

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: WAMBUI, C.J., TSEKOOKO, MULENGA, KANYEIHAMBA,
KIKONYOGO, JJSC.

CRIMINAL APPEAL NO.17/1999

BETWEEN

TUMUHAIRWE MOSES APPELLANT

VERSUS

UGANDA RESPONDENT

*(Appeal from the decision of the Court of Appeal
at Kampala before (Justices Mpagi-Bahigine,
Berko, Kitumba, JJA) dated 23rd March, 1999
in Criminal Appeal No. 57 of 1998)*

JUDGMENT OF THE COURT.

Tumuhairwe Moses herein after to be referred to as the appellant was indicted for murder contrary to Sections 183 and 184 of the Penal Code Act. He was convicted and sentenced to death on 31.8.98 by the High Court sitting at Fort Portal. The appellant's appeal to the Court of Appeal was dismissed on 23rd March 1999. Hence, the appeal to this Court.

The prosecution case as accepted by both the High Court and Court of Appeal was briefly that, the appellant was the husband of Aida Businge Abwooli hereinafter to be called the deceased. The appellant and the deceased lived at Hamukungu fishing

village in Kasese District in a rented room at the back of a small shop operated by the deceased.

On 3rd day April 1994 at about 9 p.m. the deceased was in her shop when the appellant poured paraffin on her and set her ablaze. She was seriously burnt. She made an alarm which was answered by many people including P.W. 2, Hadija Kabagenyi, the land lady. The deceased told Kabagenyi, P.W. 2, that she had been burnt with paraffin. One Ndahurira Eryeza, P.W. 3, a Community Health Worker was called to assist her. He gave her some first aid but she had been severely burnt and he therefore advised the police to take her to hospital which was done later.

When Bazara Wilson, P.W. 4, the L.C. Vice Chairman visited the scene the deceased told him that the appellant had burnt her. Ernest Kule, P.W. 5, who went to the scene in response to the cries from the deceased's home found the appellant at the scene. The appellant confessed to him (Kule, P.W. 5), that he had burnt his wife, the deceased, because she had refused him sex. Kule, P.W. 5 helped the L.C. officials and the police to arrest the appellant who was later taken into police custody.

The deceased was taken and admitted to Kilembe Hospital the following morning of 4/4/94. She was treated by Dr. Kato. However, she died on 12.4.94 due to tetanus which was consequent to the burns.

The appellant's defence was a complete denial. He said that he did not torch the deceased as alleged by the prosecution witnesses. He set up an alibi. He was on the lake fishing during the period the incident took place. He returned the following morning only to be arrested by the police. Both gentlemen assessors and the learned trial judge rejected the defence of alibi. In agreement with the assessors the learned trial judge found the appellant guilty as charged and sentenced him to death.

Aggrieved by the Judgment of the High Court the appellant appealed to the Court of Appeal which dismissed the appeal upheld the conviction and confirmed the death sentence.

The appellant's appeal to this Court was originally based on the sole ground that :-

"The learned Justices of the Court of Appeal erred in law and fact when they rejected the defence alibi".

However, during the hearing of the appeal, with leave of this Court, Mrs Eva Kawuma, the learned counsel for the appellant amended the memorandum of appeal. She added a second ground which she chose to argue as the first ground. This ground was formulated as follows:-

"The learned Justices of Appeal erred in law by accepting the appellant's confessions in the circumstances of this case".

In her submissions counsel conceded that the deceased died from the infection of tetanus consequent to the burns. There is no doubt from the circumstantial evidence adduced by the prosecution and relied on by both the High Court and Court of Appeal the deceased was set ablaze. However, it was not done by the appellant but by some other person. Counsel's particular quarrel was with the alleged confessions made by the appellant to Ndahurira, P.W. 3 and Kule, P.W. 5. To her they were inadmissible as they were allegedly made in the presence of both the L.C. officials and the police. Their admission contravened the provisions of S.24 of The Evidence Act which reads as follows:-

1. No confession made by a person whilst he is in the custody of a Police Officer shall be proved against any such person unless he made it in the immediate presence of

a) a Police Officer of or above the rank of Assistant Inspector

or

b) a Magistrate

Further, Mrs. Kawuma submitted that the learned Justices of Appeal should not have relied on a dying declaration made to Bazara Wilson, P.W. 4 without corroboration.

Counsel abandoned the second ground concerning the defence of alibi. She concluded by asking the Court to give the appellant benefit of doubt by allowing the appeal, quashing the conviction and setting aside the death sentence.

In reply, Mr. Wagona Vincent, Senior State Attorney, supported both the conviction and sentence. As far as he was concerned the confessions made to Ndahurira, P.W. 3 and Kule, P.W. 5, were made at different times and in different circumstances. They should be treated differently. He submitted that **Section 24 of The Evidence Act** was not applicable to the confession made to Ernest Kule. He further pointed out that it was not even challenged in cross-examination.

With regard to the need for corroboration of a dying declaration it was his submission that this was not a legal requirement. It was a matter of practice. In any case there was sufficient corroboration in the form of the confession to P.W. 5, Kule. He submitted that there was sufficient evidence to implicate the appellant with the commission of the offence. He asked the Court to dismiss the appeal.

Upon listening to the submissions of Counsel for the appellant we are of the view that, counsel's argument with regard to the confession made to P.W. 3, Ndahurira Eryeza, is valid. When the appellant made the alleged confession to him, he (the appellant) was already in the custody of the police and L.C. officials. In examination-in-chief Ndahurira, P.W. 3, stated inter alia that he found the police and L.C. officials already at the scene. In cross examination he replied that:

With regard to the dying declaration it is true dying declarations must always be received with caution because the test of cross examination may be wanting and the particulars of the violence may have occurred in circumstances of confusion and surprise. Generally speaking it is very unsafe to base a conviction solely on the dying declaration of a deceased person unless there is satisfactory corroboration.

Kule went on to say that he assisted L.C. officials to arrest the appellant. This piece of evidence was not challenged in cross examination. That confession was voluntarily made and was believed as true. Both the High Court and Court of Appeal were justified in relying on it.

"He (the appellant) told me he had set fire on his wife because she had refused him sex."

Further stated that:-
statement to him before he was arrested and taken into custody by the police. He made to Ernest Kule, P.W. 5. Kule, P.W. 5, testified that the appellant made the provisions of Section 24 of The Evidence Act are not applicable to the statement On the other hand, as it was rightly pointed out by Mr. Wagona, Senior State Attorney

Clearly this confession is inadmissible. With respect, both the High Court and Court of Appeal should not have based their decisions on it. See No.7770 P.C. Kikwamba vs. Uganda Criminal Appeal No. 16/91 at p.4 (unreported).

"When I went to the scene accused was in custody of the Police and L.C.'s outside the house (muzigos). People were asking Musa why he had set fire on his wife. I also asked the same question and he said she denied me sex".

However, as it was rightly pointed out by Mr. Wagona, it is not a rule of law that in order to support a conviction based on a dying declaration there must be corroboration as there may be circumstances which go to show that the deceased could not have been mistaken. It is only a rule of practice.

See *Okale vs. Republic* 1965 E.A. 555; *Tuwamoi vs. Uganda* 1976 E.A. 84; *Tomasi Omukono & others vs. Uganda* 1977 HCB 61 *Kalisiiti Ssebunywawo vs. Uganda Criminal Appeal No. 7 of 1987* (unreported), *Tindigwihura vs. Uganda Criminal Appeal No 9 of 1987* (unreported).

In the present case there is nothing to suggest that the deceased was mistaken about her assailant. The dying declaration complained of by counsel in this case, must be true taking into account the circumstantial evidence before Court. There was ample evidence before Court to implicate the appellant with the murder of the deceased.

For the aforesaid reasons we are unable to fault the decision of the Court of Appeal to uphold the judgment of the High Court and confirm the death sentence. The ground of appeal relied on by the appellant must fail.

In the result the appellant's appeal to this Court is, dismissed.

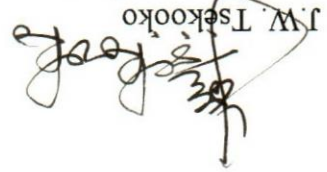
Delivered at Mengo this 9th day of March, 2000.

S. W. Wambuzi
Chief Justice



Justice of the Supreme Court

J. W. Tsekooko



Justice of the Supreme Court
L.E.M. Mukasa Kikonyogo

Justice of the Supreme Court
G.W. Kanyehamba

Justice of the Supreme Court
J.N. Mulenga