW4, and continued mentioning his name while she was in hospital till she died. Because of these factors, the learned judge, like the assessors, was satisfied that the deceased could not have been mistaken in her identification of the appellant

as her assailant.

We have carefully reviewed the circumstances tinder which the identification of the appellant was made and come to the conclusion that they favoured correct identification. It is quite clear that the deceased immediately recognised the appellant and asked him, “My son have you come to kill me?” The appellant wanted to confirm whether she had really recognised him when he asked, “Have you known me now?” The deceased confirmed that she had recognised him well, by replying, “I have known you, you are Mibulo.” The appellant did not protest or deny being Mibulo but instead advised her to say her last prayers and warned her, “This is the end of your life”. After the attack the deceased described the appellant to the R.C.I Chairman (PW4), as the eldest son of Janeroza.

The facts of the instant case are distinguishable from those in the case of ***Mande v. Republic*** (supra) where the deceased had asked the appellant, “Why are you killing me?” and the appellant denied the accusation. Then the deceased said, “If, you did not kill me, let us shake hands” and the appellant shook hands. The deceased then said, “If you did not kill me God knows” and died soon afterwards. It was held that having regard to the last words of the deceased the court could not exclude the possibility that that up to the moment the deceased died there was a certain amount of doubt still lingering in her mind about the identity of the appellant.

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

However, the learned judge did look for corroboration and found it in the disappearance of the appellant from his home soon after the attack. The learned judge rejected the appellant’s defence of alibi that on the day the offence was committed he had gone to visit his uncle Kakooza (DW2). The judge found contradictions between the appellant’s evidence and that of

Kakooza regarding among other things, their relationship and the reason for his visit. Whereas the appellant claimed that Kakooza was his uncle, Kakooza stated that the appellant was only a nephew of a man who had married a sister to his wife. Secondly while the appellant claimed that he told Kakooza the reason for his visit, which was for Kakooza to take him to the home of Nakafeero, his step daughter, Kakooza said that the appellant had told him that he had merely come to visit him. The learned judge found that the appellant could not be believed and had told lies about his whereabouts at the time of the offence, and therefore his defence of alibi failed. We think he was justified in so holding.

The learned judge also found some evidence to support the prosecution case in the presence of motive for the attack on the deceased. The motive was his belief that the deceased had bewitched his aunt, Tereza Nabukalu. There was evidence from the prosecution witnesses that at the time of the incident Tereza was sick and bedridden. There is also evidence that the deceased was a native doctor, and therefore she could have been suspected of bewitching Tereza.

Therefore we hold that there was satisfactory corroboration of the deceased's dying declaration. We are satisfied that the appellant was properly convicted of the murder of the deceased.

In the result this appeal must fail and it is accordingly dismissed.

Dated this 29th day of November 1995

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

B.J. ODOKI

JUSTICE OF SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF SUPREME COURT

I CERTIFY THAT THIS IS A

TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE

REGISTAR, THE SUPREME COURT