

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

5 **CORAM: HON. JUSTICE S.G. ENGWAU, JA.**
HON. JUSTICE A. TWINOMUJUNI, JA.
HON. JUSTICE C.N.B KITUMBA, JA.

CRIMINAL APPEAL No.62 OF 2008

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NKULA MOSES ::::::::::::::: APPELLANT

VERSUS

15 **UGANDA :::::::::::::::RESPONDENT**

*[Appeal from the conviction and sentence by the High Court of Uganda sitting at Kampala
(C.A. Okello J) in Criminal Session Case No. 153 of 2007 dated 4/6/2008)*

JUDGEMENT OF THE COURT

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This is an appeal against the conviction for the offence of manslaughter contrary to sections 189 and 190 of the Penal Code Act.

The following is the back ground to the appeal. Nkula Moses, hereinafter to be referred to as the appellant, owned a shop at Kate Falawo Zone, Kawempe Division, Kampala District.
25 Kasumba Robert, now deceased, was his shop attendant. On 3rd February 2007 the deceased, left his home and went to the appellant's shop to work at around 11.00 am. The deceased left his sister Fiona Namatovu, Pw3, at home. The deceased returned home at around 3.00 pm with a swollen head and was crying. When Pw3 asked him what had happened, he told her that the appellant had severely assaulted him on allegation that he had stolen from his shop
30 merchandise worth Shs. 200,000/-. The deceased informed his sister that because of the severe beating, he had been forced into signing an agreement in which he admitted the stealing. He had undertaken to pay the value of the goods and had made part payment of Shs.

12,000/-. Pw3 through a neighbour, Nalongo Ssebowa, informed their mother Sylvia Kasozi (Pw4) of the assault and requested her to return home.

When Pw4 returned home she found her son in a serious condition. The deceased repeated to his mother the story of how he had been assaulted by the appellant. Pw4 took the deceased to
5 Dr. Ntege's clinic at Bwaise and also reported the matter to the police. The deceased passed away at 3.00 a.m. Dr. Isyagi, Pw1, performed a post mortem on the body of the deceased, which was admitted in evidence under section 66 of the Trial on Indictment Act. He found on the body a number of internal and external injuries. The cause of death was increased intracranial pressure secondary to intracranial hemorrhage.

10 In his defence the appellant totally denied of the offence. He also denied ever employing the deceased. He stated that he had allowed the deceased to hang around near his shop to carry parcels for customers and get tips. He stated that on the day in question the deceased had attempted to steal merchandise from his shop. When the merchandise fell down and alerted the appellant the deceased ran away and in the process hit his head on the metal container of
15 the shop.

The learned trial judge rejected the defence. She preferred the prosecution case. However, she found that the appellant did not have malice aforethought to murder the deceased. She, therefore, acquitted him of murder, convicted him of minor cognate offence of manslaughter and sentenced him to five years imprisonment.

20 Dissatisfied with the decision of the learned trial judge, the appellant filed his amended memorandum of appeal in this court on the 26th February 2009. The amended memorandum of appeal contains the following two grounds; -

- 25 **1. That the learned trial judge erred in law in relying on the dying declaration without wholly evaluating corroborating evidence and the circumstances under which it was made.**
- 2. The learned trial judge erred in law in convicting the appellant for manslaughter in the absence of evidence on record to connect him with the offence.**

He prayed this court to allow the appeal, quash the conviction and set aside the sentence.

30 During the hearing of the appeal, learned counsel, Mr. Edward Mugogo appeared for the appellant and learned state attorney, Ms Josephine Namatovu represented the respondent.

Counsel for both parties argued the two grounds jointly.

In this judgment we shall handle the grounds of appeal in a similar manner.

Appellant's counsel contended that the learned trial judge erred in law when he convicted the appellant on the uncorroborated dying declaration. He urged that the judge did not take into account the circumstances under which the dying declaration was made. He submitted that according to the evidence as contained in the dying declaration the deceased was hit by the appellant with a mingling stick. However, the injuries that were found on the body by the doctor who performed the post mortem examination were not consistent with a mingling stick having been used. Counsel contended that the deceased was assaulted during the day but there was no eye witness. He submitted that the trial judge did not properly evaluate the evidence and that if she had done so she would have acquitted the appellant.

In support of his submissions, he relied on the following authorities. **Simon Musoke v Republic [1958] EA 185. Bogere Charles vs Uganda SCA No. 10 of 1999.**

The learned state attorney opposed the appeal and supported the decision of the learned trial judge. She contended that the deceased made the dying declaration to Pw3, Pw4 and to the medical staff at Dr. Ntege's clinic in the presence of his mother Pw4. She argued that the dying declaration was corroborated by the appellant's admission to the deceased's mother that he had assaulted the deceased but would not pay for his treatment. She submitted that the judge properly directed herself and the assessors on the law and the evidence before convicting the appellant on the dying declaration. She urged further that nobody witnessed the assault on the deceased because he was locked inside the shop.

We have the duty as the first appellate court to re-appraise the evidence and draw inferences of fact, **See Rule 30 (1) (a) of The Judicature (Court of Appeal Rules), Directions.** We have the duty to re-hear the case and consider all materials before the trial judge taking into account that we neither saw nor heard the witnesses.

In the appeal before us the issue is whether the learned trial judge properly evaluated the evidence and came to the right conclusion that the deceased died from injuries that were inflicted on him by the appellant and were not accidentally sustained. The learned trial judge found that there were serious injuries on the body of the deceased. She stated thus in her judgment; -

'From the evidence before this court, it is clear that Robert Kasumba is dead. The only points of contention are whether he died from injuries

inflicted during a deliberate vicious assault carried out with the intention or with full knowledge that it will end in his death.

Or did the death arise from an injury accidentally sustained by the deceased.

5 *A closer examination of the post-mortem report shows that the deceased sustained more than one injury on the head as well as minor abrasion on the right fore-arm. The larger abrasion was on the left side of the head measuring 4.5 x 0.3 cm that was surrounded by a swelling measuring 6 x 4 cm.*

10 *The more serious injuries however, were the contusion on the left aspect of the skull and haematoma in the right temporal region and in sub arachnoid membrane. It was this latter bleeding that pushed (compression) right side of the brain creating intracranial pressure and death. These injuries are extensive and serious. It is unlikely that one*
15 *accidental knock on the head could have caused it. The injuries are most consistent with an assault. On the evidence, I am convinced that the injuries were not sustained in an accidental fall but in an atrauma-an assault. Death was due to unlawful act'.(sic)*

The judge proceeded to examine the evidence of the dying declaration, which was made to
20 PW3 and Pw4. In that declaration the deceased identified the appellant as his assailant. Relying on section **30 (a) of the Evidence Act** and **Tindigwihure vs Uganda Criminal Appeal No. 9 of 1989**, she held that when the deceased made a declaration he expected to die from the injuries sustained and it did not matter that he lived from 3.00 pm to 3.00 am when he passed away. The judge also found that the injuries were sustained at the appellant's shop.

25 This court finds that when the deceased made the dying declaration to Pw3, Pw4 and to the staff of the clinic at Bwaise he was at that time conscious and able to talk. From the evidence on record it is clear that the deceased appreciated what he was saying.

The appellant by his own admission to Pw4 stated that he assaulted the deceased but would not pay for his medical treatment. This to us is corroboration of the dying declaration.

30 The argument by appellant counsel that the evidence of the dying declaration should not have been believed because there was no one who witnessed the assault whereas the offence was committed during the day is not tenable. The deceased stated to his sister, Pw3 and his

mother, Pw4 that the appellant gagged his mouth, increased the volume of the radio and assaulted him while his wife was holding the door. In those circumstances it was not possible to have eyewitnesses to the assault.

5 It is our considered opinion that all the evidence on record irresistibly point to the fact that it is the appellant who unlawfully assaulted the deceased. In consequence of the assault, the deceased had serious injuries inflicted on him, which caused his death.

This appeal is devoid of merit and is accordingly dismissed.

Dated this 17th day of August 2009.

S.G. ENGWAU

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JUSTICE OF APPEAL

A.TWINOMUJUNI

JUSTICE OF APPEAL

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C.N.B. KITUMBA

JUSTICE OF APPEAL

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