THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, ODER, KAROKORA, KANYEIHAMBA AND KATO, JJ.S.C.)

CRIMINAL APPEAL NO. 40 OF 2001

B E T W E E N

LUBEGA GERALD: :::::: :::::: :::::: :::::: APPELLANT

A N D

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

(Appeal from the decision of the Court of Appeal in Kampala (Mukasa-Kikonyogo, DCJ, Berko and Engwau, JJ.A., dated 6th June, 2001 in Criminal Appeal No. 78 of 2000).

REASONS FOR DECISION OF THE COURT

The appellant was convicted on 16-09-2000, by the High Court at Masaka of the murder of Namulindwa Caizolina and sentenced to death. His appeal to the Court of Appeal was unsuccessful. We also dismissed his appeal to this Court, reserving our reasons for doing so, which we now give.

The brief facts of the case are that on 18-11-98, between 7.30 p.m. and 8.00 p.m., the deceased, Namulindwa Caizolina, was in her kitchen with her children, preparing a meal for the family.

The appellant entered the kitchen holding what appeared to be a small calabash wrapped in banana leaves. Immediately he entered the kitchen he threw what he was holding at one of the fire-place stones on which the deceased was preparing food. The container exploded when it hit the stone. Petrol, which was in the container, splashed on a tadoba (wick) lamp which the deceased was holding. Clothes on the deceased caught fire. She ran outside, burning all over her body. The children, Balikuddembe Kayondo Gresham, PW2, and Kasozi Lawrence, PW3, also ran out, raising an alarm. The appellant ran away before persons who answered the alarm arrived at the scene. He was well known to the deceased and the children. They were relatives and lived in the same village.

The first person to arrive at the scene was the L.C.1 Chairman of Kyakayege Village, Godfrey Turyababwe (PWl). He found the house of the deceased on fire. The deceased was outside crying. He asked the deceased what had happened. She informed him that when she was preparing food with children in the kitchen, the appellant went there and threw something at her which caught fire and burnt her. She also said that appellant was dressed in a T-shirt PWl reported the incident to the LC2 Chairman, who gave him an LDU official. They went to appellant's home, but he was not found there. PWl and the LDU official returned to the scene. While they were still there the appellant arrived and he was arrested and taken to Matete Police Post. He was later forwarded to Sembabule Police Station.

The deceased died not long after the incident. In the company of No. 17445 D/C/P/ Ashaba Chris (PW5) Dr. Muhumuza performed a post-mortem examination of the body of the deceased at the scene. Dr. Muhumuza did not testify. The Post-mortem report was put in evidence by Dr. John Muguma (PW6). It indicated that:

a) *the body of the deceased was intact but had burns all over it.*

b) *extensive burns on the head, neck, face and upper limbs;*

c) *the cause of death "was extensive burns on more than 90 of the body on the external area."*

The appellant was charged with murder. At his trial, he set up an alibi in an unsworn statement. He called two witnesses to support his case. His statement was that on the material date, he left his home at 4.00 p.m. and went to attend a football match, which ended at 6.00 p.m. He then went to Nansubuga's bar in Kyaluwaya Village, where he met Kayemba, Mwanje and Luswata. They drank tonto (banana beer). At 9.00 p.m., Lubega Emmanuel (DW2) and one Ssajjabi arrived at the bar and informed him (the appellant) that the deceased had been burnt in her kitchen. He went to the scene and found that the deceased had been taken to a clinic. He got a bicycle and collected a mattress and took it to the deceased at the clinic. The doctor asked him to fetch two busutis (a traditional dress) and cooking oil. He went home and informed his grand father. He took the children Balikuddembe and Kasozi to his home. He informed his grandmother and uncle about the incident. He went with one Ssennyange to the clinic. The nurse suggested that they should move the deceased to a hospital. They went to look for money. The appellant went to the LC.1, Turyababwe who ordered his arrest. He was arrested and taken to Ssembabule Police station, from where he was transferred to Masaka Police Station

Subi Vincent, DW1, testified that he was with Lubega Emmanuel, DW2, when they saw fire burning and heard people making an alarm. They went to the scene and found the kitchen of the deceased burnt. When he and Lubega were going home, they found the deceased with other people in a bar. The time was 9.20 p.m. The appellant informed them what had happened to the decease. The testimony of Lubega Emmanuel tallied with that of Subi.

The learned trial judge did not believe that the appellant had any alibi. In agreement with the opinion of the assessors, he accepted the evidence of the prosecution witnesses and convicted the appellant as charged.

At the commencement of the hearing of the appeal, Mr. Edward Ddamulira Muguluma, the appellant's learned counsel, amended the memorandum of appeal with leave of the court. The amended memorandum reads as follows:

1. *The learned Justices of Appeal erred in law and fact in confirming that the appellant was correctly identified.*

2. *The learned Justices of Appeal erred in law and in fact when they confirmed the decision of the trial judge rejecting the appellant's alibi.*

3. *The learned Justices of Appeal erred in fact and in law when they failed to properly evaluate the evidence on record and as a result, came to an erroneous conclusion.*

4. *The learned Justices of appeal erred in law and in fact when they relied on hearsay evidence to uphold the appellant's conviction.*

The appellant's learned counsel first argued grounds one and two separately and then argued grounds three and four together. Under ground one, learned counsel contended that the only eye-witnesses to the incident were two young children; one of whom, Balikuddembe, gave sworn testimony and the other, Kasozi, gave unsworn evidence. The incident occurred at 7.30 p.m. In the circumstances, the two eye-witnesses could not have correctly identified the appellant at the scene, because conditions did not favour such identification. Moreover, the two prosecution witnesses contradicted themselves about the T-shirt which the appellant was alleged to be wearing at the material time. One of them said that the shirt was dark, arid the other said it was a black shirt with a picture of a man on it.

Mr. Michael Elubu, Principal State Attorney, appearing for the respondent, opposed the appeal. His contention under ground one was that the two eye-witnesses, Balikuddembe and Kasozi were not too young to give evidence. The learned trial judge found that one was competent to give sworn evidence and the other unsworn evidence, and they were believed as truthful witnesses. With regard to identification of the appellant at the scene, the learned Principal State Attorney contended that favourable conditions existed for that purpose. The appellant was an uncle of Balikuddembe and Kasozi. They knew him well. There was ample light and the room was six by six meters, therefore, small enough to be lit by lire from the fireplace and

the tadoba (wick lamp) which the deceased was holding. Moreover, the deceased also recognised the appellant and mentioned his name in her dying declaration.

This ground criticizes the learned Justices of Appeal for confirming the finding of the trial judge that the appellant was correctly identified. They upheld that finding when considering the ground of appeal before them, to which ground one of the present appeal is similar. The learned Justices of Appeal considered that ground of appeal before them and concluded as follows:

> *"There were two witnesses to the incident. The first was Balikuddembe Kayondo Gresham, PW2. He had known the appellant since he was born. The appellant was his uncle who used to come to their home. There was a big tadooba that was throwing a lot of light. He was standing 2 - 3 meters from the appellant. He had seen the appellant during the day. This witness gave sworn evidence. The judge found that he was a truthful witness and accepted his evidence.*
>
> *Having regard to the size of the kitchen, the source of light was sufficient to enable PW2 to identify a person he knew before and had seen during the day. Though there is evidence that the kitchen was full of smoke, that smoke came from the fire following the attack. PW2 said that he recognized the appellant when he entered the kitchen. This was before he threw what he was holding. The smoke therefore, did not hamper his observation.*
>
> *There is also the evidence of PW3 Kasozi Lawrensio. He also knew the appellant before the incident. The appellant was his cousin. He saw the appellant throw what he was holding at one of the stones the deceased was cooking on. He was able to recognize the appellant because of light from the big tadooba and light from the fire that was burning the deceased. The appellant stood six meters from her (sic). He said that the appellant was wearing a black T-shirt with a picture of a man at the back. His description of the appellant's attire tallied with that of PW2.*

Though PW3 gave an unsworn statement, his evidence amply corroborated the evidence of PW2. The evidence of the two eye-witnesses was accepted by the learned trial judge and assessors. Once the evidence of the identifying witnesses was accepted, then conviction was inevitable and we can see no reason to suppose that the learned trial judge was wrong in accepting it."

We agree with the re-evaluation by the learned Justices of the Court of Appeal of the prosecution evidence of identification and their concurrent finding thereon.

Conditions were favourable for the correct identification of the appellant by the two eye-witnesses, Balikuddembe and Kasozi. They could not have been mistaken in identification of the attacker of the deceased as the appellant.

In her dying declaration, about which Turyababwe (PWl) gave credible evidence, the deceased also identified the appellant as her attacker. With respect, we do not know why the learned Justices of Appeal disregarded the dying declaration as evidence implicating the appellant, which it did. That evidence was amply corroborated by the evidence of the eye-witnesses.

In the circumstances, we saw no merit in ground one of appeal. It had to fail, and it did.

On ground two of the appeal, appellant's learned counsel said that the appellant was not at the scene of the crime as alleged by the prosecution. He was elsewhere in a bar. Mr. Elubu countered this by contending that there was no alibi in view of what the appellant himself said in his unsworn statement in court. He was drinking in a bar with Kayemba, Mwenge and Luswata when, at 9.00 p.m., Sajjabbi and Lubega informed them that the deceased had been burnt in the kitchen. Mr. Elubu contended that this was long after 7.30 p.m., when the appellant was identified at the scene of crime by the eye witnesses.

In view of what the learned Justices of Appeal said in their evaluation of the evidence concerning the appellant's defence of alibi, we saw no merit in ground two of the appeal and we rejected it. The learned Justices of Appeal said this:

> *"We think that the argument of Ms. Nakabuye that the judge did not consider the defence case adequately has no merit. The record shows that the defence witnesses saw the appellant at the bar at 9.00 p.m. The appellant said he left his house at 4.00 p.m. and went to watch a football match which ended at 6.00 p.m. The incident happened between 7.30 p.m. and 8.00 p.m. The bar is said to be about one and half miles from the deceased's home. The judge found that the time between 6.00 p.m. and 7.30 p.m. was long enough for the appellant to have committed the offence and then go to the bar where the defence witnesses said they found him. That finding is supported by the evidence on record and we are unable to see any reason why we should differ from the trial judge. The judge clearly evaluated the appellant's alibi and came to the conclusion that it was destroyed by the evidence of the two identifying witnesses who knew the appellant before the incident and were able to recognize him."*

The appellant's learned counsel ended up by combining grounds three and four of the appeal in his submission. He said that the two grounds had been covered by his submission on the first two grounds. He then concluded that the learned Justices of Appeal did not consider the last two grounds of the appeal before them, to which the last two grounds in this appeal are similar. Finally, he reiterated the prayer set out in the memorandum of appeal.

In reply, Mr. Elubu said that his submission on the first two grounds of appeal had covered ground three. He further contended that ground four of appeal had no merit because neither the trial court nor the Court of Appeal relied on hearsay evidence to convict and uphold respectively the conviction of the appellant. The Court of Appeal found that what the deceased told Turyababwe was not hearsay but a dying declaration, which was corroborated by the eye-witnesses.

In our considered opinion, we saw no merit in grounds three and four. The passages of the judgment of the Court of Appeal to which we have already referred, clearly show that the learned Justices of Appeal re-evaluated the evidence in the case and reached their own conclusion, to the effect that there was ample evidence to support the appellant's conviction for the offence for which he was indicted. With respect, we were unable to accept Mr. Muguluma's contention that the learned trial judge or the learned Justices of Appeal relied on hearsay evidence to convict the appellant. What the learned counsel referred to as *"hearsay evidence"* was, in fact, the deceased's dying declaration, which was corroborated by the evidence of Balikuddembe and Kasozi. This was one of the pieces of evidence on which the learned trial judge could and should, have relied on to convict the appellant. Similarly, the learned Justices of Appeal could and should, have relied on it to uphold the appellant's conviction. The learned Justices of Appeal referred to it, but for reasons unknown to us, they did not rely on it either.

In the circumstances, grounds three and For the reasons given, we dismissed the appear

Dated at Mengo this 19th day of May 2003.

B.J. ODOKI
CHIEF JUSTICE

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

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

G . W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

C. M. KATO

JUSTICE OF THE SUPREME COURT