

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

**CORAM: ODOKI, CJ; TSEKOOKO, MULENGA;
KANYEIHAMBA AND KATUREEBE, JJ.SC.**

CRIMINAL APPEAL No.12 OF 2005

SEKANDI HASSAN..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

*[Appeal from the judgment of the Court of Appeal at Kampala
(Okello, Kitumba and Byamugisha, JJ.A) dated 15th June, 2005,
Criminal Appeal No.156 of 2002]*

JUDGMENT OF THE COURT

This is a second appeal from a decision of the Court of Appeal which upheld the conviction by the High Court of the appellant, Sekandi Hassan for murder contrary to sections 188 and 189 of the Penal Code Act. The High Court sentenced him to death.

The prosecution case was that the appellant and Rita Kemigisha, hereinafter called “the deceased” had been lovers since 1999. Both of them resided in Wakiso Trading Centre in different homes. The deceased, who was at the time of her death aged sixteen years, lived with her mother, Sarah Nalugya, (PW3) and her younger brother Patrick Busobozi (PW4). The appellant was a married man and had his own family and home.

Apparently during some evenings the appellant would stealthily go to PW3's residence and cause PW4 to get the deceased to sneak out of her mother's residence and go out with the appellant to have sex. The appellant used to pay some money to PW4 for his clandestine services. The deceased would normally return home. Eventually the deceased became pregnant. This displeased her mother. The latter reported the matter to LCs officials of the area.

On the evening of 14/3/2000, the appellant once more went to PW3's residence thrice and was noticed by PW3. The last time was at 10.30 p.m. As usual the appellant requested PW4 to call the deceased. PW4 obliged. The deceased went out with the appellant. This time she did not return. So PW3 was concerned and went that night searching for the deceased but failed to trace her.

On the following morning, the deceased was found lying by a village path at Kisimbiri Zone, in Wakiso Trading Centre but about 1½ miles away from home in a critical condition with the body showing serious acid burns. She could not talk coherently. Margaret Nandaula, PW5, one of the people who went to the scene gave her a khaki piece of paper and a pencil and asked her to write down her own name, the name of the person who had taken her where she was found in that condition, the name of her mother and the name of her home village.

The deceased wrote down the names of herself, as Kemigisha, of her mother, and of Hassan as the person who took her to the place where she was found. She also wrote Wakiso as her home area. At the trial, the khaki piece of paper on which the deceased wrote these particulars was admitted in evidence as exhibit P3. Its admissibility was not challenged.

Later on, the deceased's mother and Police Constable Ngwonzebwa Margaret, PW6, and many other people went to the scene. PW6 observed that the body of the deceased and the clothes she was wearing had been burnt with acid. The deceased was taken to Mulago hospital where she died on that day. Dr. Sendi Bwogi performed postmortem on the body. His report is exhibit P1. The report stated that the deceased had external deep burns covering about 54% of the body surface including all the skin on the scalp, face, the arms, upper half of the legs and the trunk. He gave the cause of death as severe burns and **pulmonary oedema**.

The appellant was arrested as the suspect because he was the person last seen with the deceased when she was alive and well and because she had written his name on the said khaki piece of paper. He was charged and eventually prosecuted on an indictment charging him with the murder of the deceased.

In his defence at the trial, the appellant totally denied the commission of the offence. He also denied going to PW3's home on the material night. He put up a defence of alibi to the effect that during day time he was at home constructing a house and did this till 10.00 p.m. when he went to bed and slept. He admitted that PW3 and PW2 knew him as they lived in the same area but on the opposite side of a road separating them.

The appellant claimed that PW3 who previously was a friend, testified against him out of a grudge which arose because she erroneously believed that the appellant had photographed the deceased at a certain function. Both the assessors and the trial judge believed the prosecution, disbelieved the appellant's story and found him guilty of murder. He appealed to the Court of Appeal on the following two grounds: -

"1. The learned trial judge erred in law and in fact when she relied on very weak circumstantial evidence to convict the appellant.

2. The learned trial judge misdirected herself when she failed to give due consideration to the defence of alibi raised by the appellant at the trial".

The Court of Appeal considered these grounds, evaluated the evidence on record and dismissed his appeal. The appellant has

now appealed to this Court on the following two grounds which are obviously similar to those argued in the Court of Appeal: -

“1. The Honourable Justices of Appeal failed to reevaluate the evidence as a whole, and particularly the very weak circumstantial evidence that the trial judge relied upon to convict the appellant.

2. The Honourable Justices of Appeal failed to reevaluate the appellant’s defence of alibi which the trial court dismissed as false”.

Mr. Robert Tumwine of Public Defender Association of Uganda, who represented the appellant filed written arguments and Ms Betty Khisa, a Senior Principal State Attorney, made an oral reply.

Mr. Tumwine argued the two grounds together. We find his arguments a little incoherent but the gist is as follows:

- The prosecution case depended on circumstantial evidence which was insufficient to establish the guilt of the appellant. The evidence did not place the appellant at the scene of crime.
- Both the Court of Appeal and the trial judge ignored the alibi of the appellant.

- Each of the two courts did not properly evaluate the evidence and each reached wrong conclusions.
- Exhibit P3 was wrongly relied upon.

Ms. Betty Khisa, supported the decision of the two courts below. The learned SPSA argued that the trial judge evaluated the evidence properly. She also submitted that the Court of Appeal re-evaluated the evidence on record and agreed with the trial judge that the appellant was a liar. She argued that since it was the appellant who took the deceased from her mother's home on the material night when she was alive and well, he must be the one responsible for the burns resulting in her death. According to the learned Senior Principal State Attorney, the two courts correctly found that because PW3 had reported the appellant to LCs for making the deceased pregnant, the appellant burnt the deceased to destroy evidence of pregnancy and possible case of defilement. In her view the circumstantial evidence proved the guilt of the appellant.

We agree with the learned Senior Principal State Attorney, that the two courts evaluated the evidence and reached correct conclusion that the appellant was responsible for the murder of the deceased. We think that there is ample circumstantial evidence incriminating the appellant for the offence. We find no merit in Mr. Tumwine's submissions.

We think that the case against the appellant depended on the credibility of the witnesses. There is no doubt that PW3 and PW4, respectively the mother and brother of the deceased, knew the appellant very well. The appellant acknowledged this. They lived 200 metres apart in Wakiso trading centre, being opposite each other separated only by a road. Indeed the appellant acknowledges that PW3 had been his friend- whatever that means and she only turned against him when she suspected that he had taken a photograph of the deceased.

The evidence against the appellant is in three parts. His love affair with deceased; his collecting her on 14/3/2000 while she was alive and the khaki piece of paper containing the names of the deceased, her mother PW3, the appellant and her area of residence. The latter evidence when linked with that of Nandaula (PW5) amounts to a dying declaration within the means of S.30 (a) of the Evidence Act.

PW4, Patrick Busobozi, (who was aged 15 when he gave evidence in 2002 but must have been aged 13 years in 2000), had known the appellant since childhood. In 1999, the appellant visited their home frequently because of his love affair with the deceased. Appellant used to ask PW4 to call the deceased for him but had asked him not to reveal the love affair to PW3. He used to take her away frequently but she always returned home. On one occasion when PW3 had gone to Entebbe, the appellant collected the deceased, went away with her. She returned late at night.

For his services PW4 was paid some money by the appellant. On 14/3/2000, the appellant first came for the deceased at 5.00 p.m. He paid PW4 100/= and PW4 called the deceased. The latter and appellant held some discussion. At night, at about 10.30 p.m; the appellant returned. There was moonlight. He wore a coat. Once more PW4 called the deceased and for this he was rewarded with shs 200/=. The couple went away together. In cross-examination PW4 added that the couple took the road leading to Wakiso round about. He also added that PW3 had quarrelled with the deceased about -

- (a) *a photograph of the deceased which the appellant had taken and*
- (b) *about deceased's pregnancy for which the appellant was responsible.*

According to PW3, she had reported to the LC officials the appellant's frequent visits to her house because of his love affair with the deceased. A week before her death, the deceased had revealed that it was the appellant who made her pregnant.

On 14/3/2000, PW3 was at home with deceased, PW4 and other children. She saw the appellant at her home thrice. First she saw him at 3.00 p.m. then at 8.00; p.m. and lastly at about 10.45 p.m. At 8.00 p.m. Najjuko, one of PW3's children had reported that the deceased was talking to the appellant. When she went out to check, she saw the appellant going away as the deceased was returning into the house. Then at 10.45 p.m. she saw the

appellant in the corridor of her same house. The appellant talked to PW4 who was washing uniforms. Some how, the deceased got water and took it outside. Her story is a bit segmented but it appears that because of what deceased did by taking water out at night and the presence of the appellant, she became suspicious and inquired from PW4 where the deceased was at that moment. By this time the deceased seems to have disappeared. When PW4 replied that the deceased was not outside, PW3 decided to check. The following is what happened-

*“As I approached the gate, Hassan came. He had a torch which he flashed as he moved along the corridor. When I reached the gate Hassan saw me and turned back. I was at the gate and he was about 5 meters away from the gate and me. I returned to the house without saying anything even to Patrick who was washing uniform, I said **“this is terrible Hassan is taking away my daughter”** I said so because he had impregnated her. I knew Rita was pregnant because I noticed her condition then asked and she told me it was Hassan who was responsible for the pregnancy.”*

That night she looked for the deceased from neighbours but could not find her until the following day when she found the deceased where she was lying at 9.00 a.m.

During cross- examination she stated that at night she did not go to appellant’s home and that in the following early morning, the appellant visited her shop wanting to buy a kavera. Because she

did not have that kavera, appellant went away. PW5, Nandaula went to the scene where deceased was. She is the one who asked the deceased to write her name, that of her mother, the person who took her to the scene and her home area which the deceased did.

In the High Court, Okello J., considered the evidence of Nanduala and found that the writings on exhibit P3 constituted a dying declaration. She relied, correctly, on our decision in **G.W.Simbwa Vs Uganda**, Sup.Ct. Criminal Appeal 37 of 1995 for the view that the evidence of PW5 and exhibit P3 connect the appellant to the death of the deceased.

The learned judge believes the evidence of PW3, PW4 and PW5. She found, correctly, that PW3 and PW4 knew that appellant was a lover of the deceased. She found, again correctly, that on the evening of 14/3/2000, the appellant was restless and he is the one who took the deceased away when she was alive that evening.

She ruled out the possibility that any other Hassan could have burnt the deceased with acid. She found the appellant's motive for killing the deceased was to avoid the possible case of defilement as deceased was aged 16 years and PW3 was pursuing the matter. The judge ruled out both the alleged grudge and the alibi as defences.

In the Court of Appeal, the appellant's counsel criticized the findings of the trial judge on the evaluation of evidence as regards the dying declaration of the deceased and the alibi of the appellant. The Court of Appeal found that the trial judge correctly considered circumstantial evidence on tests set out in **Simon Musoke Vs R. (1958) EA 715**. The Court also confirmed the judge's findings on the dying declaration and on defence of alibi and dismissed the appellant's appeal.

We have considered evaluation of evidence by the two courts below. Further, we have considered the chain of circumstantial evidence and the defence of alibi. We are not persuaded that either the trial judge or the Court of Appeal or both courts erred in the evaluation of the evidence or in the findings that on the basis of the evidence available the appellant was guilty of murdering the deceased.

We are satisfied that there was ample evidence to support the conviction of the appellant. We accordingly find no merit in the two grounds of appeal.

The appeal is dismissed as regards the conviction.

Because of the pending Constitutional Appeal No.3 of 2006, **Attorney-General Vs S. Kigula and 417 Others**, we exercise our discretion under Article 22 of the Constitution and postpone

consideration of the sentence until after determination of the said appeal.

Delivered at Mengo this 5th day of July 2007.

B.J.ODOKI
CHIEF JUSTICE

J.W.N.TSEKOOKO
JUSTICE OF THE SUPREME COURT

J.N.MULENGA
JUSTICE OF THE SUPREME COURT

G.W.KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

B.KATUREEBE
JUSTICE OF THE SUPREME COURT