

(Coram: Muzamiru M. Kibeedi, Christopher Gashirabake, &  
Eva K. Luswata, JJA)

- 1] The appellant was indicted on one count of murder contrary to Sections 188 & 189 of the Penal Code Act. He was tried and after a full trial was convicted and sentenced to thirty years' imprisonment.
- 2] The facts of the case as discerned from the record of Court are that on 26<sup>th</sup>/9/2010 PW1, a proprietor of a bakery, was woken

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up at about 3:00 am by a phone call from his neighbour, Lydia Sande, who informed him that there was someone groaning near her house, and that PW1 should go and check whether it was one of his workers. PW1 then called PW2 the guard of his bakery who informed him that a few minutes earlier, he too had heard Mujuni Bosco the deceased, making an alarm saying that Turyakira Norman (the appellant) had killed him. PW1 and PW2 rushed towards the noise together with Ms. Sande and found Mujuni Bosco on the ground in a pool of blood. Although alive, he was no longer speaking. The deceased was taken to hospital and other workers were called to assist in the arrest of the appellant whom they took to Rukungiri police station. The deceased was admitted into two different hospitals but after 12 days succumbed to his injuries. After taking the deceased to the first hospital, PW1 found the appellant in a house that he shared with the deceased and asked him about the incident. That the appellant remained quiet but grinding his teeth as if is in great anger. The appellant was eventually charged, tried and convicted as above mentioned.

3] The appellant being aggrieved with the decision of the High Court lodged an appeal premised on three grounds set out in the memorandum of appeal as follows;

- i. ***The learned trial Judge erred in law and fact when he failed to adequately evaluate the evidence on record and thus convicted the appellant on unsatisfactory***

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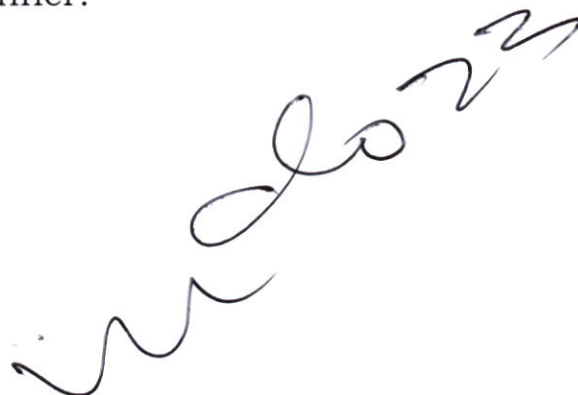
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***circumstantial and hearsay evidence thus causing a miscarriage of justice.***

- ii. The learned trial Judge erred in law and fact when he relied on inconsistent and contradictory evidence of the prosecution witnesses thus causing a miscarriage of justice.***
- iii. The learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence of 30 years on the appellant and failed to take into account/deduct the period spent on remand, thus causing a miscarriage of justice.***

### **Representation**

4] At the hearing of the appeal, the appellant was represented by Ms. Benitta Namusisi on State brief, while the respondent was represented by Mr. Sam Oola, a Senior Assistant Director of Public Prosecutions. The parties filed written arguments as directed by Court before the hearing of the appeal, and those were keenly considered when resolving the appeal. Ms. Namusisi preferred to argue the first two grounds together. It was a correct decision because they both challenge the manner in which the trial Judge evaluated prosecution evidence. We shall resolve them in the same manner.





## Ground one and two

### Submissions for the appellant

5] In her submissions, Ms. Namusisi opted to make a submission on the prosecution evidence in general. She did so by first citing the now well followed authority of **Woolmington Vs DPP, [1935] UKHL 1**, where it was held that the burden of proof in criminal cases, which is beyond reasonable doubt, lies on the prosecution. For the duration of the entire trial, that burden never shifts. Ms. Namusisi in addition cited Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions that was considered in the case of **Guloba Rogers versus Uganda, CA Criminal Appeal No. 57 of 2013** and **Kifamunte Henry vs Uganda, SC Criminal Appeal No. 10 of 1997**. She emphasized that our powers as a first appellate Court is to carefully re-evaluate the evidence on record and draw our own conclusions taking into account that we did not have the opportunity to hear and see the witnesses testify.

6] Ms. Namusisi then referred to page 10 paragraph 7 of the record to submit that PW2 Mwesigye John testified that as he was guarding at the bakery which is opposite some small bars, he heard noise and people fighting. That he heard a voice from the same direction stating that "*Norman has killed me*" and that around the same time one Kasibayo came running towards the bakery saying Norman was finishing them. Counsel continued that although Kasibayo informed PW2 that the appellant wanted to kill them, PW2 did not bother to go and check on that person

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to confirm the same since he recognized his voice and knew him as an employee at the bakery.

- 7] Counsel found it was strange for PW2 to comfortably remain at the gate between 10:00pm and around 2:00am -3:00am when PW1 called him. Counsel also found it strange that when Kasibayo returned the following day, PW2 never bothered to ascertain from him what had actually happened during the night. In her view, it was possible that it was Kasibayo who fought and killed the deceased and then returned to the gate pretending to seek refuge, or another possibility that the deceased was killed by some other people, and then dragged back near his work place.
- 8] Counsel also pointed to what she considered a contradiction between the testimonies of PW1 and PW2. That although PW1 testified that Kasibayo took the direction of Bwooma road and the deceased took Kinyeseno Ndimbire road, PW2 testified that Kasibayo ran towards the direction of Kigaga and not Bwooma. She then opined that going by those testimonies, it was doubtful that Kasibayo ever returned to the bakery, talked to the gate man and then took two different directions at the same time. She considered those testimonies a mere concoction and prayed the court to disregard the evidence of PW1 and PW2 as being full of contradictions.
- 9] Counsel in addition doubted PW1's testimony that he received a call at around 3:00am from one Lydia Sande that there was

some one groaning near her house and that he should go and see whether he was his worker. She questioned the time of that particular communication which came at 3:00pm, yet the altercation was reported to have happened at around 10:30 pm. She questioned why Ms. Sande suspected that the deceased could be one of PW1's employees and also questioned where Ms. Sande or members of her family were positioned during the time the appellant was said to have been fighting with the deceased and Kasibayo.

- 10] Counsel also drew our attention to the testimony of PW2 and Kasibayo. She in particular recounted PW1's evidence that he had given the appellant a salary advance of shs. 15,000/=. She referred to the disappearance of the two girls from the deceased's house at the instigation of the deceased, which resulted into a fight between the two between 10:30 and 11:00pm. Counsel contended that much of the altercation between the appellant, Kasibayo and the deceased was based on facts that Kasibayo narrated to PW1. That since Kasibayo the only eye witness, was not called to testify, that report would be hearsay and inadmissible since none of the prosecution witnesses actually witnessed the appellant beating, chasing or fighting with the deceased or Kasibayo. Counsel continued in particular that PW1 who conceded not to have seen the girls mentioned above, could not prove with receipts or other evidence that the appellant received any money from him.

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11] In addition Ms. Namusisi also considered the failure to exhibit the alleged murder weapon a weakness in the prosecution case. She in fact considered the prosecution evidence on that point quite contradictory. In particular, that although PW1 testified to having recovered a hoe handle with blood stains and broken parts in the appellant's house, PW2 countered that evidence to state that he found sticks in the same house. Nevertheless, that whether they found sticks or a blood stained hoe handle, prosecution did not lead any evidence about the same and none was exhibited in Court.

12] Ms. Namusisi considered the appellant's defence as sound. She recounted the appellant's evidence that he did not kill the deceased, explaining that after leaving his work place, he went to sleep until at around 2:00pm when people woke him up and tied him up while naked. Counsel did not find it strange that the appellant refused to respond to PW1's questions because he was just ambushed late in the night, and tied up when naked. She considered it normal human behavior to respond as the appellant did at that time of the night. In her view, the appellant's behavior of entering his house, sleeping with the main door open, did not point to one that was a guilty person. That if guilty, the appellant would have instead disappeared from the village as he was not a native there.

13] In conclusion, Ms. Namusisi submitted that the contradictions, inconsistencies and hearsay evidence of PW1 and PW2 bring

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doubt as to whether the appellant was responsible for the death of the deceased. She invited this honourable court to re-evaluate the evidence and make a finding in favour of the appellant and after doing so to allow this ground of appeal.

### **Respondent's submissions**

- 14] In response, Mr. Sam Oola opposed the appeal and supported the conviction and sentence of 30 year's imprisonment. However, he agreed with the submission of counsel for the appellant on the duty of this Court as the first appellate court. After citing the decision of **Simoni Musoke versus R (1958) EA 75**, Mr. Oola agreed in addition that the prosecution case was based on circumstantial evidence, but in his view, that evidence was adequate and sufficient to convict the appellant.
- 15] Mr. Oola then submitted that the circumstantial evidence in the instant case was adduced through the evidence of PW1 and PW2. That the appellant and the deceased worked in PW1's bakery and lived together in one room, a few meters away from the bakery and that PW2 was a guard at the bakery. Counsel submitted further, that on 26<sup>th</sup> /9/2020 at about 10:00pm, PW2 was on guard at the bakery when he heard a noise and a scuffle from a nearby bar a voice which he identified as that of the deceased saying "*Norman has killed me*". That shortly after, Kasibayo, a fellow worker at the bakery and, who lived in the same room as the appellant and the deceased, came running to take refuge at the bakery saying Norman was

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finishing them. PW2 did not open the gate but that when he inquired of Kasibayo the reason for his distract, the latter stated that it was Norman who wanted to kill them. That there was silence until about 3:00am when PW1 went to PW2 and told him he had been informed by a neighbor that someone was groaning in her compound.

- 16] Mr. Oola submitted further that PW1 and PW2 went and saw the person and identified him as the deceased. He was unconscious after being badly beaten and was lying in a pool of blood. At that point, PW2 revealed to PW1 that he had heard the deceased cry that Norman had killed him, and that Kasibayo ran to the bakery and told him that Norman wanted to kill them. In his view, PW1's evidence corroborated the evidence of PW2 with regard to what he had heard.
- 17] Counsel continued that it was the evidence of PW1 that following the revelations of PW2, he asked the appellant three times what had happened. However, the appellant remained quiet and he was only gnashing his teeth and appeared to be in great anger.
- 18] Mr. Oola submitted that at pages 26-29 of his Judgment the trial Judge properly analyzed the evidence to prove participation of the appellant in the murder of the deceased. In his view, the Judge correctly found that the evidence on record clearly showed that it was the appellant who fought with the deceased

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and assaulted him. The evidence on record did not point to any other person other than the appellant. He further submitted that PW1, PW2, the deceased and the appellant knew each other very well. PW1 was the employer of the three men and as such, the deceased could not have been mistaken in his identification of the appellant when he cried that the appellant had killed him. Significantly that after a few hours, the deceased was found unconscious and died a few days later from his injuries in hospital.

19] Counsel in addition submitted that the deceased's statement that "*Norman has killed me*" amounted to a dying declaration as it related to the circumstances which resulted in his death in line with section 30(a) of the Evidence Act. Counsel further contended that although corroboration of a dying declaration is not required as a matter of law, it is normally the practice to look for corroboration. That in the instant case, there was corroboration in the evidence of PW1 and the conduct of the appellant.

20] Counsel submitted further that the appellant's alibi was disproved by the evidence of PW1 and PW2. That the appellant's claim that the case against him was fabricated by PW2 because of a grudge he had with him was not put to PW2 or any of the prosecution witnesses. It came long after the prosecution had closed its case and should therefore be rejected as an afterthought. He pointed us to the decision of **James Sawoabiri**

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**& Another versus Uganda, SC Criminal Appeal No.5 of 1990,** where it was held that an omission or neglect to challenge the evidence-in-chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue.

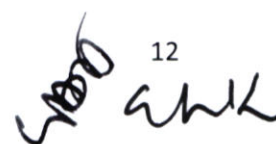

- 21] Counsel further submitted that the trial Judge was impressed with the demeanor of the prosecution witnesses and on the other hand, the appellant left a poor impression on the trial judge who rightly found that the appellant's defence was full of lies.
- 22] In conclusion to ground one, counsel contended that the trial Judge found that there was sufficient circumstantial evidence to prove that the appellant participated in the murder of the deceased. He prayed that ground one of the appeal should be dismissed.
- 23] In regard to ground two, Mr. Oola submitted that, what was pointed out as contradictions and inconsistencies were minor and did not go to the root of the prosecution case and were not fatal to the prosecution case. Firstly, that as to whether Kasibayo went towards Bwooma or Kigaga after going to the bakery was immaterial. That since PW2 did not open the gate for him, he could not possibly have known which direction Kasibayo went. Secondly, as to whether PW1 and PW2 recovered

a hoe handle or a stick from the appellant's room was immaterial. This is because none of the prosecution witnesses testified that the appellant used a hoe handle or stick to beat the deceased, and that no weapon was produced in evidence.

- 24] In conclusion, counsel submitted that the contradictions had no bearing on the case and should be disregarded as minor and inconsequential. He prayed that ground two of the appeal should also be dismissed.

### **Decision of Court**

- 25] We have carefully studied the court record, considered the submissions for either side, and the law and authorities cited by counsel and those sourced by the Court. We are mindful that this is a first appeal to this Court, and as such is governed by the provisions of Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions SI. 13-10. We are accordingly required to carefully and critically review the records from the court below to reappraise the evidence and make inferences of fact but without disregarding the decision of the High Court. For reference **Kifamunte Henry versus Uganda, SC Criminal Appeal No. 10 of 1997**. Alive to the above-stated duty, we shall proceed to resolve the grounds of appeal as below;
- 26] Counsel for the appellant argued grounds one and two jointly. In the first two grounds, the appellant finds fault with the Judge's decision to convict him for the following reasons:



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- i. He based his conviction of the appellant on unsatisfactory circumstantial and hearsay evidence;
- ii. He relied on inconsistent and contradictory prosecution evidence

**Circumstantial and hearsay evidence**

27] The law on circumstantial evidence was stated in the case of **Byaruhanga Fodori versus Uganda, SC Criminal Appeal No.** as follows:

*"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt."* Also see **S. Musoke versus R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480).**"

28] In addition to the above, in the case of **Tindigwihura Mbahe versus Uganda. SC. Criminal Appeal No. 9 of 1987**, the same Court issued a warning that;

*"circumstantial evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference."*

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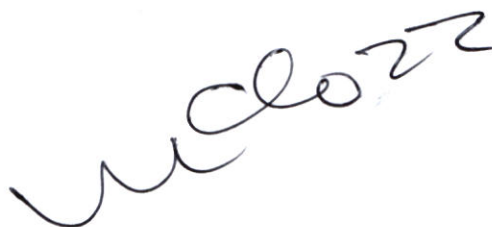
29] There was in addition a complaint that the trial Judge relied on hearsay evidence to convict the appellant. The general rule on hearsay evidence is well articulated in the **Section 59(a) and (b) of the Evidence Act** which provides that:

*“oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be evidence of a witness who says he or she saw it and if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it” (Emphasis applied).*

30] This rule is to the effect that a statement given in proceedings about something other than by the person who saw or heard it, is inadmissible. The rule against hearsay is exclusionary in the sense that it excludes hearsay evidence in the course of proceedings. However, this rule has exceptions clearly stated under Section 30 of the Evidence Act.

31] The principle regarding hearsay evidence was captured in the case of **Lugemwa Charles versus Uganda, CA Criminal Appeal No. 216 of 2017** which cited **Apea Moses versus Uganda, Criminal Appeal No. 0653 of 2015** where court stated that;

*“our understanding of the position articulated in the decision in the Badru Mwidu case is that in all cases, whether involving hearsay evidence or not, the court may only convict the accused person if it is satisfied that the evidence adduced justified such a decision.”*



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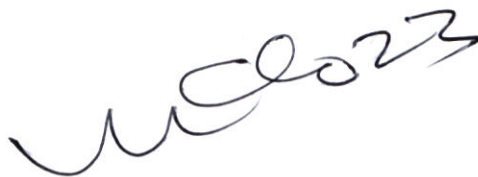
In **Badru Mwidu versus Uganda, SC Criminal Appeal, No. 15 of 1997**, Court held that hearsay evidence is admissible and can be relied upon if the totaling of the prosecution evidence points to the guilt of the accused person. We shall thus consider the evidence on record

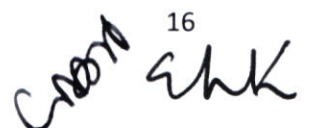
32] In his testimony, PW1 confirmed that he owned a bakery in Kagyera where the appellant, PW2, Kasibayo and the deceased worked as his employees. That on the material day in issue, he had at the appellant's request advanced him Shs. 15,000/=. He narrated further that on the same day at 3:00am, as he was sleeping, he received a phone call from one Lydia Sande who informed him that someone was groaning near her house. Prompted by that information, he called PW2, and together with Lydia Sande rushed to the scene where they found the deceased who was no longer speaking but still alive, and lying in a pool of blood. It was at that point that PW2 informed PW1 that a few hours earlier, he too had heard someone making an alarm saying that Turyakira Norman had killed him. The two men took the deceased to Nyakibale Hospital, and he died seven days later in Kabugu Hospital where he had been transferred by his family. PW1 further testified that the appellant and the deceased were staying in the same house and that he had no knowledge of a previous disagreement between them. Kasibayo informed him that which resulted into a fight between them.



33] PW1 admitted that it was Kasibayo who narrated to him most of the events of the night in particular that earlier on in the day, the deceased had brought two girls with him, who later disappeared. That the appellant suspected that it was Kasibayo and the deceased who had aided them to escape. That in retaliation, the appellant attempted to burn the deceased's mattress and to stop him, the deceased picked up a hoe handle to hit the appellant but the latter overpowered him which caused Kasibayo to run away as the accused run after them. PW1 added that Kasibayo, the appellant and the deceased shared a house and that it was in the same house that PW1 and PW2 found the same hoe handle with blood stains and broken parts.

34] On his part, PW2 testified that on 26/9/2020 at 10:00am as he was guarding at PW1's bakery, he heard noise and people fighting. In particular, he heard a voice shouting that "*Norman has killed me*". At the same time, Kasibayo came running to seek refuge at the bakery saying that Norman was finishing them. PW2 declined to open for him and he continued running towards Bwooma or Kigaga. That at around 2:00 to 3:00am, PW1 notified PW2 that someone was groaning in their neighbour's compound. They went to the neighbour's compound and found the deceased who had been badly assaulted, still bleeding and lying in a pool of blood. PW2 went on to testify that he then remembered and informed PW1 what he had previously heard when someone made an alarm saying that

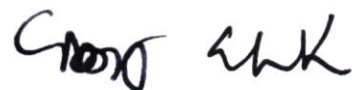


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Norman was killing him. They then went to where the appellant was staying, arrested him and took him to the police. That they found him in the house, which was open and in it, were sticks which he and the rest were using to fight.

- 35] In his defence, the appellant denied the charges and testified that he left work at 8:00pm and headed straight to his house to sleep. That at about 2:00am while in his house he was arrested while naked by PW1 and PW2 among others and taken to police. He denied sharing a room with Kasibayo and the deceased or knowledge of Kasibayo's alleged statements that he had brought two girls to his house or attempted to burn Kasibayo's mattress.
- 36] The learned trial Judge relied mainly on the evidence of PW1 and PW2 as proof that the appellant is the one who killed the deceased. In his evaluation, after recounting their testimonies, he believed PW2's evidence that on the night in question, he heard both Kasibayo and the deceased crying for help. In his view, the conduct of the appellant at the point of his arrest by PW1 and others clearly showed that he had fought with someone and was still angry and annoyed. That the fact that the appellant admitted being arrested in his house, corroborated PW1's evidence about the facts of the arrest. On the other hand, he considered the defence as full of lies.



37] It was not in doubt that there was no eye witness to the offence. None of the witnesses who were called to testify, saw the appellant beating, chasing or fighting with the deceased. The Judge relied on the circumstantial evidence that the appellant who shared a room with the deceased was involved in a fight with him leading to the latter's death. Since Kasibayo the eye witness was not called to testify, he considered the testimony of PW2 as corroborating that of PW1 who testified having at some point seen the appellant with the girls who appeared to have caused the altercation between the men, and that he after being awoken, saw the deceased in a pool of blood, and then questioned the appellant who appeared angry and declined to cooperate.

38] It is unfortunate that Kasibayo who may have witnessed the altercation that PW2 also heard earlier on in the night was never called to testify. This rendered his reports to PW1 and cry of alarm to PW2 that the appellant was killing them to be hearsay. PW2 testified that he only heard a voice of one in distress that the appellant was killing him. Since PW2 did not act on, or further investigate the source of that cry or Kasibayo's alarm, there would be no evidence directly linking the appellant to the offence. We note in addition that although PW2 saw Kasibayo the following morning, he did not find it necessary to question him about the incident. We also note the evident absence of any proper or adequate investigation by the police. Although PW1 and PW2 mentioned finding a blood stained hoe or sticks in the

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appellant's house, which Kasibayo reported the appellant wrestled from the deceased during the fight, it was never adduced into evidence and nothing else was done to confirm Kasibayo's report. The absence of any police evidence was suspicious in light of the appellant's testimony that after five days after his arrest, he was released on bond and with the consent of PW1, he returned to work at the bakery. That he was only re-arrested and then prosecuted after the deceased's demise.

39] In addition to the above, the conduct of the appellant remaining silent and looking angry at the time of arrest would not by itself incriminate him. In our view, what was profound was that in spite of Kasibayo's reports about the appellant's involvement in assaulting the deceased, he was found asleep in the same house with the front door open. That would not point to the behavior of a guilty man, or who had only recently beaten his roommate to death.

40] We therefore find that the evidence that was used by the trial Judge to convict the appellant was hearsay evidence that was uncorroborated. It should not have been admitted on the record or found sufficient to convict the appellant.

### **Dying declaration**

41] It was PW2's testimony that at 10:00 pm, as he was guarding at the bakery, he heard noise of people fighting. One of them was

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making noise *that "Norman has killed me."* Respondent's counsel considered that cry as amounting to a dying declaration made by the deceased which was then corroborated by PW1's evidence and the appellant's own conduct.

42] The Black's law Dictionary, 6<sup>th</sup> Edition defines a "*dying declaration*" to be:

*"a statement made by a person who believes he is about to die, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them".*

Such evidence in law is explained in Section 30 of the Evidence Act which states that:

*"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases;*

(a) *When the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they*

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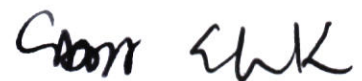
*were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question."*

A dying declaration is an exception to the rule as to the inadmissibility of hearsay evidence.

43] The admissibility of a dying declaration in evidence is founded on the principle of necessity. A dying declaration is not given on oath nor subjected to cross - examination. However, as a piece of evidence, it stands on the same footing as any other piece of evidence. If found reliable, a dying declaration can form the basis of a conviction. Generally, a dying declaration would require no corroboration as it has to be judged and appreciated in light of the surrounding circumstances and own its weight.

44] In **Mbulo Edward versus Uganda, SC Criminal Appeal No. 17 of 1995** the Supreme Court followed the decision in **Tindigwihura Mbahe versus Uganda, Cr. App. NO. 9 of 1987** where it was stated that;

*"a 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 solely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration"*

45] As stated in the above cases, it is not a rule of law that a conviction cannot be based solely on the evidence of a dying declaration. Where the evidence relating to the dying declaration was so cogent as to exclude any possibility of doubt or mistaken identification, that evidence would be sufficient to support the conviction because under the Evidence Act, evidence of a dying declaration is relevant. In all other cases, corroboration must in principle be apprehended.

46] Going by the definition above, we are not prepared to classify what PW2 heard on the night of 26/9/2010 as a dying declaration. He did not actually perceive it for he only heard someone making that statement from afar. He was not at the scene in order to evaluate the fracas to determine what was taking place, in particular, to ascertain that the person in distress was faced with a situation indicating that their life was close to an end. From his own evidence, he appeared not to be

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sure who made the declaration because during his examination in chief, he stated that he inquired of Kasibayo that "*who said Norman has killed me?*" but received no answer. Kasibayo who it was stated actually heard and saw the deceased make the statement, never testified in court. For it to be considered as relevant, a dying declaration must be relayed to and by the individual who was present at the time the statement was made.

- 47] We therefore agree with counsel for the appellant that the evidence of the dying declaration was not admissible as it failed to meet the necessary requirements of admissibility and relying on it caused substantial injustice to the appellant.

### **Contradictions and inconsistencies**

- 48] We believe our decision on the first ground should have resolved the appeal. However, it was also raised that the prosecution evidence had inconsistencies and contradictions that should have equally rendered it inadmissible or at least, insufficient to support a conviction. We shall only briefly traverse that complaint.
- 49] The well grounded legal position is that grave inconsistencies and contradictions in the prosecution evidence unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones, with exception of those that point to deliberate untruthfulness, will

be ignored. See for example, **Sarapio Tinkamalirwe versus Uganda, SC Criminal Appeal No. 27 of 1989** and **Twinomugisha Alex & 2 Ors versus Uganda, SC Criminal Appeal No. 35 of 2002**. The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material or essential to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on the basis of the relative importance between the point being offered by the contradictory evidence, and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

50] Ms. Namusisi Benitta, considered certain aspects of the evidence of PW1 and PW2 as fundamentally contradictory. In particular;

- i) That whereas P1 stated that Kasibayo took the direction of Bwooma Road and the deceased took Kinyasanao Road, PW2 testified that Kasibayo ran towards the direction of Kigaga and that he did not go to Bwooma.
- ii) That whereas PW1 testified that together with PW2 they recovered a blood stained hoe handle in the appellant's

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52] We therefore find that the stated inconsistencies were minor and peripheral as they had little bearing on the central issue of the case which was to prove the ingredients of the offence of murder.

53] In conclusion, although we have discounted the contradictions as inconsequential, it is our decision that the prosecution case had serious doubts and we are under duty to resolve those in favour of the appellant. We are in agreement with counsel for the appellant that the evidence that was relied on to convict the appellant was weak circumstantial and hearsay evidence. It was not strong enough to sustain a conviction.

54] Thus ground one of the appeal succeeds, but ground two fails

55] Accordingly, we set aside the appellant's conviction for the offence of murder contrary to Section 188 and 189 of the Penal Code Act. The appellant is fully discharged unless he is being held for any other lawful purpose, he must be released forthwith.

56] For the above reasons, we find no reason to resolve the third ground of appeal.

Dated at Kampala this <sup>4<sup>th</sup></sup>..... day of <sup>Sept</sup>.....,2023.

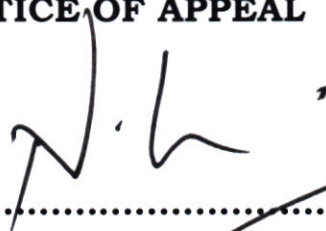


.....  
**MUZAMIRU M. KIBEDI**  
**JUSTICE OF APPEAL**





.....  
**CHRISTOPHER GASHIRABAKE**  
**JUSTICE OF APPEAL**



.....  
**EVA K. LUSWATA**  
**JUSTICE OF APPEAL**