THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI CJ, TSEKOOKO, MULENGA, KANYEIHAMBA, AND KATUREEBE JJ.SC)

CRIMINAL APPEAL NO 1 OF 2004

BETWEEN

1. **SUSAN KIGULA SSEREMBE}**
2. **NANSAMBA PATIENCE } :::::::::::::::::: APPELLANTS**

VERSUS

UGANDA ::: RESPONDENT

***[Appeal from the decision of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ, Engwau and Kitumba JJ.A) dated 5th March 2004, in Criminal Appeal No.167 of 2002*]**

JUDGEMENT OF THE COURT

The two appellants, Susan Kigula Sseremba and Nansamba Patience (hereafter referred to as the 1st appellant and the 2nd appellant respectively) were convicted by the High Court of Uganda at Kampala, of murder and sentenced to death. Their appeals to the Court of Appeal against both the conviction and sentence were dismissed. They have now appealed to this Court on a second appeal.

The brief facts of the case are that the 1st appellant was married to the deceased Constantine Sseremba. The 2nd appellant was a house maid of the Sserembas, and lived with the couple in the same house. The family had a two-roomed flat which had a sitting room and a bedroom. In addition to the 2nd appellant, the couple lived with their three children, who included Herbert Sseremba (PW6) who was aged about 3 to 4 years at the time of the murder. PW6 shared the same bedroom with the couple and witnessed the murder of the deceased.

The murder occurred during the night of 9th July 2000, at around 2.30 a.m while the family was sleeping in their flat. According to PW6, he saw the 1st appellant cut the neck of the deceased while 2nd appellant was holding the legs of the deceased. PW6 had earlier in the day seen the 1st appellant bring a panga wrapped in a polythene bag and hide it under their bed.

After cutting the deceased, both appellants ran out of the house leaving behind the panga and the three children in the house. The first appellant ran out naked shouting that thieves had attacked the family and killed the deceased. Her body was covered with blood which was flowing from a cut wound which she had on the right side of her neck. She ran to a drinking place called Sunset where she was given some clothing and later taken to Mulago Hospital for treatment. The second appellant who was dressed in a nightgown stayed outside the house shivering and crying.

The same night the neighbours who answered the alarm including the couple's landlady (PW7) found the deceased lying dead on the floor of the house with a cut wound. A blood stained panga was found in the door way to the bedroom of the house. The external door of the house was intact and the key to it was found in the lock on the inside of the door.

Both appellants denied the offence. The first appellant pleaded that she had been cut with something she did not see and ran out of the house realizing that she had been cut, leaving the deceased lying on the floor. She denied killing her husband and claimed that PW6 had been coached by Jane Ndagire (PW3) the deceased's mother to implicate her because she did not approve of her marriage to the deceased. The second appellant claimed that she had seen a man running away from the house followed by a woman.

The trial judge believed the prosecution evidence and dismissed the defence as lies. He accepted the evidence of PW6, who was aged about 6 to 7 years at the time of trial and who gave un-sworn evidence implicating both appellants. The trial Judge found sufficient circumstantial evidence to corroborate PW6's evidence and convicted the two appellants as charged.

The appellants' appeal to the Court of Appeal was dismissed, hence this appeal. Each appellant has filed a separate memorandum of appeal and is represented by her own counsel.

The memorandum of appeal of the first appellant contains two grounds of appeal framed as follows:

1. That the learned Justices grossly erred in law and fact in their assessment, interpretation and application of the law relating to corroborative evidence.

2. That the learned Justices erred in law and fact on the issue of identification of the appellant.

The 2nd appellant has preferred the following four grounds of appeal:

1. The learned Justices of Appeal erred in law when in their re-evaluation of the evidence, they failed to take into account inconsistencies in the evidence regarding the conditions under which the identification was done at the scene of the crime.

2. The learned Justices of Appeal erred in law when they construed the second appellant's subsequent conduct as exculpatory and capable of corroborating the evidence of PW6.

3. The learned Justices of Appeal erred in law when in their re-valuation of the evidence they failed to take into account evidence suggesting that the scene had been tempered with before the police arrived and that assailants had come from outside the house.

4. The learned Justices of Appeal erred when they failed to direct themselves regarding the legality and propriety of sentence of death in the circumstances of the case.

The two memoranda of appeal raised two main complaints namely:

1. That the learned Justices of Appeal erred in finding that the appellants were correctly identified.

2. That the learned Justices of Appeal erred in finding that there was sufficient corroboration in law to support the conviction.

The third complaint raised by the 2nd appellant relating to the imposition of death sentence, which is a constitutional issue that is pending determination by this Court. We shall comment on the matter at the end of our judgment.

Both counsel for the appellants and counsel for the respondent filed separate written submissions. They both argued the main grounds together. We shall adopt the same approach in considering their submissions.

In his written submissions, Mr. Ojakol, learned counsel for the 1st appellant concentrated mainly on the issue of corroboration. His first point was that this Court should take the opportunity to clarify the law on corroboration especially having regard to the requirement for corroboration, not as a rule of practice but as a requirement of law, as obtains in the instant appeal. His second point was that the purported corroborative evidence in the instant case is evidence of probability of any transaction, but not going to the transaction or act itself.

In arguing the first point, learned counsel for the 1st appellant pointed out that the leading authority on the law of corroboration is ***The King vs Baskerville*** (1916) 2.K.B. 658, which was considered by this Court in the case of ***Bogere Moses & Another vs Uganda***, Criminal Appeal No. 1 of 1997 (unreported). Learned counsel referred to ***Halsbury's Laws of England,*** 4th edn, para 454, where it is stated that the word corroboration means no more than evidence tending to confirm, support or strengthen other evidence. As to what amounts to corroboration, counsel referred to ***The King vs Baskerville (***supra) at page 667.

As regards the need for corroboration as a matter of law, Mr. Ojakol submitted that since in the instant appeal, the only eye witness to the incident was a child of tender age, there was a need for corroboration as required by Section 40 (3) of the Trial on Indictment Act. He submitted that according to ***The King vs Baskerville,*** (supra) corroboration need not be direct that the accused committed the offence but it is sufficient if it is merely circumstantial evidence connecting him

with the crime. Counsel then set out to show how the various pieces of evidence were insufficient circumstantial evidence to connect the 1st appellant with the offence.
The first piece of circumstantial evidence upon which the two lower Courts relied was the blood-stained panga. Learned counsel submitted that the fact that the blood stained sample on the blade of the panga was of the same group as the deceased's was not corroborative evidence of the fact that the 1st appellant murdered the deceased. It was his contention that the blood sample on the panga merely confirmed that it was the murder weapon but not that the 1st appellant murdered the deceased. He argued that the only valuable corroborative evidence regarding the murder weapon would have been finger prints of the 1st appellant on the panga.

The second piece of evidence the Court of Appeal considered as amounting to corroboration was the fact that according to PW6 the 1st appellant was naked on the fateful night while the 2nd appellant was dressed in a white night dress which descriptions corresponded to the evidence given by the appellants themselves. Counsel submitted that being naked was not in itself corroborative of the fact that the 1st appellant murdered the deceased. He contended that the fact that the 1st appellant was naked was capable of innocent explanation offered by the 1st appellant herself that she was naked because she and the deceased used to sleep naked.

The third piece of evidence that the Court of Appeal took as corroboration was the fact that the 1st appellant stated that she did not see anyone in the room nor did she hear any noise or footsteps in the room which corroborated the evidence of PW6 that nobody from outside entered the room at the material time. Learned counsel for the 1st appellant submitted that, that evidence was not corroborative of the fact that nobody from outside entered the room at the material time. Since the 1st appellant was sleeping in a different room from the 2nd appellant who claimed to have seen a man running from the scene followed by a woman.

The fourth piece of circumstantial evidence relied upon by the Court of Appeal was the evidence of PW3, PW4, PW7, PW9 and PW10 that the door to the room was intact with a key in the lock from inside the room, which evidence was held to corroborate the evidence of PW6 that nobody from outside came into the room at the material time. Learned counsel submitted that the purported evidence, from which an inference was drawn that the murder was an inside job was

wanting. Counsel pointed out that the Court of Appeal did not advert to a material piece of evidence from PW9 to the effect that he had changed the wooden door to the house and replaced it with a metallic one. He contended that as a result of the change, the trial Court did not have the opportunity to observe whether the door had been tampered with or not during the visit to the ***locus in quo***. It was his submission that since there were many people at the scene after the murder, it could not be ruled out that someone placed the key on the inside part of the door.

Dealing with particular witnesses, counsel contended that PW4, Ojada Robert, never actually saw the key on the inside of the door and that since he visited the scene of crime on 22nd July 2000 when the murder had taken place on 9 July 2000, some one could have placed the key in the position to look like the murder was an inside job. With regard to PW7, Grace Musoke, counsel pointed out that she only saw the key after the funeral of the deceased. In the case of PW9 Musoke Jackson, counsel contended that he did not say he saw the key on the inside of the door, but that he simply said he found the door open and the door had no problem with it. Counsel dismissed the evidence of PW10 Dhabangi Christopher as unreliable because he told Court that he got a lamp and entered the bedroom, yet he stated that there were security lights which were lit and that there was an electric switch in the bedroom which he switched on and light came. In respect of PW3 Jane Ndagire, counsel submitted that although she testified that the door was intact, she never said that she saw the key on the inside part of the door.

Finally, counsel for the 1st appellant submitted that as there were serious doubts as to the cogency of the evidence relied upon by the Court of Appeal as corroborative evidence, which evidence was of a general nature, there was no sufficient evidence to establish that the 1st appellant committed the murder and both grounds of appeal should be allowed.

As pointed out earlier, counsel for the 2nd appellant argued the three substantive grounds together. These grounds addressed the manner in which the Court of Appeal reevaluated the evidence at the trial in respect of the two issues of identification and corroboration. Counsel submitted that the Court of Appeal failed to give due consideration to evidence suggesting that the conditions under which the identification of the assailants occurred did not favour correct identification, that

the scene had been tampered with before the arrival of the police, that the single identifying witness was unreliable, and that the circumstantial evidence was weak.

Learned counsel submitted that the conditions were unfavourable for correct identification. He referred to the Court of Appeal's conclusion that though the incident occurred at around 2.30 a.m. PW6 was awake and there was electric light coming from the sitting room and security light over a low wall separating the bedroom from the sitting room.

He argued that the Court of Appeal did not take into account other evidence suggesting that if such light existed at all, it must have been poor or ineffective in aiding visibility. He submitted that this was because there was evidence from PW10 and PW7 to show that despite the existence of that light there was a need for a lantern lamp to be used by the first people who came at the scene and the police who came later and decided to enter the house. He contended that had the Court of Appeal reevaluated that evidence it would have come to the conclusion that the identification done by PW6 in such conditions was unsafe since the possibility of his having been honest but mistaken was not ruled out.

Secondly, learned counsel submitted that the scene of crime was tampered with after the incident happened. He pointed out that according to PW9 the first person to arrive at the scene and actually enter the bedroom was one Bukenya who could not be called as a witness because he was dead by the time of the trial. Counsel pointed out that the 2nd appellant testified that when she came back she found that Bukenya had put on the light and was coming out of the house. Counsel argued that this evidence suggested that at the time the deceased was killed there was no light inside the house as claimed by PW6. Therefore, it was his contention that had the Court of Appeal taken into account this evidence, it would have come to the conclusion that the evidence of identification was unreliable.

Thirdly learned counsel for the 2nd appellant submitted that the identifying witness was unreliable because he told a lie. The witness had stated:

"After cutting my father's head, Susan removed money which was in the trousers of my father and gave it to Patience and she ran away."

Counsel argued that the Court of Appeal did not give sufficient weight to the lie because it considered the allegation ***"trivial to the case."*** He contended that since the witness was of tender age and was proved to have had difficulty in distinguishing between fact and fantasy, the matter should not have been dismissed as trivial since it touched on the credibility of the witness and was entwined with the conditions of identification. It was his submission that the evidence of the identifying witness should have been rejected altogether.

The fourth ground of complaint was that both the trial court and the Court of Appeal relied on weak circumstantial evidence and failed to take into account a number of coexisting circumstances that either weakened or destroyed the inference of guilt. Counsel cited the case of ***Emmanuel Nsubuga vs Uganda*** (1992-1993) HCB 24 where, it was held that it is necessary before drawing any inferences of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The first piece of circumstantial evidence counsel pointed out was the blood stained panga found at the scene. He submitted that the blood stains proved that the panga was the murder weapon, but did not in any way implicate the second appellant as the murderer.

The second criticism was that the Court of Appeal did not take into account the evidence that the first appellant was awakened after she and the deceased had been cut and possibly shocked and confused when she came out of the bedroom and did not see the assailants who had swiftly left the bedroom and sitting room where only the second appellant saw them. It was counsel's submission that the Court of Appeal should have considered the swift occurrence of events as a possible explanation for the failure of the first appellant to see the assailants.

The third piece of circumstantial evidence considered was the manner in which the two appellants were dressed at the time of the incident. Counsel argued that PW6 never described the manner of dress during examination-in-chief or cross-examination but only stated that the first

appellant was naked and the second appellant had a white night dress when the Court visited the ***locus in quo***, after the two appellants had testified about their attire during their defences. Counsel contended that the possibility that PW6 became wiser only after listening to that testimony could not be ruled out.

On the fourth piece of evidence regarding the presence of the key-in- lock on the inside of the door, counsel for the second appellant submitted that there was no evidence adduced as to the whereabouts or movement of the duplicate key which had been given to PW7. He contended that someone could have used that key to gain entry into the house without breaking the door and this possibility was not considered or ruled out. It was also submitted that the possibility that the key was placed on the inside door by the people who first came to the scene like Bukenya could not be ruled out. Counsel further argued that there was no evidence to dispute the second appellant's evidence that she left the key to that door on the side board.

Finally, learned counsel submitted that the Court of Appeal erred in holding that the subsequent conduct of the appellant, namely not to returning to the scene after the incident, keeping silent and not attending the funeral of the deceased, were incapable of any other explanation except that of guilt, because the appellant had explained these circumstances subsequently.

Learned counsel for the respondent based his submission on the two issues, namely the Court of Appeal's consideration of what constituted corroborative evidence, and the issue of identification. On the issue of corroboration, learned counsel agreed with the submissions of both counsel for the appellants as regards what amounts to corroborative evidence, but he disagreed with their assertion that the learned Justices of Appeal did not properly evaluate the evidence on this and other aspects. He contended that there were a host of instances amounting to circumstantial evidence that pointed to the guilt of the appellants which the Court of Appeal correctly considered which could be regarded as corroborating evidence of PW6.

The first instance pointed out by counsel was the panga which PW6 saw the 1st appellant come with that evening and place under the bed. PW6 saw the 1st appellant using the panga to cut the deceased and a blood stained panga was recovered in the doorway, and it was confirmed to be

the murder weapon by the Government Chemist. Counsel contended that since there was no other panga recovered from the house, it follows that the very panga the 1st appellant brought in the house was the murder weapon.

The second instance relied on as circumstantial evidence was the lie by both appellants that there was damage on the door, implying that it was forced open by an outsider. Counsel submitted that the claim that the door was broken was a lie because PW10, PW6 and PW11 all observed the door and found it not broken. He contended that the lie was orchestrated by the appellants to bolster their claim that the deceased was murdered by a person from outside.

Furthermore, counsel argued that since the 2nd appellant confirmed that she had locked the door before retiring to bed and there was no proved breakage on the door, it must have been opened by an insider with a key which was found on the inside of the door.

The third piece of circumstantial evidence according to counsel for the respondent was the inconsistency in the 2nd appellant's account of the woman and man she alleged to have seen at the scene on the material night. Counsel pointed out that according to the evidence of PW3 and PW7, the 2nd appellant told them that she had seen a woman and a man getting out of the house walking away and that the woman resembled Maama Mebo covering herself with a lesu. However, in testimony in Court during examination-in-chief, she claimed that she saw the woman following the man but she did not come out of the house as she was outside it. Yet in cross-examination, the 2nd appellant claimed that after she heard the alarm, she saw a man ran out of the 1st appellant's room, and saw a woman following the man.

The fourth piece of circumstantial evidence was the lie that the 2nd appellant had removed the key after locking the door and placing it on the sideboard. Counsel for the appellant submitted that PW10 and PW11 who were police officers stated that they found the key in the lock on the inside of the door and this evidence was not challenged. PW7 who was the landlady also confirmed the evidence of the police officers and stated that after the first appellant had collected her property from the house, she removed the key from the door and kept it, and later handed it to the police.

The fifth piece of circumstantial evidence counsel for the respondent pointed out was the contradictions in the first appellant's account of what she perceived on the fateful day. She had stated that by the time she was in hospital, she was not aware that her husband was dead, and that she first heard about the death from Salongo John on Central Broadcasting Station (CBS) Radio. But in cross-examination, she stated that before she ran out of the house, she saw his body, and that she saw the cutting which was done with some precision. Yet she also claimed that there was no light in the bedroom which was in total darkness. Counsel for the respondent questioned how she could observe a cutting made with precision if there was total darkness. It was counsel's submission that the evidence of darkness was conceived merely to counter the evidence of PW6 that there was light from the sitting room that enabled him to observe the action of the two appellants. Counsel contended that the above instances were sufficient to furnish ample corroboration to the evidence of PW6 that the two appellants were the killers of the deceased.

On the issue of identification, learned counsel for the respondent submitted that there were conditions which favoured correct identification. These were the existence of light in the bedroom coming from the sitting room, and outside, which enabled PW6 who was sleeping in the same room as the deceased and the 1st appellant to observe the events of that night, without any possibility of error.

This appeal raises three fundamental questions in a criminal trial namely, identification by a single witness, unsworn evidence of a child of tender age and the nature of corroboration required to support a conviction where the first two questions arise. The law relating to identification by a single witness is that subject to certain well known exceptions, a fact may be proved by a single witness, and there is generally no requirement for a plurality of witnesses. However where a conviction is based on the evidence of a single witness, the Court is required to exercise extreme caution in examining the evidence of a single witness to ensure that the conditions favouring correct identification were present, and that there was no possibility of error on the part of the witness. It is acknowledged that a witness may be honest and yet mistaken.

The law on identification by a single witness was ably stated by the Court of Appeal for East Africa in the cases of ***Roria vs Republic*** (1967) E.A. 583 and ***Abdala Bin Wendo & Another V.R*** (1953) 20 EACA 166, which authorities have been consistently followed by the Courts in this country.

In ***Roria vs Republic*** (supra) the Court of Appeal recognized the possibility of convicting innocent people based on the question of identify and observed that the danger is greater when the only evidence against the accused person is identification by one witness. The Court stated that although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of the Court to satisfy itself that in all the circumstances it is safe to act on such identification. The Court then went on to say,

> ***"In Abdala Bin Wendo and Another V R (supra) this Court reversed the finding of the trial Judge on a question of identification and said this at page 168:***
>
> > ***"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidences whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

In the present case the learned Justices of the Court of Appeal addressed themselves to the issue of identification by a single witness and found that the learned trial Judge was alive to the law regarding the evidence of a single identifying witness. They accepted the findings of the trial Judge that the conditions were favourable for correct identification. These conditions were that

there was sufficient light in the bedroom and PW6 knew both appellants well, PW6 took some considerable time observing what they were doing and demonstrated the same before the trial Judge at the ***locus in quo.***

In this Court learned counsel for the appellants submitted that the finding that there was sufficient light in the bedroom was not justified since those who came to answer the alarm had to light a lantern to enter the bedroom. In our view this submission lacks merit in view of the fact that both appellants accepted that there was light in the sitting room and also from the security lights outside which according to PW6 enabled him to observe the participation of the two appellants in the crime. According to the witness, he saw the 1st appellant cutting his father's neck while the 2nd appellant was holding the legs of the deceased.

It was argued that PW6 being a young boy of three years must have been asleep at 2.30 a.m and, therefore, unable to see the events he claimed to have witnessed. However PW6 stood firm in cross-examination on this issue and stated that he had no sleep on that night. It may well be that the assailants believed the child to be asleep at that time. Unfortunately for the appellants he was awake and witnessed the well executed murder of his father by them. His testimony shows that he was a very intelligent and impressive witness.

The tendency of children to tell the truth and not to have capacity to sustain perjury has been expounded in ***Sarkar's Law of Evidence***, (12th end 1971) at page 1291 where the authors state:

> ***"Sir William Blackstone appears to have thought that less credit was due to the testimony of a child than that of an adult but reason and experience scarcely warrant this opinion. In childhood the facilities of observation and memory are usually more active than in after life, while motive for falsehood are then less numerous and powerful. The experience and artlessness which, in a great measure must accompany tender years, render a child incapable of sustaining consistent perjury, while the same causes operate powerfully in preventing his true testimony from being shaken by the adroitness of counsel. Not comprehending the draft of the questions put to him in cross-examination, his only course is to answer them according to fact. Thus, if he speaks falsely, he is most inevitably detected; but if he is a witness of truth, he avoids that imputation of dishonest, which sometimes attaches to older witnesses, who though substantially telling the truth are apt to throw discredit on their testimony by a too anxious desire to reconcile every apparent inconsistency."***

In the present case, we are satisfied like the two lower Courts that PW6 was a witness of truth, and was not mistaken in his identification of the appellants nor was he couched to implicate the appellants.

We therefore find no merit in the complaints relating to the identification of the two appellants by PW6, and the grounds based on this complaint must accordingly fail.

The next issue relates to the requirement for corroboration of the evidence of a child of tender years. PW6 who was the only eyewitness was at the time he testified 6 to 7 years old. He gave unsworn evidence. The law relating to such evidence is stated in Section 40 (3) of the Trial on Indictments Act, (Cap. 23) which provides as follows:

> ***"Where in any proceedings any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his or her evidence may be received though not given upon oath, if in the opinion of the Court he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her."***

The conviction in this case cannot therefore stand as a matter of law unless there was material evidence corroborating the evidence of PW6.

Why is there such a requirement for corroboration of evidence of children of tender age? A child of tender age has been defined as any child below the age of 14 years. See ***Kibangeny vs R*** (1959) EA 92. While discussing the evidence of children of tender years, the authors of ***Sarkar on the Law of Evidence***, (supra) state at page 1291 that although children are not prone to telling lies they can be easily tutored or threatened and despite the fact that they possess un-sophicated minds and have hardly any motive to deceive, their evidence should be received with caution. The authors observe,

> ***"But they are not difficult to handle as witnesses of tender age very soon break down in cross-examination when lying. The great danger in regard to child witness is that on account of their tender age and immature faculty it is impossible to expect any very precise narrative of what they actually witness and when leading questions are put to their mouth in cross-examination they are liable to give affirmative answers without understanding exactly what they were questioned about."***

The question that arises then is what is the corroboration required to support the unsworn evidence of a child of tender years? The term corroboration was defined in the case of ***R V Baskeville*** (supra) where the Court stated:

> ***"We hold that the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it."***

The decision in ***R V Baskeville*** (supra) was approved in the case of ***R V Ronald Ishwerlal Purchat*** (1942) 9 EACA 58, when the Court of Appeal for Eastern Africa observed,

> ***"It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and whilst the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime. Corroboration may be found in the conduct of the accused."***

Corroboration in part corroborates the whole. Therefore, if a material part of the child's evidence is corroborated, not only may that part of his evidence be relied upon but also that part which is not corroborated, the corroboration of a material part being a guarantee of the truth of this evidence as a whole: See ***R V Tarbhai Mohamedbhai*** (1943) 10 EACA 60.

In ***Bogere Moses & Another vs Uganda*** Criminal Appeal No 1 of 1997, (unreported), while discussing the nature of corroboration, required for a single identifying witness, this Court stated,

> ***"We have to point out that the supporting evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences."***

The ***Bogere Case*** is distinguishable from the instant case where corroboration of a unsworn evidence of a child is required as a matter of law.

In ***Mande vs Republic*** (1965) EA. 193, the Court of Appeal for East Africa considered the nature of corroboration required to support the child's evidence under Section 152 of the Criminal Code of Tanganyika, and said,

> ***"In our opinion therefore all that seems to be required under S.152 (3) of the Criminal Procedure Code is that the corroboration should be sufficient to afford some sort of independent and unimpeachable evidence to show that the child is speaking the truth with regard to the particular accused person whom he seeks to implicate. The trial Judge should tell the assessors that the corroboration required is some "material evidence" tending to connect the accused with the offence."***

In considering the issue of corroboration of PW6's evidence, the learned Justices of Appeal stated,

> ***"The learned trial Judge was alive to the need for corroboration of the evidence of a child of tender age as a requirement of the law. There was also the direct evidence of PW3, PW4, PW7, PW9 and PW10 that the door to the room was intact. They saw a key on the lock from inside the room. That piece of evidence corroborates PW6 who said that nobody from outside came into the room at the material time. The 1st appellant also admitted that she rushed out naked and that it was common for her and the husband to sleep naked. The body of the deceased was also found naked at the scene. At the locus in quo, PW6 demonstrated to Court the exact part of the room he was sleeping and in what position he was sleeping while observing both appellants. He also showed Court the position in which each appellant was when they were executing that unlawful act. With all that direct evidence in mind, we think that the trial Judge was right to hold that the killing of the deceased was an inside job corroborating the evidence of PW6 that both appellants, the only adult persons in the house, did that job."***

Jane Ndagire (PW3) D/Sgt Ojaba Robert, (PW4) Grace Musoke (PW7) Jackson Musoke (PW9) AIP Dhabangi Christopher (PW10) and SPC Katwesigye Godfrey (PW11) are all witnesses who visited the scene of crime after the incident. Their evidence was to the effect that the door to the room was not tampered with and there was a key on the lock from inside of the room. The first

appellant stated that the lock was functioning normally and the 2nd appellant confirmed that she had locked the door before going to bed.

In our view the learned Justices of Appeal were justified on the above evidence in confirming the finding of the trial Judge that there was no breaking into the house and that the murder of the deceased was an inside job. There was no evidence to suggest that a duplicate key was used to enter the house or that somebody from outside had placed the key into the lock of the house after the incident. Leaving the key in the lock seems to be consistent with the assailants having left the house in a hurry. In the present case the two appellants seem to have rushed out of the house as soon as the incident happened.

There was a claim by the 2nd appellant that she had seen a man running away from the scene and being followed by a woman, but the 1st appellant stated that she did not see anyone in the room nor did she hear any noise or footsteps in the room. In our view the learned Justices of Appeal were justified in refusing to accept the claim of the 2nd appellant which was full of contradictions, regarding whether she had seen a man and woman who resembled Maama Mebo getting out of the house or just walking away outside the house. If anybody had entered the house or indeed the bedroom where the 1st appellant was sleeping with the deceased and cut the deceased with a panga so precisely, the 1st appellant would not have failed to see him and to have said so in her evidence. Therefore the 2nd appellant must have told a lie to exonerate herself from the part she played in the murder of the deceased. We are therefore unable to fault the concurrent findings of the two lower Courts that the murder of the deceased was an inside job.

The learned Justices of Appeal also found corroboration in the panga which was found at the scene of crime. PW6 testified that he saw the 1st appellant cutting the neck of his father with a panga. The panga was blood stained. On examination the blood sample on the blade of the panga it was found to be of the same blood group, as the deceased's which was blood group 'O.' According to PW6, the 1st appellant had brought the panga into the house and hidden it under the bed on the same day. In her evidence the 1st appellant stated that the deceased had been away for two days and she returned in the evening together with him on the fateful day. Therefore the 1st appellant had opportunity to secure the murder weapon and keep it safe as the deceased was away.

Although the evidence of the panga would have been more incriminating if the 1st appellant's finger prints had been found on it, nevertheless the fact that it was found at the scene and had blood stains of the deceased's group confirms that it was the murder weapon and corroborates the evidence of PW6 that it was used in the murder of the deceased.

The 1st appellant herself stated that the cutting of the decease's neck was done with precision which tends to corroborate the evidence of PW6 that the deceased was cut with a panga. We do not find the fact that the chain of evidence regarding the movement of the panga to the Police was broken adversely affecting the value of this evidence, since the fact that a blood stained panga was found at the scene immediately after the incident was not disputed, thus confirming that it was the murder weapon.

The learned Justices of Appeal considered the subsequent conduct of the two appellants as constituting corroboration. They stated,

> ***"After the incident both appellants rushed out of the bedroom with great fear and panic while raising alarm. Before their alarm was answered both of them had run away from the scene. In fact the 1st appellant ran away naked. Both appellants could not explain what had happened to the deceased to the people who eventually answered the alarm. It is in evidence that the 1st appellant kept quiet while the 2nd was crying all the time. According to PW3, the 2nd appellant did not attend the burial of the deceased. After one month, she was arrested at Rugaga Village in Isingiro. We think that the conduct of both appellants before, during and after the incident was not consistent with their innocence."***

However, the corroborative evidence of conduct is, in our view, the subsequent conduct of the two appellants. The appellants ran out of the house naked or dressed in night dress. This conduct is consistent with panic and confusion after participating in a heinous crime. It is not consistent with being attacked and running out of the house naked following the assailants to

raise alarm. Secondly the appellants seem to have kept quiet when asked by those who answered the alarm which tends to show that they did not want to report immediately what they had done and instead claimed that they had been attacked. Yet the 1st appellant later claimed she had run away leaving the deceased lying down with a cut wound. They even left the children in the house.

We are, therefore, satisfied that the learned Justices of Appeal were justified in finding that there was sufficient corroboration of the evidence of PW6 to support the conviction of the two appellants for the murder of the deceased. Accordingly the grounds of appeal of both appellants on the issue of corroboration have no merit and must fail.

The 4th ground of appeal by the 2nd appellant complains that the learned Justices of Appeal erred when they failed to direct themselves regarding the legality and propriety of sentence of death in the circumstances of the case. It is clear that when the Court of Appeal determined this appeal and confirmed the convictions and sentences on 5th March 2004, the Constitutional Court had not decided Constitutional Petition No.6 of 2003 ***Susan Kigula and 416 vs. The Attorney General,*** which decided that the various laws of Uganda that prescribe mandatory death sentences are inconsistent with Articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution. The affected provisions included section 189 of the Penal Code Act (Cap.120) which imposes a mandatory death sentence for murder, the offence for which both appellants were convicted.

The Constitutional Petition was determined on 5th June 2005 exactly three months after the appeal in the present case was decided by the Court of Appeal. It was therefore practically impossible for the Court of Appeal to follow the decision in the Constitutional Petition. Consequently, we are unable to hold that the learned Justices of Appeal erred in failing to consider the legality and propriety of the death sentence which was still under the consideration of the Constitutional Court. The learned Justices of Appeal cannot be faulted for imposing on the appellants the mandatory death sentence in accordance with the prevailing law.

However, in view of our decision in ***Philip Ndahura v Uganda***, Criminal Appeal No.16 of 2004, we suspend the sentence of death imposed upon the two appellants until the Constitutional Appeal No.3 of 2006 is determined.

In the result the appeal against the conviction by the appellants is dismissed. The sentence of death imposed upon the appellants is suspended pending the determination of Constitutional Appeal No.3 of 2006.

Dated at Mengo this 15th of October 2008.

B J Odoki
CHIEF JUSTICE

J W N Tsekooko
JUSTICE OF SUPREME COURT

J N Mulenga
JUSTICE OF SUPREME COURT

G W Kanyeihamba
JUSTICE OF SUPREME COURT

Bart M Katureebe
JUSTICE OF SUPREME COURT