REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA &KANYEIHAMBA JJ.S.C)

CRIMINAL APPEAL NO. 32 OF 2000

B E T W E E N

AJIONZI MANASE:: APPELLANT

V E R S U S

UGANDA:: RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala (Okello, Mpagi-Bahigeine and Engwau JJA) dated4th August, 2000 in Court of Appeal Criminal Appeal No.121 of 1999)

JUDGMENT OF THE COURT:

This appeal is against the decision of the Court of Appeal which rejected the appellant's appeal against his conviction by Katutsi of murder on 3.11.1999. According to the prosecution evidence adduced during the trial, on 6.4.1997, the appellant, Ajionzi Mananse, who was a Police Sgt. and driver attached to Police Anti Robbery Squad, based at Katwe Police Station, was instructed by police to drive the deceased D.C. Mwebaze, P.C. Topaco and D/Cpl Okullo Bwangamoi, hereinafter called the group, to Sun-Rise Bar along Kampala/Entebbe road to check on a suspected stolen car. The operation was directed by the police control room at the Central Police Station (CPS),Kampala. The appellant had a gun plus 30 rounds of ammunition. So had Topaco and the deceased. The group met the person who complained about the suspected stolen vehicle which was parked at the bar. We shall hereinafter refer to the car as the stolen vehicle. The complainant joined the group. After introduction, and as the group watched the stolen vehicle, some people (two men, a woman and a child) entered it. When the vehicle started moving, the group alerted the control room who instructed the group to trail it while sending information to the control room. Police in the control room advised that a **999** vehicle would intercept the stolen vehicle and the group should not

shoot. The group trailed the vehicle in a car bearing civilian numbers. The accused drove this car. As the two vehicles moved on, the stolen vehicle took Katwe Police Station direction while the **999** vehicle took Makindye road direction. The group's vehicle slowed down due to traffic jam. The deceased who was the commander of the group, directed the appellant driver to overtake other vehicles in the jam in order to catch up with the stolen vehicle.

At Najjanankumbi, the stolen vehicle turned into a side murrain road. The group's vehicle followed it and at some point the groups' vehicle overtook the stolen car. Cpl. Okulu Obwangamoi who was now armed with Topaco's gun jumped out of the car and sped towards the stolen car, stopped it and demanded for the vehicle's ignition keys. Then Obwangamoi heard rapid gun shots from his left side and when he looked there, he saw the appellant and asked him about what happened. The appellant who was still armed with his gun did not reply. Meanwhile Cpl. Okulu Obwangamoi heard someone cry out from the stolen vehicle that he had been shot. The driver inthe stolen vehicle appealed for mercy.

Obwangamoi and the appellant returned to Katwe Police Station. The deceased who had been left behind was at 8.30 p.m. taken to Katwe Police Station by a minibus. According to D.C Betungura (PW6), the deceased

"was talking in a confused way saying he had been shot by a fellow Police Officer with whom he was on duty. "

The deceased later died from gun wounds. The appellant was charged with the murder of the deceased.

DIP Henry Mbabazi (PW4) gave evidence to the effect that he had given to each of the three policemen a gun with 30 rounds of ammunition. When he received back the three guns after the incident and verified on the ammunition, it was the gun of the appellant which had 5 rounds of ammunition fewer.

In his sworn evidence, the appellant admitted being in the group which trailed the stolen car in the company of Topaco, the deceased and Obwangamoi. He claimed

that they were instructed to look for car **No.UDD244,** which had been highjacked by gunmen. According to him, the group chased the suspected vehicle and found it abandoned at Najjanankumbi where the deceased, Topaco and Obwangamoi followed the stolen vehicle on foot. The appellant claimed he was ordered by patrol commander to remain in the groups' vehicle and he did so. According to him, he had been given orders by the patrol command vehicle to shoot if he heard bullet shots. Later he heard gun shots from the direction taken by Topaco, the deceased and Obwangamoi. Upon hearing the gun shots, he got out of his vehicle andreplied by shooting in the air. Thereafter a **999** vehicle appeared at the scene. He and the **999** vehicle drove in direction taken by his group and found the stolen vehicle 250 metres away. He was ordered to drive his civilian vehicle back to base. He gave a lift to Topaco to CPS parking yard.

Thereafter he was taken to the office of the controller of anti robbery squad where he and Topaco each made a statement about what happened before he was driven to Kiira Road Police Station and subsequently back to CPS. He appeared in Court on 11.4.1997. He admitted that he, Topaco and the deceased each had a gun and that he had shot in the air to provide cover. In effect the appellant did not admit killing the deceased.

Upon the above evidence, the two assessors believed the prosecution caset hat it was the appellant who shot and killed the deceased and advised Katutsi, J, to convict the appellant. The learned judge also believed the prosecution evidence that it was the appellant who shot and killed the deceased. He disbelieved the appellant whom he convicted of the murder of the deceased and sentenced him to death.

His appeal to the Court of Appeal which was based on three grounds was dismissed. The appellant has now come to this court on the basis of four grounds of appeal.

Mr. Jogo Tabu, Counsel for the appellant, argued grounds one and two separately. He then argued grounds three and four together.

The complaint in the first ground is that the Court of Appeal erred in law in holding that the dying declaration of the deceased was complete. This complaint had been raised as the first ground of appeal in the Court of Appeal where the ground failed.

In arguing this ground, Mr. Jogo Tabu contended that the Court of Appeal erred when it held that the utterance by the deceased to PW6 (D.C.Betungura), was a complete dying declaration since the deceased must have been in a confused state of mind and did not name his assailant. Counsel relied on a number of decisions including **C.WAUGH vs R** (1950) AC 203and **C DAK1 S/O DAKI vs R** (1959) EA 931. Mr. Elem-Ogwal, Principal State Attorney, for the respondent, supported the decisions of the courts below contending that the dying declaration was complete. He surmised that it appeared that both the deceased and the appellant did not know each other's names but argued that the dying declaration was complete. He distinguished Waugh's case from the present one because in the former case, the deceased went into a coma before he completed his declaration and that in the present case the evidence of Obwangamoi (PW2) to the effect that the appellant kept quiet when he was asked about what happened after the shooting, corroborates the dying declaration of the deceased.

In the proceedings before us, it is common ground that Obwangamoi (PW2),the deceased and the appellant were at or near the scene of crime at the material time. The appellant admits tiring his gun albeit in the air. Neither Obwangamoi nor Topaco who were armed and were with the deceased fired their guns. It was only the appellant who fired his gun. The appellant was the only fellow police officer of the deceased on duty at the time who had shot his gun. There was no evidence of shooting by any other officer. On the facts of this case, we think that the trial judge and the Court of Appeal acted properly when they treated the utterance of the

deceased to D/C Betungura as a complete dying declaration. We agree with Elem-Ogwal that Waugh's case is distinguishable from the case before us.

In **CHARLES DAKI S/O DAKI** (supra) the Court of Appeal rejected the dying declaration because the statements of the deceased **were** ambiguous, possibly colored by the fact that because the deceased had earlier seen the appellant with a gun, the deceased must have concluded that it was the same appellant who shot him. Moreover, there was evidence of an alleged grudge between the deceased and the appellant and that might have affected the deceased in thinking that he was shot by the *"enemy"* appellant. Besides in that appeal the trial judge had failed to caution himself and the assessors on relying on dying declaration which had not been subjected to cross-examination.

In **TINDIGWIHURA MBAHE vs UGANDA** (Sup.Ct. Cr. Appeal 9 of 1987)which was also relied upon by Mr. Jogo Tabu, this court held that the trial judge acted properly in accepting the dying declaration of the deceased. The Court held that this was particularly so as the dying declaration was corroborated by another witness and the trial judge cautioned himself as well as the assessors.

In the present appeal, it is clear that both the trial judge and the Court of Appeal directed themselves on the law relating to dying declarations and cautioned themselves on the question of the absence of cross-examination of the deceased on this particular declaration. The trial judge found corroboration in the evidence of Corporal Obwangamoi (PW2). The Court of Appeal agreed with the trial judge on the question of corroboration. We find no reason to disagree with the conclusions of the two courts. Ground one must therefore fail.

The complaint in the second ground which is related to the first ground is that the Court of Appeal erred in law in holding that there was sufficient circumstantial evidence to corroborate the dying declaration of the deceased.

Mr. Jogo Tabu referred to the four pieces of circumstantial evidence upon which the trial judge and the Court of Appeal relied as corroborative evidence and contended that these were not corroborative.

In its judgment, the Court of Appeal dealt with the matter in the following way-

> ***"The trial judge found corroboration to the dying declaration in the circumstantial evidence surrounding the shooting. The pieces of circumstantial evidence were:***
>
> ***(1). that immediately he heard the rapid gunshots from his left-hand side, D/Cpl. Okullu Bwongamoi turned and saw the appellant. He asked the appellant what happened but the latter kept quiet.***
>
> ***(2). that there was no exchange of gunshots between the occupants of the suspected stolen vehicle and the pursuing police because the occupants of the suspected stolen vehicle were not armed and the police were accordingly instructed not to shoot at them.***
>
> ***(3) only the appellant's gun (SMG) had less ammunition than had been issued. There were other two officers who were also armed with guns.***
>
> ***(4). his explanation for the missing bullets that he fired shots in the air in response to the shot he heard from the direction of the suspected stolen car was rejected by the trial judge.***
>
> ***We think that the above pieces of circumstantial evidence sufficiently corroborated the dying declaration as they irresistibly pointed to the appellant's guilt. The spent cartridges and a live bullet collected by DIP Bernard Muhumuza (PW3) from the scene could have reinforced the prosecution case. However, their chain of movement was broken as DIP Muhumuza did not mark them when he handed them to the counter officer at Katwe Police Station. We agree with Mr. Tabu that no reliance whatsoever could therefore be placed on them.***
>
> ***Despite the absence of those exhibits in the evidence, we still think that the prosecution case was not adversely dented. The appellant himself admitted that he fired his gun. The crucial issue to be determined was whether to believe the appellant's or Cpl. Bwongamoi's version. Appellant told court that he fired his gun in the air a distance from the suspected stolen vehicle in response to the gunshot he heard in that direction. D/Cpl. Bwongamoi on the***

> ***other hand stated that when he heard the rapid gunshots at the scene coming from his left-hand side, he turned and saw the appellant. When he asked him what happened, the appellant kept quiet.***
>
> ***The determination of that issue depended on credibility of the two witnesses, as they were the appellant's words against D/Cpl. Bwongamoi's. The trial judge believed D/Cpl. Bwongamoi's version.***
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> ***As was stated in PANDYA vs R (1957) EA 336 - 338 on such question, which turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the judge who saw the witnesses. We agree with that principle and therefore cannot interfere with the trial judge's finding as there is no circumstance to justify our differing from him. In our view, the above disposes off all the grounds. The trial judge rightly convicted the appellant as there was overwhelming evidence to support his decision."***

We think that the circumstantial evidence listed as items 2 and 3 are evidence of consistency rather than corroborative evidence. In our opinion, the pieces of evidence listed as item 1 and 4 provide corroboration to the dying declaration. Subject to these observations, we agree with the conclusions of the Court of Appeal.

The third and fourth grounds were argued together. In the third ground the complaint is that the first appellate court erred in law in merely giving a formal approval of the trial judge's finding on the evidence of PW2, Okullu Obwangamoi, without considering and weighing the evidence as a whole. The complaint in the fourth ground is that the first Appellate court erred in law in failing to resolve the doubts in the evidence in favour of the appellant.

The complaints really are that the first appellate court should have re-evaluated the evidence and arrived at its own conclusions. Mr. Jogo Tabu contended that the prosecution should have adduced the evidence of the officer who gave orders that there should be no shooting by the group in which the appellant was. Learned Counsel also contended that Cpl. Obwangamoi must have been mistaken in the identification of the appellant.

With regard to the last point we say that on the evidence available, we are not persuaded that Cpl. Obwangamoi who had accompanied the appellant from Katwe Police Station, rode in the same car driven by the appellant could have been mistaken about the appellant before the shooting as the person who fired the shots at the deceased and the people in the stolen car. There is no evidence to prove that any other person than the appellant shot at the deceased, fatally wounding him.

On the first question of doubts in the prosecution evidence favoring the appellant, we are unable to see any. Admittedly, there were deficiencies in the investigations and prosecution of the case but these deficiencies have not in our opinion raised reasonable doubts in favour of, and fatal to the conviction of, the appellant.

Accordingly grounds 3 and 4 must also fail.

For the foregoing reasons we think that this appeal has no merit and it is dismissed.

Delivered at Mengo this 10th day of January 2002

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**

J.N. Mulenga
JUSTICE OF THE SUPREME COURT

G.W. Kanyeihamba

JUSTICE OF THE SUPREME COURT