THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORUM : ODOKI, *CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJSC.)*

CRIMINAL APPEAL NO. 44 OF 2000

BETWEEN

1. **KOOKY SHARMA) :::::::::::::::::::::::::::::::::::: APPELLANT**
2. **PALINDER KUMAR)**

VERSUS

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

[APPEAL from the decision of the Court of Appeal, at Kampala (MANYINDO DCJ, MPAGI-BAHIGEINE AND BERKO, JJA.) dated 19th SEPTEMBER 2000 in COURT OF APPEAL CRIMINAL APPEAL NO. 7 of 2000]

JUDGMENT OP THE COURT: This is an appeal against the decision of the Court of Appeal which confirmed the conviction by the High Court of the appellants for the murder of Renu Joshi, the wife of the first appellant.

The first appellant, Kooky Shamar (A1), is the elder brother of the second appellant, **Davinder** Kumar (A2). The deceased, Renu Joshi, was the wife of the. first appellant with whom he had two children. The first appellant lived with his deceased wife and the two children in a rented house, at Plot 43/45 Martin Road, Old Kampala. In the same house lived their cook called Raju and a lame relative of the first appellant called Bitu Kumar. The first appellant owned a shop across the same road at Plot 40A Martin Road. The second appellant assisted the first appellant in running that shop.

Kooky's residence was part of a two family building. The other part was occupied by the family of Mr. Rurebwa Deo Twine (PW2) who lived with his wife Margaret

Twine (PW14) and his children including his daughter Busingye Lilian Twine (PWl). The residences of the two families were separated by an inner common partition wall.

On 23/12/1997, the two appellants had a busy day at their shop selling commodities. The first appellant left home at 9.00 a.m. and did not return home for lunch till 2.30 p.m. At home he found his deceased wife and his cook Raju. The first appellant was served lunch by Raju. At about 3.00 p.m., he returned to the shop and continued selling shop goods as well as supervising construction of flats on the top of the shop building.

It was the case for the prosecution that the two appellants returned to the residence in the course of the night after closing the shop probably soon after midnight. According to Lilian Busingye (PWl) at night she heard two male voices and cries of a female from Kooky's residence. She also heard from the same house at the same time banging or beating. The crying of the female voice went on for a long time and when the cries decreased, Lilian resumed her sleep.

During the same night, Mr. Rurebwa Twine heard quarrels and a female crying and so he woke up his wife, Margaret Twine (PW14) saying "your friend is being beaten". Margaret Twine woke up and also heard the deceased crying saying "mummy" "mummy". At the same time Margaret Twine heard and recognized the voices of the two appellants from the same house. She also heard from the same house bangs followed by cries of the deceased. She went back to sleep after these noises stopped. Next morning on 24/12/1997 she saw a mattress put up in the corridor of the residence of Kooky leaning against and covering a window. This was her first time to see a mattress covering a window in this manner. She also saw a mechanic in the compound where there were two vehicles. That morning, Margaret went to attend to her drug shop business but returned home after learning of the murder of the deceased.

Later the same morning of 24/12/1997, Abdi Jamal (PW3), an LC1 Chairman of the area learnt of the death of the deceased. He went to Kooky's house where he found Kooky, who was planning to have the body of the deceased cremated. Kooky claimed that the deceased had died of malaria. Jamal looked at the deceased's body which was dressed up to the writs and ankles except for the face.

Kooky wanted to take the body of the deceased for cremation. As Jamal was not satisfied with the cause of the death of the deceased, Jamal prevented Kooky from taking the body for quick and hurried cremation. Jamal got some information as a result of which he called the police from the nearby Old Kampala police station. Police officers examined the body and upon noticing bruises on the body, treated the case as murder. This was about 11.00 a.m. The policemen and Jamal made a quick search of Kooky's residence. Raju, the cook, was found lying in bed, unconscious, with broken limbs and a swollen mouth. Police took him to Nsambya Hospital where he was admitted. When the police returned to Nsambya Hospital two days latter they could not trace Raju there. Raju has never been seen or heard of again ever since.

On the 24/12/1997, at 1.00 p.m., at the request of the police, Dr. Martin Kalyemenya (PW10), a pathologist at Mulago Hospital, carried out an autopsy on the body of the deceased. Externally, he observed multiple bruises which he described as burns caused by electric action or acid. When he opened up the body, he noticed that the liver and the spleen were coloured slightly differently from what they should normally be. So he removed a piece of liver, the spleen, a kidney and a piece of brain and sent them to a Government Chemist, Mr. Emmanuel Nsubuga, (PW13) for chemical analysis. This doctor formed the opinion that the cause of death was:

> **"shock due to electrical burns with blunt injury. Poison could not be ruled out".**

Mr. Emmanuel Nsubuga (PW13) the Senior Government Chemist, carried out toxicological analysis on the parts of the body which were sent to him by Dr. Kalyemenya. He found some amounts of acaricide poison in all those organs.

It appears there was general dissatisfaction in respect of the opinion of Dr. Kalyemenya about the cause of the death of the deceased. Consequently, on 29/12/1997, another autopsy was carried out by Dr. Wabinga H. R, who was the Head of the Pathology Department of the Medical School at Mulago. He also saw the multiple bruises and the electric burns seen earlier by Dr. Kalyemenya. Dr. Wabinga's opinion was that the cause of death was shock due to the punched out

abrasions which, like Dr. Kalyemenya, he observed on the lateral areas of both upper and lower limbs accompanied by multipde ecchymosis.

It was the case for the prosecution that the two appellants murdered the deceased by means of electric shocks.

In their defence during the trial, the appellants made lengthy unsworn statements during which they were fully examined by their respective counsel which is contrary to normal practice. We will revert to this at the end of this judgment. Be that as it may, according to each appellant, on 23/12/1997 from the morning, the two sold goods in their shop. The first appellant (Kooky) also supervised construction of flats on top of the shop. He returned home at 2.30 p.m. where Raju, the cook, served lunch to him. The deceased wife was present and apparently there was nothing unusual in the home. After lunch the first appellant returned to the shop and resumed supervision in the shop. He was assisted by the 2nd Appellant together with Babu and Kumar Palinder (DW1). This went on up to about 9.30 p.m. when the second appellant, Kumar Palinder (DW1), Babu and Bitu, the lame man, went home (Al's residence) to have their supper before returning to the shop at about 10.00 p.m. At that time Raju the cook took food to the first appellant who ate it from the shop. Up to this point there is no evidence about any thing being wrong with the deceased or with Raju.

According to their statements, appellants and their assistants continued with the sales till after midnight when the first appellant went home to sleep. The 2nd appellant together with Palinder Kumar and Babu retired in their room at the rear of the shop. That night there was no UEB electricity along the whole of Martin Road area including the shop and the residence. The first appellant claimed that when he reached home, he found Bitu and the children sleeping in their own bedroom. The first appellant entered his bedroom where he found the deceased seated on the bed with hands folded and held on the stomach. She said she had pain in the stomach. She refused A1's suggestion that she should visit a doctor. According to A1 the deceased went to the toilet twice but still she did not want to visit a doctor. This went on for twenty minutes. Nothing suggests that the first appellant called for a doctor. Because he was tired, the first appellant chose to enter his bed to sleep only to be awakened at 4.00 a.m. by the cries of the

deceased. She was sweating. The first appellant then called Raju the cook four times but Raju could not respond. So A1 phoned A2 whom he sent to fetch a doctor. A2 fetched Dr. Prakash Patel (PW5). Meantime A1 also phoned Doctor Shah. Dr. Patel arrived at the scene first at about 5.00 a.m., and examined the deceased and pronounced her dead. According to A1, he and the two doctors (Patel and Shah) saw a packet of metecalfine tablets. A1 claimed that he asked A2 to inform the police and the LC1 Chairman, among others, about the death of the deceased. He also phoned Raju Taylor (PW4), the Chairman of the Indian Community in Uganda. Taylor came to the scene and made arrangements to get a priest so as to prepare to cremate the body at 11.00 a.m. At that time, as the body was due to be taken for cremation, police arrived at the scene and eventually took A1 and A2 to Old Kampla Police Station. As they were going with police, people who had gathered in A1's home shouted:-

"Kooky had killed his wife".

A1 denied killing the deceased.

In his defence, A2 denied killing the deceased and also repeated much of what was said by A1 about the business in the shop during the day and on the evening of 23.12.97 both before and after lunch. A2 stated that between 9.30 p.m. and 10.00 p.m., he (A2), Kumar Palinder, Bitu and Babu had supper at the residence of A1. They returned to the shop and carried on business till after midnight when they retired in their bedroom and slept. A1 went to sleep at his home after midnight. At 4.00 a.m. A1 phoned and asked A2 to fetch a doctor. A2, collected Dr. Patel and took him to attend to the deceased at A1's home, where they arrived at about 5.00 a.m. Dr. Patel, who was later joined by Dr. Shah, pronounced Renu Joshi dead after examining her. A2 denied participation in killing the deceased. Both appellants claimed, in their statements in court that the Twine family testified against them because Twine wanted to purchase the whole of plot 43/45 where each family lived.

In the trial Court and in the Court of Appeal, defence counsel in their addresses dwelt much on two issues. The first issue was that Mrs. Twine's identification of the appellants by voice was inadequate and unreliable. The second issue was that the cause of death connecting the appellants to the killing of the deceased was not

proven. Counsel contended that medical evidence as to the cause of death was inconclusive because firstly that since there was no evidence of electricity in A1's residence on 23/24 Dec, 1997, the opinions of Dr. Kalyemenya and Wabinga that the deceased died of electric shock was inconclusive. Secondly that the evidence of Dr. Kalyemenya and that of the Government chemist, Mr. Emmanuel Nsubuga, (PW13) shows that the deceased could have died of poisoning by ingestion of acaricide which Nsubuga found in the parts of the body which were sent to him by Dr. Kalyemenya for examination. According to defence counsel, the presence of acaricide supports the theory that the deceased committed suicide.

At the conclusion of hearing the case in the trial Court, the male assessor whose opinion was a little confused, advised acquittal. The female assessor believed the medical evidence that death was due to electric shock and that that was the cause of death. She also believed Mrs. Twine's evidence about the identification of the appellants by voice. She advised conviction.

The learned trial judge ruled out death due to malaria and poisoning. He relied on the evidence of Dr. Wabinga as to the cause of death and on the evidence of Mrs. Twine as to the identification of the appellants by voices. He found that although there was no electricity in Martin Road area on the material night, the appellants caused the death of the deceased *by* use of electric shocks. The learned Judge found that although acaricide poison was traced in the body of the deceased, death was in fact due to electric shock and that it is the two appellants who must have administered the electric shocks. The learned Judge convicted the two appellants of the murder of the deceased and sentenced each of them to death. On appeal to the Court below, the appellants' arguments centred, as we have observed already, on the same two issues, namely that of identification and of the cause of death. The Court of Appeal upheld the findings of the trial judge and therefore dismissed the appeal. The appellants have now come to this Court. Each of the appellants filed a separate memorandum of appeal.

The first appellant was represented by Mr. P. S. Ayigihugu and Mr. Mubiru-Nsubuga.. His memorandum of appeal contained four grounds but his Counsel, Mr. Ayigihugu, abandoned ground 4. The second appellant was represented by Mr. Akampurira who presented a memorandum containing three grounds of appeal. During submissions, he abandoned the third ground.

We will first consider the grounds of the first appellant. The first complaint in his memorandum of appeal is that in view of conflicting medical evidence, the Court of Appeal erred in law by failing to subject medical evidence to fresh scrutiny and merely confirmed the trial judge's holding that the death of the deceased was caused by electric burns. In other words the complaint as we understand it, is:-

(a) The Court of Appeal did not re-evaluate medical evidence but merely confirmed the trial judge's finding that death was due to electric burns;

(b) Medical evidence on the cause of death is conflicting and insufficient.

When arguing this ground, Mr. Mubiru-Nsubuga referred us to the evidence of the three prosecution expert witnesses, namely Dr. Kalyemenya (PW10), Dr. Wabinga (PW12) and the Senior Government Chemist, Mr. Emmanuel Nsubuga (PW13). Learned counsel pointed out that Dr. Kalyemenya was the first pathologist to carry out the autopsy on 24/12/97 at 1.00 p.m., 7 hours after death and when the body was still warm. Counsel pointed out that although this doctor saw multiple electric burns, he found no internal injuries and as he was not sure of the cause of death, and after noticing that the liver and the spleen had changed colour, he removed pieces of the brain, the liver and kidney and sent them to the Government Chemist for toxicological analysis. The doctor did not rule out death by poisoning. Learned counsel urged us to rely on Dr. Kalyemenya's evidence in preference to that of Dr. Wabinga because the former doctor was supported by the finding of toxicological analysis of Mr. Emmanuel Nsubuga, the senior Government Chemist whose evidence shows that the quantity of the acaricide found in the parts sent to him was high and could cause death. Learned counsel criticised the two Courts below for relying on the evidence of Dr.Wabinga who gave a firm opinion that the multiple electric burns found on the body of the deceased could cause death and also held the firm view that there was no need to rely on the findings of the Government chemist. Counsel urged us to hold that the deceased must have committed suicide. Counsel cited **Waihi & Another vs. Uganda** (1968) EA 278 **and Criminal Evidence by Richard May (1986)** Ed; pages 139/140 in support of his contentions.

Mr. Byabakama-Mugenyi, Senior Principal State Attorney, appearing for the Respondent, supported the decisions of the two Courts below. He contended that there was no discrepancy between the evidence of Dr. Kalyemenya and that of Dr. Wabinga as to the cause of death. According to the learned Senior Principal State Attorney, Dr. Kalyemenya indicated throughout his evidence that electric burning could cause death even though he was not sure of the cause of death. On the other hand, Mr. Byabakama-Mugenyi submitted that Dr. Wabinga who found on the body of the deceased the same injuries as did Dr. Kalyemenya, was of the view that the multiple electric burns were the cause of death. Learned SPSA contended that Dr. Kalyemenya found no specific signs or features such as traces of poison in the mouth of the deceased or any vomit which are features of poisoning causing death. Counsel submitted that the claim by A1 in his unsworn statement in Court that before she died the deceased vomited, sweated and lost breath was an afterthought which he gave after listening to medical evidence given by Kalyemenya and Nsubuga in Court about the symptoms of a person dying from poisoning by acaricide and that this afterthought statement should be ignored. Mr. Byabakama- Mugenyi contended that though poison was found in the body of the deceased, it was not poison which was the probable cause of death.

It is clear that the conviction of the appellants was based solely on circumstantial evidence. Moreover, this is a case in which the two Courts below have made concurring findings of fact based on expert opinions that the cause of death was due to electric burns and not poisoning. Furthermore, one of the assessors was of the same view. In these circumstances we would, as a second appellate Court, ordinarily be bound by those concurrent findings. However, this is a peculiar case. Two doctors, and a chemist, have proffered scientific opinions which to some extent conflict as to the cause of death. It is upon these opinions that the convictions of the appellants were based. In as much as the expert opinions were not demeanours of the experts which influenced the courts below, we can review the evidence of the experts as well as the approach adopted by the two Courts. We do this because it does not appear to us that in forming his conclusion, the learned trial judge was influenced by the demeanour of any of the expert witnesses. Conclusions of a trial judge which are based on demeanour of a witness or witnesses seen by him at the trial should not normally be reviewed unless such conclusions are clearly erroneous in law or do not reflect the correct position of all

the evidence available on the record: See **Patrick May on Criminal Evidence**_(supra) and **(Phipson on Evidence** 14th Ed., page 831/832.

We will now examine the relevant evidence including that of the appellants. First we have the evidence of the first appellant himself. On 23/12/1997 he left his deceased wife at home at 9.00 a.m. There is no suggestion that she was sick. It is only Kumar Palinder (DW1) who claimed she had been sickish 2 days before. The claim that she was receiving treatment at Dr. Ahmad's clinic a few days before her death was destroyed by the evidence of Dr. Nuwagira (PW8) and this is reflected in Exh. P8, which shows that she received treatment for mild malaria on 1/12/1997 which was three weeks before her death. Further, on the morning of 23/12/1997, Mrs. Twine (PW14) saw the deceased well and alive hanging her clothes on a line in the yard. They greeted each other. The deceased must have been fit enough to wash clothes in the early morning and hang them outside. It appears she was friendly to Mrs. Twine and in all probability she would have said she was sick if indeed she was. At 2.30 p.m. the first appellant went back home and ate his lunch after A2, Palinder Kumar (DW1) and Babu had had their lunch. The deceased was present. There is nothing to suggest that she was sick. Between 9.30 p.m. and 10.00 p.m. on the same day, again A2, Babu and Palinder ate food in the same home. There does not seem to have been any problem with either the deceased or Raju, the cook. Indeed, the latter took food to A1 in the shop after 10.00 p.m. which food A1 ate. We hear nothing wrong about either the deceased or Raju. According to the two appellants, A1 left the shop soon after midnight. According to his own statement, A1 arrived home soon after midnight. His two children and Bitu, the lame man, were asleep in their own bedroom. Also Raju the cook was asleep in his own separate bedroom. It was only the deceased who was sitting on her bed with folded hands touching her abdomen, or the chest, because of pain in the stomach. A1 stayed up for a while persuading her to visit a doctor. She refused. Curiously, instead of calling a doctor, A1 chose to enter his bed to sleep only to be awakened at 4.00 a.m. by the cries of the deceased who was holding her abdomen. He then called A2 and instructed him to fetch a doctor.

We note that in his charge and caution statement recorded by the police on 24/12/1997, A1 stated, in so far as it is relevant, that:

"On 24,12/97 the deceased woke me up and informed me that she was feeling pain from her heart. This was about 4.00 a.m. I called my brother KUMAR from where he puts (sic) and I sent him to call a doctor to come and attend to the deceased".

Clearly, this statement which A1 made immediately after the death of the deceased gives a very different picture from what A1 stated in Court. It suggests that until the deceased woke A1 up at 4.00 a.m., he had not observed anything wrong with the deceased. Indeed, it suggests that when he returned home after midnight, the deceased showed no sign of sickness. Dr. Patel (PW5) and a Dr. Shah appeared on the scene probably soon after the death of the deceased but the remarkable thing is that Dr. Patel who examined the deceased did not see any naked part of the body save for the face. Instead of saying what the deceased suffered from, A1 told Dr. Patel that the deceased died of malaria. How did he know this so quickly? There is of course evidence that before Dr. Patel was called, Lilian Twine (PWl) had heard cries of a female voice and noises of voices of two males. She also heard beating and banging at the same time. So did Mr Twine (PW2) and Mrs Margaret Twine (PW14). The latter was definite that the cry was that of the deceased and the male voices were those of A1 and A2. However injuries consistent with beating were not found on the body of the deceased. This may mean that some other person was the one who was beaten.

In the morning as Mrs Margaret Twine was going to work, she saw two Benz cars in A1's yard and a mechanic who used to repair vehicles there. There is no explanation about the presence of this mechanic that morning. Later at 1.00 p.m. Dr. Kalyemenya carried out an autopsy. The results appear on Exh. P4 signed by him and read as follows: *"External injuries:*
"Multiple ecchymotic bruises on both upper and lower limbs surrounding multiple Black Deep Burns Cause of death and reason for same:

> *Shock Due to Electrical burns with blunt injury. Poisoning could not be Ruled out. The brain liver and kidney, have (sic) taken for Toxicology Studies".*

This appears to mean that Dr. Kalyemenya was not certain that shock due to electric burns was the cause of death. On the other hand. Dr. Wabinga (PW12) who

carried out a second post-mortem on the same body five days later, on 29/12/1997, recorded his findings on Exh. P.5 as follows:-

> *"External injuries:*
> *Punched out abrasions 1 cm- Diameter involving the lateral areas of both upper and lower limbs accompanied by ecchymoses (multiple). Cause of Death and Reason for same.*
>
> *"Suspected shock due to above injuries (specimen taken off for Toxicological Analysis)"*

Mr. Emmanuel Nsubuga, (PW13), Senior Government Analyst recorded his own toxicological analysis and findings in his report, exh.P.6, dated 22nd January 1998 as follows: -

> *"Phosphine test for organophosphorus poison - positive.*
>
> *By Gas Chromatography and Thin Layer Chromatography Analysis, Chlorfenvinphos was detected in the exhibits, (brain, liver, kidney and stomach and its contents).*
>
> *N.B. Chlorfenvinphos is the active ingredient for Acaricides like Supona Extra, Superdip and Steladone. It kills if ingested".*

We note that the information provided in each of Exh. P4, P5 and P.6 is brief. The trial Court record shows that each of the three witnesses gave more detailed information. In particular Mr. Emmanuel Nsubuga asserted when he testified nearly 1 year and 3 months after his report was made that:-

> *"I did not quantify (poison) but it was in macro amount. That substance is very toxic. When it is ingested, it can cause death".*

The police sent organs of the deceased person to Mr. Nsubuga for analysis. It is most likely he was aware that the police wanted to know if there was poison in the organs which could have caused death. We would have expected Mr. Nsubuga to indicate in his report the ratio in percentage terms of poison found in the organs and whether that amount must have caused death. We think that without use of notes made by him when analysing the organs on which he could have made notes as to the quantity of the poison found in the organs upon which he carried out

toxicological analysis, his opinions to court about the quantity of poison found in the organs is of least weight.

Because of the controversy in regard to medical evidence we will quote medical evidence in some detail.

In his examination in-chief in so far as relevant, Dr. Kalyemenya stated that -

> *"I examined the body and found the following external injuries. Multiple ecchymotic bruises on both upper and lower limbs there were surrounding multiple black deep burns going into the dermis but not extending to the subcutaneous tissues. These injuries could not tell me what actually caused death—*
>
> *I found on arm (sic) multiple bruises with the burns then on the forearm. There were similar injuries on both hands. The same was seen on both lower limbs.----------*
>
> *The burns involved the epidermis and the dermis but did not extend to the subcutaneous tissue. The burns were skin deep.*
> *Burns were injuries caused by either fire or chemicals.----------*
> *-------I saw small almost pin head burns spot burns. They were not extensive burns. What I could think about is may be <u>ELECTRODE</u> being inserted into the skin. In electricity we have two points, the positive and negative points. The two could have been put on skin for an electric shock; if power is high you get burns. If it is 240 volts you get the shock as well as the burns at the sites of insertion of the positive and negative electrodes. The power in ordinary electric bulbs could cause*
> *the burns.---------- By looking at the external injuries I could not conclude the cause of death I went ahead and opened the body. I looked at all the organs* - ***the brain, the lungs, the heart, the liver, the kidneys. There were no injuries on all these organs. Each organ looked normal except the liver which was a bit grey but of the normal size.*** *These organs ordinarily should be reddish-pink in colour. I suspected they could be*

poisoning. . . . I took the brain the liver and kidney (for toxicological analysis)".

Later **on** still during examination- in-chief the doctor testified that:

"In this case disregarding the organs which I sent to the Government chemist ***the probable cause of death was shock due to electric burns and blunt injuries*** *the*
ecchymotic bruises. The injuries the ecchymotic could cause death. With the electrical burns, the electricity itself causes
cardiac arrest or ceasing of the functioning of the heart.----------It is neurones which carry the message of pain. A lot of pain inflicted on human being can actually cause irreversible shock which means death. It does not matter on which part of the body pain is inflicted."

During cross examination by three counsel (Kasule, Kabega and Mubiru-Nsubuga) for the appellants, the doctor referred to poisoning, but he largely repeated the opinions he expressed in examination- in- chief. Thus in cross examination by Mr. Kasule, the doctor stated:-

"I am not certain about the cause of death.----------
What makes me say that the injuries were a result of electric power was because of the spot burns which appeared in two sides. I said I saw two burnt areas which appeared as though someone had placed two electrodes at each of those points. If there were no two burnt areas I would have no means of telling that electricity was used. The two burnt areas were about one centimetre apart. At the time I made this report I did not know the other possible cause of death. If it transpires that the cause of death was something else then my conclusion in the post-mortem report would not be correct."

When cross-examined by Mr. Kabega, this is what the doctor answered:- *"The bruises which I found on the body were superficial----------*

They could have been a result of electric shock. I equated power to that of electric bulbs. I do not agree that if the voltage was 240 the burns would

have been deeper. The eccyymotic bruises were a result of the burns What I said on the post-mortem report was PROBABLE CAUSE OF DEATH. I said so. I added that poison could not be ruled out. This made shock only a probable cause o f death "

Following questioning by the Court, Dr. Kalyemenya was further cross- examined by Mr. Kabega, defence counsel and revealed that there was a mortuary book in which he wrote some information about the post- mortem he did on the body of the deceased. There were two entries relating to the cause of death. One entry was in black ink entered on 24/ 12/97 which stated that:-

"No anatomical cause of death: Shock?

The Doctor explained that by this he meant to say that.-

"All internal organs of the body looked normal. I could not find the cause of death as far as those organs were concerned. There was a question mark. I mean that shock was a possibility. I had seen external injuries."

On 25/12/97 members of the Indian Community criticised the doctor at his clinic and demanded to know why the doctor did not, after viewing 'he body, note in the mortuary book bruises he had seen on the body. After that confrontation the doctor then wrote in blue ink the passage which reads:-

"Has multiple bruising over upper and lower limbs"

He also wrote the word "MURDER" to satisfy the anger of the Members of the Indian Community. Clearly this means that Dr. Kalyemenya was not confident in his opinions. It must be in this context that the learned trial judge observed that this doctor was over-cautious. He does not appear to be confident in his opinions. That is why he yielded to public demand. The evidence of the doctor himself shows that immediately after his report, there was dissatisfaction about his findings. The first dissatisfaction was from the Indian Community which took trouble to bring in another pathologist from Kisumu, Kenya. There were also complaints by the Director of CID, and from the Director of Mulago Hospital, Dr. Kaggwa, who eventually asked Dr. Henry Wabinga (PWl2), the Head of Pathology Department, where Dr. Kalyemenya was a member, to carry out a fresh autopsy. Dr. Wabinga did this, apparently, in the

presence of Dr. Kalyemenya, himself and many other doctors. We note in passing that Dr. Kalyemenya qualified as a pathologist in 1996, just one year before he carried out the postmortem in this case.

We will now refer to the evidence of Dr. Wabinga. He had qualified as a doctor in 1979 and as a pathologist in 1987 so that by the time he carried out the autopsy on 29/12/1997, he had been a pathologist for 11 years.

We have already reproduced relevant contents of the post-mortem report by Dr. H. Wabinga. He said this in his evidence:-

> *"I examined the body and found external injuries. These were punched out (round like) abrasions of about 1 centimetre in diameter, they were involving the lateral areas of both upper and lower limbs, accompanied with ecchymosis, ecchymosis means large collection of blood under the skin An abrasion is an injury to the skin which is superficial. Ecchymosis was around the punched out abrasions with (sic) ecchymosis are caused by electrical burns----------*
>
> *I did not find any injuries on the internal organs which were there-like the intestines, the lungs the brain.----------*
>
> *I concluded that this lady died of shock due to the injuries I mentioned above - the punched out abrasions with accompanying ecchymossis. In this particular case the punched out abrasion with accompanying ecchymossis are due to electrical bums. These burns cause a cardiogenic shock. This is shock due to fast beating of the heart. A heart beats by electrical impulses. When you introduce an electric current it interferes with your electrical impulse causing the heart fast (sic) this leads to shock. Shock is lack of perfusion of blood in the body tissues. Cardiogenic shock means that the heart is not pumping blood to the body tissues. The other organs of the body fail to function. Death occurs. Cardiagenic shock does not cause any tell tale signs on other organs of the body. Such death does not depend on the state of the person. We are talking about an electric current entering the body. Even '0' Ne electric burn can cause the results.* ***I*** *observed multiple punched out electrical burns. The injuries caused sudden death As a pathologist when I am reading my findings* ***I*** *do not have to take into*

*account the results of the toxicological analysis. My conclusion does not depend on the findings of a Government Chemist. Whatever the findings of the Government analyst **I** would maintain my conclusion. **I** request for toxicological analysis where **I** suspect poison. **I** would like to find out the type of poison."*

On poison the witness stated:-

"---------Before a pathologist forms an opinion that there could have been poisoning on the body, it depends on the poison. There is no general feature for poisoning. These features are specific and depend on the poison; a type of poison leaves a specific feature. When you see that feature you take a specimen for analysis. I would take a specimen when I suspect poisoning after seeing a feature of poisoning. That is what I expect a competent pathologist to do. I did not suspect any poisoning in the case of Reno Joshi. The duration after death does not affect my observation of features of poisoning and my suspicion that there was poisoning".

During cross-examination by Mr. Kasule, the doctor was shown the report made by Dr Kalyemenya, where upon he stated that the latter's findings were similar to his. He maintained his earlier opinion that the cause of death was shock due to the injuries he had described. He ruled out any other probable cause of death. In his view if the electric voltage was very high the burning would have been extensive and would cover the whole body. That a voltage of 240 or 110 would cause the injuries he saw. Dr. Wabinga was emphatic that it was most unlikely that burns could have been caused by anything else other than electricity. He saw **electrodes punched out bruises with encchymosis.** Again he emphasised that the injuries which were all over the lateral aspects of the body could not have been caused by anything else and that the burns could not be self inflicted because of the nature and site of the injuries. Apparently, the "beating" did not cause injury to the deceased.

Now it is clear that the evidence of the two doctors agree on the nature and site of the injuries. The doctors also agree that the injuries were caused by the application of electricity to the body. Whereas doctor Kalyemenya at some point said that

these burns caused death, he later doubted this. He eventually stated that he was doubtful as to the cause of death. On the other hand, Dr. Wabinga was firmly of the view that it is the electric burns which killed the deceased. He ruled out poisoning and gave reasons why. He was apparently not asked to say what specific features of poisoning by acricide would be.

The two Courts below did not consider or take into account the experience of each of the two doctors. We note that Dr. Kalyemenya qualified as a doctor in 1984 and as a pathologist in 1996. It is clear that Dr. Wabinga has 11 years experience as a qualified pathologist whereas Dr. Kalyemenya had only one year as a qualified pathologist. In these circumstances we appreciate the equivocation in Dr. Kalyemenya's opinion and with respect this must be due to less experience. We accordingly think that the learned trial judge and the Court of Appeal acted properly in relying on the opinion of Dr. Wabinga. The blame on the learned trial judge is that he dwelt too much on the medical evidence by reverting to the same finding over and over. He accepted Dr. Wabinga's opinion after evaluating the evidence of both doctors over and over and that of the Government chemist to whose evidence we shall turn shortly.

In his unsworn statement in his defence, A1 was guided and led by his counsel. The first appellant attempted to give terminal symptoms of his deceased wife to match with the evidence given by both Dr. Kalyemenya and the Government chemist. Yet on 24/12/97, in his charge and caution statement to the police, the first appellant never mentioned such symptoms but only claimed that his deceased wife woke him up and complained that she was suffering from the heart. On this aspect of the defence of A1, we agree with the Learned Senior Principal State Attorney that the story given by the first appellant in court about the symptoms allegedly exhibited by the deceased, were an afterthought designed to support the explanations of Dr. Kalyemenya and Mr. Nsubuga.

Earlier in this judgment we set out the relevant contents of Mr. Nsubuga's report. In Court after he had recited those contents he expounded on his report this way:-

> *"An acaricide is a chemical used to kill ticks. Chlorfenvinphos is in that group of organophosphorus. I did not quantify hut it was in macro amount in each organ.*

It was in substantial amount. That substance is very toxic. When it is ingested it can cause death. I don't know if it is the one which caused death Once acaricide is ingested inside the stomach the first signs will appear between 2 to 8 hours some of the symptoms may include nausea, sweating, dizziness, somebody feels drunk. Later after 8 hours other symptoms appear which include diarrhoea, respiratory failure and eventually death occurs. I dont not know how long after taking poison death would occur.

I *could not tell for how long the substance had stayed in these organs. I could not tell if the substance had caused the death of the person from whom these organs were removed."*

Yet towards the end of cross-examination, he stated:-

"From my analysis of the four organs the amount of poison found in them could have caused death. It is possible."

Surprisingly after expressing that doubt, the witness further testified that as little as 1000 milligrams can cause death and that the amount he found in the organs were more than that. This piece of evidence is a little puzzling because if the request for analysis indicated suspicion that the person had been poisoned we would expect Mr. Nsubuga as Senior Government Chemist to have put in his report the quantity in ratio or figures found in the organs and the consequences of those quantities. It is difficult to believe this opinion which was expressed more than one year after the analysis was made particularly since the witness was only saying these things from his memory.

We have already said that the trial judge evaluated all medical evidence repeatedly before he ruled out malaria as a possible cause of death. Like the Court of Appeal we think that the Judge was justified on the medical evidence in holding that malaria did not kill the deceased.

On poison as a probable cause of death, apart from considering medical evidence, the learned judge considered the conduct of the first appellant during the critical period after he arrived home from the shop which A1 said was soon after midnight on 23rd - 24th December, 1997. The judge concluded that the evidence of the

appellant was lies and unreliable. Under our criminal system of justice, an accused can only be convicted on the basis of evidence adduced by the prosecution but not of lies in his evidence. However on the facts of this case we think that on the evidence before him the learned Judge was entitled to make that conclusion. The Judge then considered the evidence of Dr. Kalyemenya and that of Mr. E. Nsubuga about how acaricide could cause death. He concluded that :-

> *"Nsubuga Emmanuel (PWl3) confessed during his testimony that he did not know if it was the acaricide which caused the death of the person from whom the organs were removed."*

Earlier in this judgment, we produced the relevant evidence of Mr. Nsubuga. The judge opined that on the basis of the evidence of Nsubuga and Dr. Kalyemenya, it was possible to detect poison in the internal organs when in actual fact the poison did not cause the death of the deceased. He therefore concluded that though acaricide was in the deceased's internal organs it had not reached the level of causing death. Therefore poison was not the operating and immediate cause of the death of the deceased. The learned Justices of the Court of Appeal evaluated the expert evidence which we have alluded to before they concurred with the conclusions of the trial judge.

As we have pointed out, both Dr. Kalyemenya and Mr. Nsubuga were ambivalent and not firm in their different opinions about acaricide as having been the effective cause of death. On the evidence as a whole we cannot say that either the trial Judge erred in his findings or that the Court of Appeal acted wrongly in concurring with the findings of the trial Judge that acaricide was not the effective cause of the death of the deceased.

With regard to electric burns as the cause of the death of the deceased, we have noted from the court record that the learned trial judge considered the views of counsel for both sides as canvassed before him. He considered the apparent anomalies such as the possibility that Dr. Wabinga's report of autopsy which is said to have been done in the presence of other doctors was apparently not submitted to the trial Court. We note that the judge considered the very crucial factor that by the time when injuries were inflicted on the deceased, there was no "UEB" electricity

in the area including the residence of the first appellant where the injuries were inflicted on the deceased.

The trial judge reviewed the evidence of Dr. Kalyemenya relating to the electric burns, their causes and effect and how those burns can result in gradual death. The judge also reviewed the evidence of Dr. Wabinga who opined that the electric injuries he saw could cause death. The judge then held that the two doctors were in agreement on the following:-

(i) What they saw as external injuries on the body of Renu Joshi;

(ii) The parts of the body which were affected by the injuries;

(iii) The fact that the injuries were located in the lateral areas of the body;

(iv) The classification of the injuries as electrical burns;

(v) The cause of the injuries as electricity, and the use of electrodes;

(vi) The cause of death and reason for the same expressed to be shock due to electrical burns and the injuries.

The judge again opined that on the basis of the evidence of the two doctors, the external injuries found on the deceased were inflicted by another person or other persons and not the deceased herself. He also correctly concluded that the area of disagreement between the evidence of the two doctors concerned the question whether or not it was necessary to send some internal organs of the deceased for toxicological analysis. He evaluated the views of the two doctors about circumstances that would lead a pathologist to send body organs for toxicological analysis and concluded, again correctly in our judgment, that none of the pathologists saw any specific feature of poisoning when they opened up the body of the deceased. We have said that the judge carefully considered the statements, in court and at the police, of the first appellant concerning the cause of the death of the deceased and found the version given by the first appellant to be unreliable and so he rejected that version.

In the appeal to the Court below, grounds one and two were complaints about *conflicting medical* evidence and the finding by the trial judge that death was due to electric burns whereas there was no electricity in the house where the deceased died. In this respect, ground one which has been argued before us in this appeal is in reality a combination of those two grounds. Those two grounds were argued in

the court below by Mr. Nsubuga-Mubiru who has argued ground one before us. His arguments in the court below revolved around the evidence of the same three witnesses whose evidence we have earlier reproduced - namely that of Dr. Kalyemenya Martin (PW10) Dr. H. Wabinga (PW12) and Mr. E. Nsubuga. The Court of Appeal set out the essentials of the evidence of these three witnesses and that of Dr. P. Patel and Dr. Muwagira (PW8). After evaluating all that evidence, the Court of Appeal, like the trial judge, ruled out death due to malaria or other natural causes. With regard to acaridide, the Court of Appeal also concluded that::

> *"In our view the learned judge was therefore right in finding that though acaricide was found in the deceased's internal organs it had not reached the level of causing death and therefore the poison was not the operating and immediate cause of death."*

The Court accepted the submission of Mr. Ngolobe, Senior Principal State Attorney, who opposed the appeal in that court, and the finding of the trial judge that suicide by the deceased was untenable. The court also held that if the deceased wanted to commit suicide by poisoning herself, there would have been no need for anybody to inflict the kind of injuries found on her body. The Court of Appeal agreed with the trial judge that the deceased was tortured and also poisoned to cover up the cause of death.

In our view the evidence of Mr. E. Nsubuga (PW13) which was accepted by the trial judge and the Court of Appeal that acaricide found in the body of the deceased was in substantial quantities is inexplicable. We have already referred to Mr. Nsubuga's evidence where it is clear that he neither noted anywhere, the amount of acaricide poison found in the deceased's body nor the details of his chemical analysis when he made the analysis in Dec, 1997 and wrote his report on 22/1/1998. Therefore to come up as late as 1999 when he testified in the court and assert from memory that the amount was substantial certainly creates doubt about his conclusions. Indeed in our view of his ambivalent evidence, we are supported by his own statement that he was not sure that the acaricide caused the death. In our opinion Mr. Nsubuga's opinion was more of speculation than scientific and the opinion was unhelpful on the cause of death.

We think that the evidence on shock due to electrical burns as having been the cause of death is overwhelming. Dr. Wabinga's evidence was very clear about this.

Indeed, in spite of his ambivalence in his own opinion about the cause of death, Dr. Kalyemenya essentially supported Dr. Wabinga when he stated in his autopsy report that the cause of death was:- " **shock due to electrical burns with blunt injury".**

There was a suggestion that in view of the evidence that there was no electricity in Kooky's residence where the deceased died, the prosecution failed to prove that the cause of death was due to electricity. In that regard we refer to the reasoning of the East African Court of Appeal **in S. Mungai Vs. Republic** (1965) EA 782 at page 787 to the effect that there was no burden on the prosecution to prove the nature of the weapon used in inflicting the harm which caused death nor was there an obligation to prove how the instrument was obtained or applied in inflicting the harm.

Mr. Mubiru-Nsubuga relied on the case of **Waihi vs. Uganda** (Supra). It is clear that in that case medical evidence was unsatisfactory about the cause of death. But the confessions of the appellants and the other evidence pointed irresistibly to an unlawful killing. The conviction for murder was up held by the Court of Appeal for E. Africa.

Upon a review of all the relevant evidence, we have no doubt in our minds that medical evidence established that the deceased died from shock caused by electrical burns and the burning by electricity was deliberate. Therefore Ground one of the appeal before us must fail. The discussions of ground one would really dispose of the appeal by the first appellant. But we will now consider submissions by Mr. Ayigihugu who argued together grounds two and three of the memoranda of appeal of the first appellant.

The complaint in ground two is that the Court of Appeal erred in law in failing to evaluate the evidence of Dr. Kalyemenya (PW10) and of Mr. E. Nsubuga (PW13) and confirmed the trial judges holding that death of the deceased could have not been caused by poison.

In the third ground, the complaint is that the Court of Appeal erred in law in failing to resolve the conflicting evidence in favour of the appellants. These two complaints are in reality different aspects of the complaints raised by ground one

in this appeal of the first appellant; only that they are worded slightly differently. From the submissions of Mr. Ayigihugu, it is clear that these complaints are about the cause of death.

Mr. Ayigihugu first adopted the submissions made by Mr. Mubiru- Nsubuga in relation to the first ground which we have just disposed of. Arguing ground 2 and 3, Mr Ayigihugu contended that the learned trial judge was biased and also prejudiced towards the evidence of Dr. Kalyemenya. Learned counsel contended further that the trial judge did not rely on Dr. Kalyemenya's evidence of poisoning, because he believed that Dr. Kalyemenya fabricated that evidence of poisoning and therefore the judge considered it reluctantly. According to learned counsel, because of the judge's prejudice, he could not find that the death of the deceased was caused by nothing other than electric shock. Counsel also contended that the Court of Appeal erred when it confirmed the conclusions of the trial Judge. Counsel submitted that Dr. Kalyemenya had reason for removing the brain, liver and a kidney and that the doctor's action was confirmed by E. Nsubuga (PW 13) who found poison in the three organs of the deceased. The role of the chemist, argued Mr. Ayigihugu, was to analyse the substance as to its contents and possible effect. Counsel criticised the trial Judge and the Court of Appeal for their view that poisoning had not reached the terminal stage. Counsel referred to the charge and caution statement and in his unsworn statement in court, where the first appellant claimed that the deceased was sweating and went to the toilet twice. Counsel submitted that the trial Judge did not give serious thought to this evidence and that the Judge shifted the burden of proof to the first appellant when he held that poison had not reached terminal stage.

Again learned counsel argued that the two courts below misunderstood the evidence of the chemist when those courts held first that the chemist did not tell how long the poison had been in the body and secondly its cause. Yet the role of the chemist was to analyse the substance as to its contents and its possible effect. Counsel argued that poison was a factor that could cause death and that the prosecution did not disprove this. Mr Ayigihugu submitted that had the two courts below fairly evaluated the evidence on poisoning, they would have found that death was due to poison.

As noted already in this judgmenet, Mr. Byabakama-Mugenyi submitted, that symptoms of poisoning were not seen on the body of the deceased and that it was the first appellant who gave symptoms in his unsworn statement as an after-thought after he had earlier heard the evidence of Dr. Kalyemenya and Mr. Nsubuga in court. Counsel submitted that A1 informed Dr. Patel (PW5), the first doctor to see the dead body, that the deceased had been suffering from malaria for which she received treatment from a clinic run by Dr. Nuwagaba and Dr. Ahmad. Yet in his charge and caution statement, A1 did not refer to these symptoms but only claimed that the deceased was "feeling pain from her heart".

The learned Senior Principal State Attorney contended that death was not due to poisoning. He further argued that the absence of electricity on Martin Road area at the residence of the first appellant where the deceased was killed does not rule out death by electrical shock. He contended that belated police arrival at the scene gave opportunity for the removal from the scene of weapons used in the murder. He also submitted that by discouraging the cleaning of the body which had been dressed up to the ankles and wrist, A1's conduct in that respect supports the view that injuries were caused by electric shock. Counsel pointed out Dr. Kalyemenya's evidence which confirmed that these injuries existed at the time of death. Counsel urged us to find that the Court of Appeal acted properly in upholding the finding of the trial judge on the cause of death.

We were referred by Mr. Ayigihugu to a passage in the judgment of the trial judge in support of counsel's contentions that the judge was biased and also prejudiced in regard to the evidence of Dr. Kalyemenya. The passage reads :-

> *"In my view Dr. Kalyemenya (PWE10) was just overcautious and he had to find some reasons for* **his** *action of removing some internal organs and sending them for toxicological analysis. As a pathologist Dr. Kalymenya (PW10) did not say that poisoning had manifested itself in any way on the body or in the organs of Renu Joshi. This goes to strengthen my finding that though acaricide was in the deceased's internal organs it had not reached the level of causing death. None of the pathologists saw any specific feature of poisoning when they opened up the body of Renu Joshi".*

We think that the view of the learned judge expressed in the first sentence of the above passage is, with respect, a misdirection on the evidence. The doctor removed the organs because of the colour of the liver and the spleen. Subject to this observation, and with respect to learned counsel, we are unable to read into this or any other passage in the judgment any bias or prejudice by the trial judge regarding the evidence of Dr. Kalyemenya. In our view, the above passage contains summarised conclusions reached by the judge after evaluating the evidence of Dr. Wabinga and that of Dr. Kalyemenya in relation to the alleged disagreement between the two doctors on the question of whether or not it was necessary to send some internal organs for toxicological analysis. Indeed it was during the submissions of defence counsel at the trial when defence counsel contended that the evidence of Dr. Kalyemenya was at variance with that of Dr. Wabinga. Therefore, the judge appears to have found it necessary to express an opinion on that question. That is why the learned trial judge raised for his consideration what in his view was the point of disagreement, having earlier listed six points where the evidence of the two doctors was in agreement. We have already listed the six points of agreement. The judge then set out the opinions of the two doctors relating to what pathologists would do in case poisoning is suspected and what the opinion of each of the two doctors was in respect of their individual findings about whether or not the cause of the death of the deceased was poison. It was at that stage that the learned trial judge made the conclusions set out in the passage quoted above and which, in Mr. Ayiguhugu's submission, constituted bias or prejudice on the part of the trial judge. We think that this criticism has no foundation nor do we agree that the passage manifests suspicion by the judge that Dr. Kalyemenya had fabricated the evidence of poisoning.

Nor do we see justification for the criticism by the learned counsel that the judge was reluctant in his evaluation of the evidence relating to poisoning. We think that the trial judge was very much alive to the issue of poisoning and that he properly evaluated all the relevant evidence on poisoning and collated it with other evidence before he ruled out poisoning as the immediate cause of death. The judge summarised the contentions of both the defence counsel and the prosecuting State Attorney. The judge was concerned with and gave careful consideration to the issue of poisoning because, for example, he stated at some stage that -

"I find it necessary to scrutinize carefully the prosecution evidence on this matter".

Thereafter the judge evaluated at length the evidence of Nsubuga Emmanuel and that of Dr. Kalyemenya in relation to the poison and the effects of poisoning. The judge related that expert evidence to that of the lay witnesses who visited the scene and or saw the body of the deceased and the scene in the house where the deceased died. These other lay witnesses whose evidence the judge considered are D/ACP Edward Ocom (PW15), D/Sgt. Mujuni (PW9), D/ASP Emukule (Pwl8). These non-expert witnesses found no vomit or evidence of diarrhoea which would manifest signs that the acaricide poison had reached the terminal or critical stage in the body of the deceased and was probably the cause of death. We do not agree that in making that conclusion the trial judge shifted the burden of proof to the appellant.

We have already reproduced a portion of the judgment of the trial judge where he ruled out poisoning as the cause of death. For the sake of clarity we reproduce the relevant part :

"According to the evidence of the said doctor (Kalyemenya) and Nsubuga Emmanuel (PW13) death would occur after another six or more hours. In such an event it would be possible, in my view, to detect poison in the internal organs when in actual fact it did not cause the death of the deceased.

I find that the prosecution evidence does not point to the existence of any terminal symptoms of poisoning in the case of Renu Joshi. If the symptoms preceding death as narrated by Dr. Kalyemenya (PW10) and Nsubuga Emmanuel (PWl3) did not appear then, I find that though acaricide was in the deceased's internal organs it had not reached the level of causing death. I find that the poison was not the operating and immediate cause of the death of Renu Joshi".

The evaluation of the prosecution and defence evidence as we have pointed out and the findings embodied in the foregoing passage show that the learned trial

judge fully considered the issue of poisoning before he ruled out poisoning as the operating cause of the death of the deceased. We have observed already that Dr. Kalyemenya ended his evidence by saying that he was not certain of the cause of death.

We think that on the available evidence, the prosecution had discharged the burden of proof which satisfied the judge to reach the conclusions which he made. Further we are satisfied that the Court of Appeal did re- evaluate the evidence of Dr. Kalyemenya, Dr. Wabinga and Nsubuga before it concluded that the:

> *"Learned judge was right in finding that though acaricide was found in the deceased's internal organs it had not reached the level of causing death and therefore the poison was not the operating and immediate cause of death."*

We do not, with respect, agree with the contention of Mr. Ayigihugu that the courts below did not give serious thought to the effect of poison nor that the conclusions of the two courts below are contrary to medical evidence.

Mr. Ayigihugu finally contended that the trial judge and the Court of Appeal misdirected themselves on the evidence when they held that death was due to electric burns. Learned counsel conceded that a judge is entitled to accept the evidence of one witness in preference to that of another witness but Counsel criticised the two courts below for relying on the evidence of Dr. Wabinga as to the cause of death in preference to that of Dr. Kalyemenya and that of Nsubuga. Counsel referred us to **Phipson on Evidence,** (supra), **Crim. Evidence by Richard. May,** (supra), and **vs. Matheson** (1958) 2W.L.R.475. Mr. Byabakama Mugenyi for the respondent made submissions to the contrary and supported the decisions of the two Courts below. These arguments have been considered under ground one.

The passage from Phipson on Evidence (supra) reads as follows:-

> ***"In general, the Court of Appeal (in England) will be unwilling to interfere with a finding by a trial Judge whereby he preferred the evidence of one expert to another, notwithstanding that the demeanour of the expert witness is not so important for the purpose of assessing his***

credibility as it is in the case of a witness of fact. Nonetheless the court will be prepared to intervene if the Judge has clearly erred,

It is thought that the assessment of the cogency of evidence given by experts who offer competing hypotheses is assisted by a consideration whether the conflict lies in the scientific or hypothetical sphere of the evidence. Where such a conflict occurs in a criminal case on an issue on which the prosecution bears the burden of proof, it is not enough for the Jury to be directed to choose which experts evidence it prefers; it must be informed that it must be satisfied beyond reasonable doubt that the prosecution's expert evidence is correct" (underlining added).

This passage is principally concerned with the discretion of a first Court of Appeal in England to intervene in a criminal case in a decision made by jury following a direction by a trial judge. In our context we can say that the passage is concerned with the discretion of the Court of Appeal, or indeed this Court, to intervene in a decision of the trial judge whose decision is made on the basis of evidence of one of the two competing experts. It is clear from the passage quoted above that in order for a first appellate court to uphold the decision of a trial judge who relies on the evidence of an expert, in a criminal trial, the appellate court must itself be certain that the trial judge was satisfied that the expert evidence relied upon by that trial judge was the correct evidence.

In the case before us, the learned trial judge considered the expert evidence of Dr. Kalyemenya, of Dr. Wabinga and of Mr. Nsubuga and preferred the evidence of Dr. Wabinga as the correct expert evidence proving the cause of the death of the deceased. In the passage we have quoted from his judgment the judge was satisfied, after considering evidence on three possible causes of death, that electric burns and shock were the cause of death. The judge was fully satisfied with the expert evidence of Dr. Wabinga which the judge preferred to that of Dr. Kalyemenya. It must be pointed out again that the evidence of Nsubuga was inconclusive as to the cause of death and that of Dr. Kalyemenya was equally unsatisfactory on the matter of cause of death whereas the evidence of Dr. Wabinga was clearly and firmly in support of the prosecution case that the deceased died from shock due to electric burns. We have not found any other relevant unchallenged medical evidence on the record firmly supporting the

contention by the appellants' counsel that the deceased died of anything other than shock due to electric burns. Nor are we persuaded that either the trial judge or the Court of Appeal misdirected themselves on medical evidence or on the evidence of Mr. Nsubuga as to the cause of death. We think that Dr. Wabinga's medical opinion established the cause of death.

Mr. Ayigihugu alluded to the prosecution evidence to the effect that there was beating in the house when the deceased was crying. We note that in her evidence, Mrs Twine talked of bangs. It was Ms. Lilian Busingye Twine (PWl) who referred to beating. There is evidence that in the morning, Raju, the cook, was found in the same house lying unconscious in bed with broken limbs. On the facts available, it is not unreasonable to infer that it was that man, Raju, who was beaten that night. This is because as stated earlier, the man (Raju) had been well at least by 10.00 p.m. that night when he served supper to the appellants.

The other authority cited by Mr. Ayigihugu is **Criminal Evidence by R. May (1986) Ed.** Pg. 129. The passage referred to relates to the function and the weight of expert evidence which is admissible as opinion evidence. We know that opinions of experts are received as an exception to the general rule that evidence of opinion is not admissible. The function of expert evidence is to assist the court by providing information which is outside the experience and knowledge of a judge. It is for the judge to attach what weight he/she can to the expert evidence. It is the practice that if there is nothing to contradict the expert's evidence, the judge should accept it. At page 140 of the book by **R. May** (supra), the author repeats the view expressed by **Phipson** (supra) that where two or more expert witnesses give evidence for opposing sides, the judge should convict if he/she is satisfied beyond reasonable doubt that he/she should accept the expert evidence adduced by the prosecution and reject that evidence adduced by the accused if the latter opinion evidence is not correct. We have looked at the English decision in **R. v. Matheson** (supra) and think that that case is distinguishable from the case before us. Medical evidence which was given on behalf of the accused in **Matheson** case that the accused suffered from diminished responsibility was patently unchallenged by any prosecution evidence. That is not the position in the case before us. In the present case, all the expert witnesses were produced by the prosecution. Moreover, the trial judge was satisfied that Dr. Wabinga's evidence was conclusive and on that basis convicted the appellants. The Court of Appeal

upheld the decision. We have not found any fault in the conclusions of the two courts and their final decisions.

For the foregoing reasons we think that grounds 2 and 3 have no merit and they both must fail.

Because of the evidence of the first appellant himself the question of his identification did not arise for consideration.

Ground 4 of the Memorandum of Appeal was abandoned. As a consequence of the conclusions reached on all the grounds of the appeal of the first appellant, we find no merit in his appeal which is accordingly dismissed.

We now turn to the appeal of the second appellant which was argued on his behalf by Mr. Akampurira. There were three grounds in the memorandum of appeal but the third ground was abandoned. Mr. Akampurira argued the remaining two grounds separately though they are related.

In the first ground the complaint is that the learned Appellate Justices erred in law to hold that the evidence of identification with regard to the 2nd Appellant was not free from the possibility of error. Mr. Akampurira submitted that both the trial judge and the Court of Appeal correctly set out the tests which were emphasised by the Uganda Court of Appeal in the case of **Nabulele and Others vs Uganda** (1979) HCB76 as relevant considerations in cases where identification of an accused person is in issue. Learned counsel submitted that the two courts failed to apply those tests to the facts of this case. He referred to the evidence of Mrs. Margaret Twine (PWl4) who testified that she identified the voices of the two appellants and Counsel contended that the witness was not familiar with the voice of A2. Counsel wondered how Mrs Twine could hear only the voices of the two appellants and yet there were two other persons who were in the same house. He submitted that identification by voice was not possible because, first the talking in the appellant's house was at a distance, and secondly, she was separated by a wall and thirdly because though the residence of Twine had no covered up ceiling, that of A1 had a ceiling. He argued that had the Court of Appeal re-evaluated the evidence properly, that court would have arrived at different conclusions. Counsel relied on the case of **Nyanzi vs. Uganda,** Sup. Court Criminal Appeal No. 16 of

1998 (unreported) in support of his arguments. On the other hand, Mr. Byabakama Mugenyi supported the decisions of the two courts arguing that Mrs. Twine was familiar with the voices of A1 and A2 and that she was supported by her daughter Busingye Twine (PWl) to the extent that she heard two male voices from the residence of A1 on the night of23rd - 24th December, 1997.

The question of whether A2 did or did not participate in the murder of the deceased depends partly on whether he was or was not correctly identified by Mrs. Twine and to some extent it depends on A2's conduct after 4.00 a.m. on the night of 23rd - 24th Dec, 1997 when he fetched Dr. P. Patel (PW.5) from the latter's residence. The prosecution evidence against the 2nd Appellant is circumstantial and is primarily that of Mrs. Twine and A2's subsequent conduct. According to PW14, she was woken up from sleep in the dead of night by her husband, Mr. Rurebwa Twine, (PW2), who informed her that her friend, the deceased, was being beaten. Mrs Twine got out of bed and heard the deceased cry out "mummy", "mummy," "mummy". Mrs. Twine then heard voices which she believed were of the two appellants talking in hindi language which she could not understand.

The evidence for A2 is that throughout the day of 23rd December 1997, he together with A1 worked in their shop which is on the opposite side of the same Martin Road. That between 9.30 and 10.00 p.m. he, Bitu, Babu and Palinder Kumar (DW1) were in the residence of the deceased eating supper. After supper, he returned to the shop to help A1 in the shop which closed slightly after midnight. A1 went to his residence while A2, Babu and Palinder went to sleep in his (A2's) bedroom which is behind the shop. On the morning of 24/12/97, at 4.00 a.m., A1 phoned A2 and asked the latter to fetch a doctor to attend to the deceased who was sick. Eventually A2 collected Dr. Prakash Patel (PW5) and drove him to A1's residence where Dr. Patel examined the deceased and pronounced her dead. In other words the appellant set up an alibi which can be condensed into the statement that he was away and does not know how the deceased met her death. He is supported in this by Palinder Kumar (DW1). We shall revert to the question of alibi later. We are now concerned with A2's identification in relation to the killing of the deceased.

We would like to state what this Court and other courts have said about conviction of an accused person on the basis of circumstantial evidence. In a case depending

exclusively upon circumstantial evidence, a court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt: **See Simoni Musoke Vs. R (1958)** EA. 715. In other words the guilt of the accused must be proved beyond reasonable doubt.

In his unsworn evidence, A2 denied ever talking to Mrs. Twine face to face. In other words he claimed that Mrs. Twine has never heard him talking. Further, A2 alleged that Mrs. Twine implicated him in the murder because the Twine family and the two appellants were competing for the purchase of the building where A1 and the Twines live. This last point cannot be the motive why Mrs. Twine gave evidence against the two appellants. In our view the serious point at this stage is the claim that Mrs. Twine could not recognize his (A2's) voice because she had not been meeting him or talking to him.

It can be said that in modern living in urban centres, life is full of bustle and hustle and that generally neighbours who are not of the same race or culture may not regularly talk to each other. This is possible even where they have residences under the same building separated by a common wall as is the case of A1 and the Twines and to some extent the evidence of Mrs. Twine supports this.

During cross-examination by Mr. Mubiru-Nsubuga, Mrs. Twine stated -

> *"I do not know where Kumar used to sleep.----------*
> *I knew Raju and Bitu were staying in Kuki's house. The people whom I did not know where they were staying were Kumar, Babu and Palinda. I did not know if those people use to eat food at Kuki's house. I do not know where they had their super on 23/12/97-*
> *When Mr. Twine touched me I woke up I did not know the time.*
> *----------I heard distant voices. For the six years I have stayed with them I could tell it was Kuki and Kumar talking. The cry of "mummy, "mummy", was not loud. They were very brief cries."*

Here, Mrs. Twine shows that she did not know all details about Kooky's household, but she knew the voices of the appellants and the people who lived in Kooky's house. She certainly suggests that A2 lived elsewhere. **So** could he (A2) be assumed to have been in Kooky's house after mid-night on the fateful night?

Again during cross-examination by **Mr.** Kasule, Mrs. Twine's answers in

part are as follows:-

> *"Me I am telling you the truth. I have never held any long conversation with either Kuki or Kumar. I confirm that there were many people in Kuki's house. I have had opportunity to know the voices of KUKI and KUMAR when they are in the house I hear them talking. We share the hind yard. When the sewerage is blocked they come to unblock it and I hear them talking. I do not talk to them but I hear them talking".*

Here **Mrs.** Twine did not clearly disprove the claim by the second appellant that she has never had face to face discussion with him. This appears to raise the possibility of mistaken identity by voice in so far as A2 is concerned. **Moreover, Mrs** Twine stated that the appellants spoke a language she could not understand and that she did not understand what the appellants were saying. In our view, although it is not necessary for a witness to understand or be literate in a language being spoken in **order to i**dentify the speaker with whose voice she is already familiar, identification becomes a crucial issue if the identifying witness is unable to physically see the speaker whose voice she claims to identify. This is the problem we see in this appeal; for unlike A1 who admitted being at the scene at the material time, A2 denied being present. Therefore it was necessary for the trial court to consider the identification of A2 by Mrs. Twine with greatest care and caution.

We note that the version of Dr. Patel (PW5) of what transpired at his home when A2 called on him differs from the version given by A2 himself. There is evidence that when A2 went to Dr. P. Patel's (PW5's) home, he was unsteady, panicky and frightened. He did not tell the doctor what had happened to the deceased. Mr. Byabakama-Mugenyi urged us to infer that A2 told lies to Dr. Patel and that because of those lies and his unsteady conduct, A2 was not innocent.

We would point out that different people behave differently in moments of crisis. Whilst the panicky behaviour of A2 may suggest that he knew what had happened to the deceased, there is no evidence on the record to support a firm conclusion that his conduct was incapable of innocent explanation. So whilst there is strong suspicion that A2 might have known more about what happened to the deceased, suspicion alone is not enough in a criminal trial to conclude that the second appellant was properly identified as having participated in the murder of the deceased. Ground one must therefore succeed. This conclusion would dispose of the appeal of the second appellant. We would however briefly consider ground two.

The complaint in ground 2 of appeal, by the second appellant, is that the learned Justices of Appeal erred in law in rejecting the defence of alibi without proper evaluation of evidence in support of it. Mr. Akampurira relied on the statements in court of the two appellants and their charge and caution statements as well as on the evidence of P. Kumar (DW1) and Dr. Patel. The totality of that evidence is to the effect that soon after midnight, A2, Kumar Palinder and Babu retired into their bedroom which is at the back of the shop. That A2 did not go to the scene of crime till about 5.00 a.m. when he and Dr. Patel drove there and upon examination of the deceased Dr. Patel pronounced her dead. The evidence implicating A2 is that of Mrs. Twine on identification and which we have considered.

Mr. Akampurira submitted that both the trial judge and Court of Appeal did not take into account the evidence of the eye witness Palinder Kumar (DW1) on the alibi. He criticised the Court of Appeal for its failure to re-evaluate the evidence on alibi. Counsel referred to this Court's decision in **Nyanzi case** (supra) in support. He contended that had the two courts considered the evidence of Palinder Kumar, those courts would have concluded that the prosecution did not prove the case against the second appellant beyond reasonable doubt. For the Respondent, Mr. Byabakama-Mugenyi submitted that Mrs. Twine's evidence placed the second appellant at the scene of crime. That she was familiar with the voice of the second appellant. Counsel further argued that the conduct of A2 when he went to call, and when he talked to, Dr. P. Patel (PW5) was not consistent with his innocence in as much as he did not give a true account that the deceased was dead. Counsel contended that by the time A2 went to Dr. P. Patel residence, A2 must have known that the deceased had been killed and should have said so to the doctor.

We have already discussed submissions on the conduct of A2 when he reached the home of Dr. Patel (PW5) .

The charge and caution statement of A2 says in effect that A2 did not know the cause of the death of the deceased and that during the material time he was sleeping in the shop until 4.00 a.m. when A1 called him. Palinder Kumar (DW1) supported A2.

In his judgement, the trial judge referred to the evidence of alibi and to the cases of **R vs Eria Sebwato** (1960) EA 174, **Nabulele & Another vs Uganda** (supra) and other cases before he ruled out any possibility of mistake in the identification of A2 by Mrs Twine and therefore rejected the alibi.

The judge referred to A2's defence of alibi and the relevant law in these words:

"Davinder Kumar (A2) set up a defence of alibi. The law is that there is no burden of proof on an accused person who puts forward an alibi as his defence. He merely has to raise it. The burden of proof lies on the prosecution to adduce evidence to destroy the alibi by placing the accused person at the scene of the crime. The court has to weigh the defence of alibi with the rest of the evidence on the record. If the prosecution adduces evidence which puts an accused person at the scene of crime at the material time then his alibi must be false and must be rejected: ***See Woolmington Vs. DPP*** *(1935) AC462;* ***Seketoleko Vs Uganda (1967) EA 531,*** *and* ***Kyadondo Vs. Uganda*** *Court of Appeal of Uganda, Crim. Appeal No. 18/96 (unreported).* ***The alibi raised by Davinder Kumar (A2) has not created any doubts in my mind. Nor did it create any doubts in the mind of lady assessor Mrs. Ronah Kakaire.*** *I believe the prosecution witness (sic) and I find their evidence consistent and credible. The prosecution evidence placed both Sharma Kooky (A1) and Davinder Kumar (A2) at the scene of crime, namely in the house of Kooky Sharma (A1) at plot 43 Martin Road in the night of the 23rd/24th December, 1997. So I do not believe the alibi of Davinder Kumar (A2) and I reject it".*

In our view this passage shows that the trial Judge correctly appreciated the law on the burden of proof in regard to alibi. But we think that the learned Judge did not

adequately evaluate the evidence of the defence of alibi. The judge misdirected himself when he stated that "the alibi raised by A2 has not created any doubt in my mind. Nor did it create any doubt in the mind of the lady assessor

It was the duty of the prosecution to disprove the alibi. In the passage quoted above, the judge appears to suggest that the second appellant should have proved the alibi so as to raise a doubt in his mind. Further more we have studied the record and noted that P. Kumar (DW1) in his evidence supported the story of the second appellant up to the time A2 went to fetch Dr. Patel. The learned judge did not, in our view, and with due respect, evaluate Kumar's evidence adequately.

The Court of Appeal alluded to the law relating to a single identifying witness and to the law on the burden of proof in respect of a defence of alibi. The court referred to the defence of alibi as follows:-

> *"The evidence of the second appellant is corroborated by DW1, but he also did not indicate when he returned to the shop after dinner.*
>
> *The second appellant by his charge and caution statement and his evidence in court has placed himself in the house of the first appellant. This is supported by the evidence of DW1. The evidence of PWl4 had placed him at the scene when the deceased was heard crying. Therefore his claim that he was not in the house of the first appellant at the time the deceased was heard crying cannot be true. The learned trial Judge was therefore right to reject his alibi".*

We have had occasion to state that where an accused denies a charge and puts up the defence of an libi and calls evidence to support that alibi both the trial judge and the Court of Appeal, as a first appellate court, should adequately evaluate the evidence of alibi along side the rest of the evidence in the case before rejecting the alibi: See **Bogere Moses vs. Uganda** (sup.ct. Cr.Appeal, of 1997) and **Kagunda F. vs. Uganda** Sup. Ct. Cr. Appeal 14 of 1998 (unreported). We are not satisfied, and we say this with respect, that both the learned trial judge and the Court of Appeal sufficiently evaluated the evidence of P. Kumar which supported the alibi of the second appellant.

It is incorrect to say that A2's charge and caution statement placed A2 in A1's house. The fact that A2 had meals in A1's house is indisputable. What the prosecution had to prove was the presence of A2 in the house at the time the injuries found on the body of the deceased and caused her death were inflicted. In our view the prosecution evidence did not establish this. On the other hand the evidence of Palinder Kumar (DW2) tends to corroborate the story of A2 that from 10.00 p.m. up to 4.00 a.m., A2 was not at the scene of crime. Palinder Kumar does not seem to have been shaken in his evidence. He might have been mistaken about time but there is nothing to suggest that what he stated about A2's whereabouts is false. In a criminal a trial, it is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt. We are not satisfied that in this case the guilt of A2 has been so proved.

In view of the evidence of A2 in that regard, we think that the prosecution failed to discharge the burden of disproving the alibi. So ground two must succeed.

This means that the appeal of the second appellant must succeed.

Before leaving this case, there are two matters on which we wish to comment. The two matters relate to procedure. First, for the avoidance of doubt, we would like to endorse the view expressed by the Court of Appeal that since the appellants had chosen not to give sworn evidence it was absolutely wrong for the trial judge to allow the appellants to be led by their counsel throughout the making of their unsworn statements.

All the three counsel who defended the appellants were senior advocates and, therefore, we are rather perturbed that they went to great lengths to mislead the trial judge by insisting on leading each accused in his unsworn statement. Counsel on both sides are under a duty to ensure that proper procedure in conducting a criminal trial is followed in adducing evidence by both sides so that not only justice is done but is seen to be done.

Secondly we noted too many objections were raised during the trial. In the process, the trial judge was bogged down by adjourning the hearing in order to write rulings. The objections and adjournments contributed greatly to the delay in concluding the trial of this case. Such practice must be discouraged by trial judges.

We conclude. The appeal of the first appellant is dismissed. The appeal of the second appellant succeeds. His conviction is quashed and the sentence of death is set aside. Unless he is held on some other lawful charge, A2 must be set free forthwith.

Delivered at Mengo this 15th day of April 2002.

B. J. ODOKI.
CHIEF JUSTICE.

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

J. W. N. TSEKOOKO.
JUSTICE OF THE SUPREME COURT.

A. N. KAROKORA.
JUSTICE OF THE SUPREME COURT.

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT.