THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER - JSC, TSEKOOKO - JSC, KAROKORA - JSC, MULENGA - JSC AND MUKASA-KIKONYOGO - JSC)

CRIMINAL APPEAL NO. 14 OF 2000

B E T W E E N

HADIJA NASOLO: :::::::::::::::::::::: APPELLANT

AND

UGANDA: :::::::::::::::::::::: RESPONDENT

(Appeal from the decision of the Court of Appeal in Kampala (Okello, Mpagi-Bahigeine and Kitumba - JJA) in criminal Appeal No. 15 of 1998, dated 16th October, 1998).

JUDGMENT OF THE COURT

The appellant was convicted by the high court at Kampala (Lugayizi, J) of the offence of murder c/s. 183 of the penal code, and was sentenced to death. She appealed to the Court of Appeal. The appeal was unsuccessful. Hence this appeal.

The prosecution case as accepted by the trial judge, briefly, was that at the material time, Nalunkuma Fina (PWI), a girl of about 11 years, was employed as a baby-sitter, by Bitijuma Nalugwa (PW3) and her husband, Hassani Mugisha (PW4) at their home in Nsambya West near Kampala. The baby was Sadat Byarugaba (the deceased). He was six months old at the *time With the knowledge of Nalugwa, Fina went with the baby to the home of the* appellant to play with other children. At the appellants home, Fina placed the child to sit in a basin in the compound while she played with other children nearby. At one point during their play, Fina left briefly to return home. As she was leaving, Fina saw the appellant seated near where the deceased had been seated. When Fina returned to the appellant's home, she did not see both the deceased and the appellant. She went to the toilet (a pit latrine) and met the appellant at the door coming out of the toilet. The appellant said to Fina that she (the appellant) had thrown the deceased into the toilet, and warned Fina not to tell any one or else

the father of the deceased would shoot her (Fina). The father of the deceased, Hassan Mugisha was an askari of local Defence Unit.

Fina apparently feared, and heeded the warning. She did not reveal what had happened to anyone, including the parents of the deceased, until she was arrested and detained by the Police. When Nalugwa realised that her baby was missing, she asked the appellant if she knew where the baby was. The appellant denied the whereabouts of the baby. Nalugwa reported the matter to the Local Council Chairman and to her husband.

A search for the deceased was made. During the search, the appellant informed the search team not to bother searching in the toilet because there was nothing in it; she had only thrown in it her old red plate. The search team found the body of the deceased in the pit latrine, dressed in a red dress. Medical evidence revealed the cause of his death to be aspiration pneumonia.

The appellant was arrested, charged with, and tried for, the murder of the deceased. She denied the charge. Her defence was an alibi to the effect that she was not at the scene of crime at the material time, as alleged by the prosecution. The trial judge rejected her defence, and accepted the prosecution evidence, convicting the appellant with the consequences already referred to.

At the hearing of this appeal, the appellant was represented by Mr. Edward Damulira Muguluma and the respondent by Mr. Vicent Waguna, Senior State Attorney.

This appeal was first called for hearing on 29.9.2000. It could not be heard on that occasion, because the court discovered that the record of appeal appeared to be incomplete in view of the complaint raised in one of the grounds of appeal in what was entitled as ***"Additional Memorandum of Appeal"*** dated 20.11.2000, and lodged by the appellant's Counsel. The complaint was that the trial court had allowed Fina to testify for the prosecution although she had been indicted jointly with the appellant for the offence in this case. The record of appeal before the Court did not indicate whether this claim was true. It was, therefore, necessary to have a complete record of the appeal to clarify this point. Consequently, the court ordered the Registrar to file a Supplementary record of Appeal for that purpose. If Fina was originally named as a co-accused of the appellant in the same indictment as claimed by the appellant's learned counsel, a question arises; was the charge against her withdrawn by the DPP before the appellant was tried or was she still an accused person in the same indictment when she testified for the prosecution?

In due course, the registrar filed a supplementary record of appeal indicating what had transpired in the Magistrate's Court before and during the committal proceedings in respect of the appellant. The effect of the supplementary record of appeal will be discussed later in this judgment in the context of the ground of appeal concerned.

In support of the appeal the appellant's learned counsel lodged three documents variously headed: "***Memorandum of Appeal",*** dated 27-9-2000; ***"Additional Memorandum of Appeal",*** dated 20-11-2000, and ***Additional Memorandum of Appeal"*** dated 27-11-2000. Altogether, nine grounds of appeal were set out in these documents, many of them repeating complaints made in others. This amounted to a contravention of rule 81 of the Rules of this Court, which stipulates that:

> ***"(1) a Memorandum of Appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against specifying the points which are alleged to have been wrongly decided and the nature of the order which it is proposed to ask the court to make.***
>
> *(2)*
>
> ***(3)***

When *the hearing* of *the appeal commenced on* 21-11-2000, the *appellant's learned counsel* sought, and was granted leave, to amend some of the grounds of appeal, and to abandon others. As a result, we have had to re-number the grounds of appeal which emerged from that exercise. The essence of the grounds of the appeal which the appellant's learned counsel has argued are recast as follows:

1. ***The learned Justices of Appeal erred in fact and in law in believing and accepting the evidence of Fina Nalunkuma (PW1) who was a self-confessed liar and an accomplice without corroboration and thus arrived at a wrong conclusion.***
2. ***Alternatively, the learned Justices of Appeal erred in law and in fact in accepting and relying on the evidence of Fina Nalunkuma (PW1) without withdrawing the charge against her.***
3. ***The learned Justices of Appeal erred both in law and in fact in failing to evaluate evidence as a whole and thus arrived at a wrong conclusion.***
4. ***The learned trial Judge and the learned Justices of Appeal did not adequately consider and examine the discrepancies on record and thus came to a wrong conclusion.***

The appellant's learned counsel argued the first and the alternative ground together. In effect, he appears to have started with the alternative ground, which is number 2. He submitted that when Fina testified at the trial of the appellant, she was a wanted person as an accused in the same case and one

against whom a warrant of arrest had been issued, as indicated by the record of proceedings in the Magistrate's court. The record does not indicate whether and when the indictment against her was withdrawn, if at all. There is no explanation how she came to be a prosecution witness. Before she testified as such the charge against her should have been withdrawn first by the Director of Public Prosecutions in accordance with established practice. The learned counsel said that he had no authority to support his contention. He undertook to forward such authority within three days, but he never did.

In reply, Mr. Wagona submitted that according to the record of proceedings in the Magistrate's court, it appears that the prosecution had intended to have Fina committed for the same offence as the appellant, but this was never done. He submitted that as Fina was not committed for trial in the High Court, there was no error in law or fact when she was called as a witness in view of the provisions of section 1 of the Trial on Indictment Decree, 1971

We have examined the record of proceedings in the Magistrate's court in this case. According to the Police Charge Sheet, five persons were originally charged with the murder of the deceased. Fina Nalunkuma was accused number 1, and the appellant was accused number 4, in the Charge Sheet. On 8-12-95, the Court record written by M. Tibula, Magistrate Grade I reads: ***"8-12-95:***
Accused 1, 2, 3 and 5 here.
D/Asp Musede. I have instructions to withdraw from Al, 2, 3 and 5. I have a letter from DPP to that effect "

This appears to indicate that the charge against Fina was withdrawn on that occasion.

Thereafter on 26-7-96, the court record made by G. Otto, Magistrate Grade II, surprisingly, reads:

"26-7-96:

Accused not in court.

Production Warrant for 9-8-96.

Signed:

26-7-98 - A.4 present.

Kagezi Joan (Mrs.) S/A.

Mrs. Kagezi:

I pray that the accused be committed My instructions was to commit two accused persons A. 1 and

A4 but A. 1 is absent. I therefore pray for a Warrant of arrest to issue against A. 1.

I can proceed against A. 4.
A. 4 - I wish the indictment and the summary of the case to be read in Luganda.

A 4: I have understood both the indictment and the summary of the case.

Court: - Both the indictment and the summary read and explained to accused in Lug an da.

Court: - A. 4 is committed to High Court to stand trial on the next convenient date. File to be sent to C.R. for further action. Warrant of arrest to be issued against A. 1 Nalunkuma "
The indictment available on record and apparently filed in the Magistrate's court by the DPP is undated. It states:

"The Court is informed by the Director of Public Prosecutions that NALUNKUMA FINA and HADIJA NASOLO are charged with the following offence:

Statement Of Offence:
Murder contrary to sections 183 and 184 of the Penal Code Act.

Particulars The Offence:

NALUNKUMA FINA and HADIJA NASOLO on 14th of October 1995, at Nsambya West Zone in the Kampala District, murdered SADAT BYARUGABA.

AMOS NGOLOBE

SENIOR PRINCIPAL STATEATTORNEY

For: DIRECTOR OF PUBLIC PROSECUTIONS

Following the record of committal proceedings for the appellant the next available court record is that of the High Court for the trial, which began on 14-4-98, when the appellant was arraigned and she pleaded not guilty. There, only the appellant was shown as the accused. Ms. E. Kawuma was shown as representing the appellant and the State as represented by Mr. Byandema. Thereafter, the trial of the appellant alone proceeded up to the end. Fina Nalunkuma never figured as an accused person in the whole trial. She only figured as PW1.

Section 1 of the Trial on Indictments Decree, 1971, provides:

> ***"The High Court shall have the jurisdiction to try any offence under any written law and may pass any sentence authorised by the law.***
>
> ***Provided that no criminal case shall be brought under the cognisance of the High Court for trial unless the accused person has been committed for trial by the High Court in accordance with the provisions of the Magistrates' Courts Act, 1970."***

In view of the provisions of section 1 of the Trial on Indictments Decree, the indictment siting Fina as accused was not and could not be brought under the cognisance of the High Court

for her trial unless she was committed for trial in accordance with the provisions of the Magistrates' Courts Act, 1970.

As we have seen from the record of the appellant's committal proceedings the DPP intended to commit Fina (PW1) together with the appellant but she (Fina) was absent on that day, and she was not committed. There is no record that she was committed on another day or at all. The trial of the appellant thereafter commenced, and Fina was called as a prosecution witness, apparently, without the charge against her having first been withdrawn or the indictment amended excluding her name.

According to the provisions of s.l of the T.I.D ., committal by a Magistrate's court for trial in the High Court is an essential step before an accused person can be tried by the High Court.

Applying the provisions of section 1 of the T.I.D. to this case, it means that Fina could not be tried as an accused person either together with the appellant or separately for the offence unless she was committed for trial in the High Court in accordance with the Magistrates' Courts Act, 1970. The provisions of the Magistrates' Courts Act, 1970, regarding committal for trial by the High Court are found in sections 163 A(l), (2) and (3)(a), (b) and (c). These provisions were introduced by The Magistrates' Courts (Amendment) Statute, 1990 (Statute 6 of 1990). They are:

> ***"163A.(1) When a person is charged in a magistrate's court with an offence to he tried by the High court, the Director of Public Prosecutions shall file in the magistrate's court an indictment and a summary of the case signed by him or by an officer authorised by him in that behalf acting in accordance with his general or special instructions.***
>
> ***(2) The summary; of the case referred to in subsection (1) shall contain such particulars as are necessary to give the accused person reasonable information as to the nature of the offence with which he is charged***
>
> ***(3) When a person charged with an offence to be tried by the High Court appears before a magistrate and the Director of Public Prosecutions has complied with the provisions of subsection (1) the magistrate shall:***
>
> ***(a) give the accused person a copy of the indictment together with the summary of the case;***
> ***(h) read out the indictment and the summary of the case and explain to him the nature of the accusation against him in a language he understands and inform him that he is not required to plead to the indictment;***
>
> ***(c) commit him for trial by the High Court and transmit to the Registrar of the High Court copies of the indictment and of the summary of the case."***

With regard to Fina in the instant case, there is an indictment on record charging her and the

appellant with the present offence. That indictment must have been filed in the Magistrate's court by the DPP in accordance with the provisions of sub-section (1) of section 163 A of the Magistrates' Court Act. However, in her case, there is no record indicating that the DPP complied with the provisions of section 163 A (3), for record shows that the Magistrate concerned actually committed Fina for trial by the High Court in accordance with the provisions of sub-section (3)(a), (b) and (c).

In the circumstances, we are satisfied that Fina was not an accused person, in the sense of having been committed for trial in the High Court in this case, although her name appeared in the Police Charge Sheet, in the Indictment and summary of the case, and in the Magistrates court's proceedings for committal of the Appellant.

Section 137 of the T. I. D. provides:

> ***"Subject to the provisions of any written law, no finding, sentence or order passed by the High court shall be reversed or altered on appeal on account of any error omission, irregularity, or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless such error, omission, irregularity or misdirection has in fact, occasioned a failure of justice.***
> ***Provided that in determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. "***

We think that it was an error by the trial court to proceed with the trial of the appellant on an indictment naming Fina who was not committed, without amendment. Calling her as a witness was not an error. The error not withstanding, we think that the appellant's conviction was saved by the provisions of section 137 of the T.I.D. In the circumstances, we see no reason to interfere with the appellant's conviction.

Ground 2 of the appeal therefore fails.

We shall next consider what is now ground 1 of the appeal. Under this ground the appellant's learned counsel submitted, first, that Fina was an accomplice, because she was arrested as suspect and later charged together with the appellant for this offence. The prosecution wanted to continue with the charge against her, so, a warrant for her arrest was issued. The warrant of arrest was never withdrawn. The police gave no explanation, which they should have done, why they arrested her as a suspect and a co-accused with the appellant. Fina was an accomplice, whose evidence required corroboration. Her evidence also required corroboration because she was a child of tender years when she gave evidence. The learned trial judge erred not to have warned himself of the necessity for, and to have accepted Fina's evidence without,, corroboration. Learned counsel submitted that the appellant's evidence that the red item seen in the pit latrine was a plate thrown there by her, which the learned tried judge found to be false, did not provide sufficient corroboration of Fina's evidence.

Secondly, the appellant's learned counsel submitted that Fina admitted in her testimony that she had lied in her charge and caution statement to the police. He contended that Fina gave evidence different from what she had said in the charge and caution statement, because she wanted to cover up her role as an accomplice in the offence in this case. In the charge and caution statement she said:

> ***"Maama Kitona (Hadija Nasolo) cautioned me not to reveal anything to any person if she dumps the kid called Sadat Byarugaha into a pit latrine because if I do reveal it to any person we will all be imprisoned "***

This is different from what she said in her testimony. In this connection she testified: "The accused then told me not to say anything concerning the fact that she had thrown the child in the toilet. If I did, Mr. Mugisha would shoot me. "

It is contended by the appellant's learned counsel that in view of the fact that Fina confessed in court that she had lied in her charge and caution statement to the police the learned trial judge should not have believed her evidence.

In reply the learned senior State Attorney submitted that Fina was not an accomplice since she was not committed for trial, and was not tried or convicted of the same offence. Moreover, there was no evidence to show that she was an accomplice. For his submission, the learned State Attorney relied on: ***Davies*** vs ***DPP (1954) 1A 11 E.R 504; Canisio s/o Wahva vs R (1956) 23 EACA 453, M' Kanyoro (M'Nduyo)*** vs ***R (1962) E.A. 110; and Mushikoma Watete & Others*** vs ***Uganda, Criminal Appeal NO. 10/2000 (S.C.U.)*** (unreported).

Alternatively, the learned State Attorney submitted that even if Fina were to be regarded as an accomplice, the learned trial judge found that her evidence was corroborated. This was inspite of the fact that the issue of corroboration did not arise at the appellant's trial. Corroboration was available from the prosecution evidence that the appellant diverted the search party's attention from searching the pit latrine, on the pretext that what was in the pit latrine was a red plate she had thrown in it, not the body of the deceased dressed in a red dress.

Regarding Fina's self confessed lie to the Police the learned Senior State Attorney submitted that her admission to have lied did not affect her credibility, because she gave an explanation which the learned trial judge and the Court of Appeal accepted. He then urged us not to interfere with the finding of the trial judge in this regard, which the Court of Appeal up-held.

As we have already said in this judgment, Fina was not tried as an accused person in this case because she was not committed for trial either with the appellant or alone for the same offence. Nor had she been convicted of the offence. The issue of her being an accomplice because she was an accused person or for any other reason was not raised during the appellant's trial. It is now submitted by the appellant's learned counsel that Fina was an accomplice because she had been charged with the offence and a warrant of arrest was issued for her arrest.
In a criminal trial, a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial.

However, even in absence of such confession or conviction, a court may find, on strength of the evidence before it at the trial, that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit, or incited the commission of the offence under trial, he would be regard as an accomplice. See ***D.R. Khetem vs R. (1956) E.A. 563;*** and ***Mushikoma Watete and Others*** vs ***Uganda,*** (supra)

On the authorities, there appears to be no one accepted formal definition of ***"accomplice."*** Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In ***Davies vs DPP*** (supra), the House of Lords said on page 513:

> ***"On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category: (1) on any***

view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in case of misdemeanors).

This is surely the natural and primary; meaning of the term "accomplice" But in Uvo cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule; viz (it) receivers have been held to be accomplice of thieves from whom they receive goods on a trial of the latter for Larceny, (R. V. Jennings 1912, Cr. Appl. Rep. 2428; R. V. Dixon, 1925,
19 Cr. App. Rep. 36); and (iii) when X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accidents, in such cases, the court has held, that, in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration R. V. Mohamed Farid 30 Cr. App. Rep 168."

In the instant case available evidence indicates that Fina was an accessory after the fact to the offence committed by the appellant. Fina's own testimony was to the effect that after the appellant had thrown the deceased into the pit latrine, she warned Fina not to reveal it to any one or else the father of the deceased would shoot her. In view of the threat Fina kept quiet in order, apparently, to protect the appellant. She did not speak out until she was arrested and detained at a police station. In the circumstances, Fina should have been treated as an accomplice witness at the appellant's trial. However, the learned trial judge did not do so. Nor did he warn himself and the assessors of the danger of acting on her evidence without corroboration. In the event, however, the failure of the learned trial judge to warn himself of the necessity for corroboration was not fatal to the appellant's conviction, because the learned judge made a finding, with which we agree, that Fina's evidence was corroborated.

Corroborative prosecution evidence consisted of the appellant's unsuccessful attempt to divert the search party from searching the pit latrine in which the appellant knew that the body of the deceased was lying. She lied that she had thrown into the pit latrine an old red plate when, in fact, the red object seen in the pit latrine was the body of the deceased in a red dress. Her alibi that she was not at the scene of crime at the material time was also discredited as a lie by the evidence of Nalugwa and the evidence of the appellant's own defence witness.

The learned trial judge acted on Fina's evidence not withstanding inconsistencies and her failure to make a first report to the parents of the deceased and the authorities. This is what he said in his judgment:

> ***"I agree that PW1 told the police quite a number of lies in her police statement (i.e. Exits. D.l (a) and D1 (b) which she was not ashamed to reveal to court during the hearing. However, when one carefully examines the above police statement and compares it with PW1's sworn testimony in court one would discover that both are essentially agreed that it is the accused who committed the offence in issue. On my part, I am quite satisfied with PWl's consistent explanation that she was initially compelled to lie to the police (amongst other things) that it was a Mugisu woman who threw the deceased into the pit latrine, etc, etc,) because of the serious threat of death which was issued to her by the accused in case she implicated her with the offence in issue. As a result I am prepared to find that her evidence against the accused in court was reliable and should be acted upon. In any case, PW1's evidence is amply corroborated by PW3's PW4's and PW5's evidence. According to PW3, (whose testimony was not shaken) soon after the deceased disappeared, the accused told PW3 that she (accused) had seen the deceased near the scene of crime but did not know at the time of talking with PW3 what had happened to hint In my view that was tacit admission by the accused that at the time of the crime, she was at the scene of crime. Secondly, according to PW4 and PW5, the accused diverted the search party when they came to search the toilet in issue on the first occasion. She told them that she had thrown an old plate in that pit latrine***

So, when the search party flashed light into the pit latrine and saw a red object down below, they believed what the accused had told them They did not search the pit latrine any more that evening.

However, on returning to the same pit latrine, some other day, they realised that the real object down below was not a red plate as the accused had told them, but the deceased who was by then dead and was dressed in a red dress. That evidence was not shaken. I am therefore prepared to find that it represented what actually happened during the search for the deceased In my opinion that conduct on the part of accused was not conduct of an innocent individual, but of someone who had a lot to fear that if the first search in the pit latrine had continued the deceased's body would have surely been recovered at that point To the accused that meant the end of that dirty game!!''

In the appellant's appeal to the Court of Appeal, only the following three grounds of appeal were set out in the Memorandum of Appeal:

1. ***The learned trial judge erred in law and in fact in believing the evidence of PW1 which was inconsistent, false and uncorroborated***

2. ***The learned trial judge erred in law and in fact in believing the prosecution witnesses who contradicted each other.***

The learned trial judge erred in law and in fact in disbelieving the appellant's alibi as a defence.

In the Court of Appeal, the appellant's counsel, Mr. Eric Muhwezi, vigorously attacked the evidence of Fina as accepted by the learned trial judge. He criticised the trial judge for accepting Fina's evidence which he contended, was:

(a) inconsistent within itself;

(b) contradictory with her police statement;

(c) inconsistent with and not corroborated by the evidence of PW3, PW4 and PW5;

(d) unreliable.

♦ The learned Justices of Appeal rejected the grounds of appeal and the arguments of the appellant's learned counsel before them.

In their judgment, the learned Justices of Appeal upheld the learned trial judge's finding made in the passage of his judgment we have reproduced above. They said inter alia:

"Mr. Opolot, Principal State Attorney, who appeared for the State conceded that:

(1) There were inconsistencies in evidence of PW1 but that the trial judge considered the inconsistencies and found them to be minor and not go to the root of the question whether it was the appellant who committed offence.

(2) PW1 admitted that she told lies but that the trial judge dealt with that issue and found PW1 substantially truthful Counsel agreed with the finding of the trial judge that PW1 was influenced by threat to tell lies. He submitted

that the evidence of PW1 substantially pointed to the appellant as the culprit.

The law governing inconsistencies in evidence was stated in - Alfred Tatar vs Uganda (1969) EACA Cr. Appeal No. 167 of 1969, to be that minor inconsistency unless the trial judge thinks it points to a deliberate untruthfulness does not result in evidence being rejected the same case also laid the principle that it is open to the judge to find that a witness has been substantially truthful even though he/she had lied in some particular respect. The above principles were followed in Uganda vs Dusman Sabun (1981) HCB 1 which counsel for the respondent cited to us."

The Court of Appeal then reproduced the passage in the judgment of the learned trial judge to which we have already referred, and continued:

"We agree. The learned trial judge correctly dealt with the issue of inconsistencies in the evidence of PW1 and with the Police Statement Despite those inconsistencies, which we agree are minor, PW1 stood out substantially truthful The trial judge was thus entitled to make that finding. It is important to note that besides the threat which was issued to her by the appellant, PW1 was also subjected to beatings at the Police Station after her arrest and before she recorded that charge and caution statement. In view of that threat coupled with the beatings, it is not at all surprising that PW1 recorded a Police Statement full of lies. That is to he expected from a child of tender age subjected to such treatment We agree that her sworn evidence given after the threat had been removed from her is reliable."

We hasten to point out that we know of no authority to support the view of the Court of Appeal that a child of tender age tells lies when he/she is subjected to mistreatment. Apart from this observation what the learned trial judge and the Court of Appeal said of Fina in the passages above referred to, in our view, give a satisfactory explanation of PWl's apparent abnormal conduct in this case. Such abnormal conduct includes the fact that she did not reveal that the accused had thrown the deceased into the toilet until her arrest as a suspect for the offence; and the inconsistent stories within her evidence and her charge and caution statement recorded by the police.

The passage of the judgment of Court of Appeal, we have just referred to, then continued:

"Learned Counsel for the appellant submitted that the evidence of PW1 was not corroborated by the evidence of PW3, PW4 and PW5.

It is important to note that PW1 is a child of tender age. She gave evidence on oath. Her evidence as a matter of law therefore does not under section 12 of the Oaths act require corroboration. In practice, however, courts usually, look for corroboration for such evidence as a matter of prudence. See - Oloo s/o Gai vs R (1960) EA66 . Corroboration was defined in - Kerville (1916) Z.K.B. 658 to mean:

Independent evidence direct or circumstantial which confirms in some material particulars not only that the offence has been committed but also that the defendant committed it.

The above definition was approved by the Supreme Court in Isaya Bikuma vs Uganda, Cr. Appeal No. 24 of 1989 (unreported). "

The court of Appeal then agreed in the following terms with the trial judge's finding that the evidence of PW4 and PW5 implicated the appellant:

" The appellant clearly diverted the search team from searching the toilet in which the body of the deceased was later found She made the search team believe that the red object they saw down in the toilet was a red plate which she had thrown there. But when the team later returned to the toilet, they discovered that the red object they thought was the red plate of the appellant was in fact the deceased's body. It was dressed in a red dress. No such plate was found.
That evidence is incriminating to the appellant and corroborates the evidence of PW1. The evidence of PW4 and PW5 is not contradictory either to each other or to the evidence of PW1. The evidence of PW3 is also not contradictory to that of PW1 because it shows that the appellant had admitted to PW1 that she had seen the deceased seated in a basin though she did not know who took hint This indicates that the appellant was at the scene of crime as testified to by PW1. We find no merits in these grounds and they must fail"

In the circumstances, we are satisfied that the trial court and the Court of Appeal properly acted on PWl's evidence.

Another aspect of the Fina's evidence giving rise to one of the appellant's complaints under the ground of appeal now being considered is that she was a child of tender years when she gave evidence. She was 12 years old, and yet the trial judge did not warn himself of the requirement for corroboration.

Due to Fina's age the learned trial judge conducted a voir dire before receiving her evidence. He then concluded:

"I am satisfied that this child understands the nature of an oath and the duty to tell the truth. "

This, we are satisfied, was substantial compliance with section 38(3) of the T.I.D, Section 11 of the Oath's Act, and decisions in ***Nyasani s/o Bichana (1958) E.A. 190; Kbageny Arap koliil vs R (1959) EA 92*** and ***Oloo*** *s/Gai vs* ***R*** *(1960 EA 86:*

We have already adverted in this judgment to what is corroboration with regard to accomplice evidence. As regards corroboration in respect of evidence from witnesses who are children of tender years reference to a few authorities will suffice.

In the case of - ***Kibageny Arap Khohil*** (supra) the Court of Appeal for Eastern Africa said this at pages 85:

"There was, however, another irregularity regarding the evidence of these boys which has fortified us in allowing the appeal, and that is the failure of the learned trial judge, so far as can be gathered from the record, to warn either himself or the assessors of the dangers of convicting on their uncorroborated evidence. Had their evidence been neither sworn nor affirmed, there would have been a legal necessity for its corroboration by other material evidence implicating the appellant, by virtue of the provision section s. 19(1), and a conviction on it, if uncorroborated would have been bad, notwithstanding such a warning. But even where the evidence of a child of tender years is sworn (or affirmed), then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it, if not corroborated, without warning itself and the assessors (if any) of the danger of doing so..... In Rv. Leonard bin Ngimbwa (1943), 10 EACA, a case where a girl of about eleven years old was the sole eye - witness to a murder, and whose evidence was given on affirmation, this court held that even though she was affirmed the court must be very careful before acting on her evidence and should weigh and scrutinize it closely in the light of all the surrounding circumstances, and the appeal was dismissed in that case only because the trial court had appreciated the danger and looked for corroboration of the girl's story. In such cases trial court must either find corroboration implicating the accused or must, after warning itself of the danger of convicting without it, express itself to be convinced of the truth of the child's story not withstanding that danger."

This passage was cited with approval by the same court in ***Oloo s/o Gai vs R*** (supra) on page 90, and it is still good law.

Section 38(3) of our T.I.D is the equivalent of section 19(1) of the Kenyan Oaths and Statutory Declarations Ordinance (as amended) referred to in ***Kibageny Arap Kohil*** (supra).
In the instant case, the learned trial judge neither warned the assessors nor himself of the danger of acting on PWl's evidence without corroboration. This was an error which, however, was not fatal *to the appellant's conviction as* the trial judge found that there was ample corroboration. The Court of Appeal upheld that finding. In any case the provisions of section 12 of our Oaths Act appear to mean that no corroboration of sworn evidence is necessary to convict an accused person against whom such evidence has been given.

In the circumstances, we see no merit in what is now ground 1 of the appeal, it must fail.

What we have said in this judgment so far adequately covers and disposes of what are now grounds 3 and 4 of the appeal. We see no merit in both grounds. They must also fail.

We are satisfied that there was ample evidence to support the appellant's conviction for the offence for which she was indicted and tried in this case. She was properly convicted and the Court of Appeal rightly dismissed her appeal to that court.

Her appeal to this Court is accordingly dismissed.

Before we leave this case, we would like to comment on two matters. First, the absence of

evidence from the investigating and arresting police officers. Five persons were originally arrested as suspects and charged with the murder of the deceased. They were: Fina Nalunkuma; as A. 1; Nulu Nyombira, A.2; Nabugwere Janet, A.3; the appellant, Hadija Nasolo; and Naduyu Christine, A.5.

Initially, Fina concealed what she knew about the incident, and revealed it only after she had been arrested and detained at the police station for over a month. As we have already seen, the record of proceedings in the Magistrates Court indicates that on 8-11-95, the police officer representing the prosecution informed the Magistrate that he had been instructed in writing by the D.P.P. to withdraw the charges against Al., A.2, A.3 and A.5. Unfortunately, the Magistrate did not make the relevant order withdrawing the charges as requested. On 26-7- 96, only the appellant was present before the Magistrate for committal for trial by the High Court. Fina and the other three accused persons were not. The prosecuting State Attorney applied for a warrant of arrest for Fina. No reason was given why Fina should be re-arrested if, as the record shows, the charge against her had been withdrawn by the DPP. This is a mystery which could have been explained by the investigating and arresting police officers had they given evidence at the appellant's trial, which they did not.

It was also necessary for the police to explain why Fina was detained for over one month at the police station. We have said in many cases before, that investigating and arresting police officers should always be called as prosecution witnesses. Alas, the advice does not seem to be heeded by the prosecution authority.

The second matter is that this case has shown that the necessity for records of committal proceedings of accused persons in the Magistrates courts being part of the records of appeals in this court. We wonder why records commence only with trial court's records. In the

circumstances, we direct that records of criminal appeals to this court should always include records of appellant's committal proceedings in Magistrates Courts.

Dated at Mengo this 15th day of August 2001

A.H. ODER
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

J.W.N TSEKOOKO
JUSTICE OF THESUPREMECOURT

L. E. M. MUKASA-KIKONYOGO JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT