CRIMINAL APPEAL NO. 214 OF 2007 MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**ONAEL DAUSON MACHA Vs. REPUBLIC-Appeal from a conviction and sentence of the High Court of Tanzania at Moshi-Criminal Sessions Case No. 61 of 1996 <u>Munuo, J.</u>**	Multiple counts of murder contrary to Section 196 of the Penal Code-murdered seven members of his own family and/or near relatives. **What is a dying declaration?-**It is a statement made by a deceased person as to the cause of his death. **Relevance of Dying Declaration-**It is relevant in criminal proceedings and admissible in evidence in cases in which the cause of that person's death comes into question. **Dying Declaration in East Africa and India-**In East Africa, as is the case in India but unlike in England, such statements are relevant whether or not they were made under expectation of death. In England, on the other hand, they are relevant and admissible in

		evidence when the declarant was under a settled hopeless expectation of death. **Weight of Dying Declaration-** dying declarations should carry less weight in East Africa than in England: see, for example, **R. v. MUYOYA bin MSUMA (1939) 6 EACA 128** and **DALA s/o MKWAYI v. R (1956) 23 EACA 612**, at page 613, among the earliest cases decided on this issue. **Corroboration of Dying Declaration-** It is now settled law that where a dying declaration is admitted in evidence, it should be scrupulously scrutinized, and in order to be acted on corroboration is highly desirable: see **R. v. ELIGU s/o ODEL & ANOTHER (1943) 10 EACA 90.**- But this is not

		"say that corroboration is always necessary to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and that would be incorrect"- **R. v. ELIGU s/o ODEL & ANOTHER (1943) 10 EACA 90.**

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 214 OF 2007

ONAEL DAUSON MACHA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 27th day of June, 2000
in
Criminal Sessions Case No. 61 of 1996

JUDGMENT OF THE COURT

19 October & 30 November, 2007

RUTAKANGWA, J.A.:

The appellant was convicted as charged by the High Court of Tanzania sitting at Moshi on multiple counts of murder contrary to Section 196 of the Penal Code. He was found guilty of having murdered seven members of his own family and/or near relatives in September, 1995. The deaths occurred on different dates but were due to a single incident which occurred on the evening of 16th September, 1995. Having been so convicted he was sentenced to suffer death by hanging. Being aggrieved by the conviction and sentence he has preferred this appeal.

In this appeal the appellant is represented by Mr. Makange, learned advocate. Mr. Makange has raised only two grounds of appeal. These are: -

One, that the learned trial judge erred in basing the convictions for murder on the dying declaration of the deceased Haikasia Macha, whose truthfulness and reliability was not beyond reproach;

Two, that the learned trial judge erred in law in shifting the legal burden of proof to the appellant.

The respondent Republic is represented by Mr. Henry Kitambwa, learned State Attorney. The Republic supported the convictions of the appellant and urged us to dismiss this appeal.

But why was the appellant charged in the first place and subsequently convicted? A clear cut answer is not easily gleaned from the prosecution case which rested mainly on the dying declaration of one Haikasia Macha, which was admitted in evidence as exhibit P2 at the trial of the appellant. The short but not simple facts of the case are as follows:

As already indicated above seven people lost their lives. These were Mina (a relative of the appellant), Grace (house girl), Haikasia (appellant's sister in law), two step brothers of the appellant and the appellant's two children.

According to Haikasia's statement to A. S. P. Alfred Mango (PW1) which was taken on 17th September, 1995 at the K.C.M.C.

hospital, on 16th September, 1995 at about 19.45 hrs. she was at the appellant's home. While inside together with the other deceased and the appellant, the appellant was told by his wife that Grace and Mina had done something wrong. The appellant and his wife went out of the house. Haikasia and the rest remained inside. Thereafter Haikasia saw the appellant blow a fuel like substance from his mouth and struck a match. Suddenly fire broke out in the room. The appellant blocked the door. Nobody could get out. However, Haikasia managed to push him aside and rushed out of the house while her clothes were on fire. The rest of the occupants including the appellant managed to get out of the house after sustaining burns of various degrees. She concluded her statement saying that she did not know what motivated the appellant to act as he did. All the eight people who sustained burns were immediately admitted at the K.C.M.C. hospital. All of them died on divers dates except for the applicant. His survival explains his presence in this Court, on account of Haikasia's dying declaration.

The appellant denied starting the fire which led to the deaths of his dear ones and nearly caused his death as well. In an elaborate

defence he told the trial High Court that on the maternal day he had arrived home from Kenya where he used to work. There was a small family gathering whereat they consumed beer and soda. Himself as well as Haikasia took some beer.

There came a time when the deceased Grace lit a wick lamp. After filling it with kerosene, it exploded. Grace hit the lamp with her hand and it landed on a table cloth which caught fire immediately. The fire spread rapidly. The door curtain as well as the kerosene container caught fire. The adult people tried to put out the fire. All was in vain. Smoke filled the room and there was confusion. When they finally got out of the house every one inside had sustained serious burns including himself. He was admitted at the K.C.M.C. hospital and kept in the I.C.U. up to 5/10/1995. He thus denied murdering his dear ones and expressed anguish at the loss of their lives.

The learned trial judge and the three assessors who tried the case with her were not impressed by the appellant's defence. The

defence evidence indeed was fleetingly referred to in the High Court judgment, as follows: -

> *"In his sworn defence the accused denied the killing. He blamed his house girl, Grace for accidentally starting the fire when she was putting kerosene in a wick lamp".*

In convicting the appellant the learned trial judge held: -

> *"…… The dying declaration is a true account of how the accused unhappy at the report he got from his wife about Grace and Mina douched an inflammable liquid in the house and lit it causing a big explosion of fire in the house. To make the victims of the fire die the accused closed and held unto the door and as Haikasia stated in her dying declaration she tried to push the accused and open the door for the victim in vain apparently because the accused overpowered her. The accused therefore burnt the seven including his 2 children and 2 step brothers in cold blood." (Emphasis is ours)*

Since she found the dying declaration "fully corroborated by the evidence of PW1, PW2, PW3 and PW4 who got the same story of the accused douching the house", the learned trial judge found "no merit whatsoever in the defence of the accused". "It is not probable in those circumstances", she concluded. This conclusion provides an appropriate springboard for our discussion of the grounds of appeal. We shall first dispose of the second ground of appeal.

In the second ground of appeal the appellant is attacking the learned trial judge for allegedly shifting the legal burden of proof to him. In support of this ground, Mr. Makange strenuously argued that by asserting that the appellant's "defence was not probable but an after-thought", she had shifted the burden of proof to the appellant who had no duty of proving his innocence. This contention was rebutted by Mr. Kitambwa who argued that what the learned judge did was only to reject the defence story which she found to be an after thought.

We are in agreement with Mr. Kitambwa. Given their natural meaning the words complained of do not carry the impression that

the learned judge was holding that the appellant had failed to prove his innocence. The problem with Mr. Makange seems to us to be that he read those words in isolation from what had preceded them. The learned judge had to make a decision on two diametrically opposed versions on what caused the fire. She directed her attention on exhibit P2. She concluded that it contained nothing but the truth. As both exhibit P2 and the appellant's explanation could not be true at the same time, she chose to believe the dying declaration and reject the appellant's defence. To her, the defence could not likely be true, (i.e. not probable) in the face of exhibit P2 which she found was "fully corroborated by the evidence of" PW1 to PW4. We accordingly dismiss this ground of appeal without expressing any opinion at this stage as to whether or not the learned trial judge was right in so holding.

The first ground of appeal cannot be easily disposed of as the second one. Admittedly the conviction of the appellant was wholly predicated upon exhibit P2. This is because the evidence of PW1, PW3 and PW4 was based on what they were allegedly told by Haikasia. No. C5698 D/Sgt. Rafael (PW2) never talked to Haikasia.

His evidence was based on information obtained through reading exhibit P2. The evidence of Neema Maeda (PW5), a nurse at the K.C.M.C. hospital, as far as establishing the guilt of the appellant is concerned, carries no weight at all, in our view. We shall show why later.

All the same, in resolving this issue we have found it necessary to pose these crucial questions. **One**, is exhibit P2 a dying declaration? **Two**, if it is one, does it contain a correct and accurate account of what Haikasia told PW1? **Three**, is it reliable evidence? **Four**, does it need corroboration? **Five**, if it does, was it corroborated?

In order to answer the above posed questions convincingly, we think it is necessary first, to answer this simple question: what is a dying declaration? Our answer to this question is that it is a statement made by a deceased person as to the cause of his death. It is relevant in criminal proceedings and admissible in evidence in cases in which the cause of that person's death comes into question. In East Africa, as is the case in India but unlike in England, such

statements are relevant whether or not they were made under expectation of death. In England, on the other hand, they are relevant and admissible in evidence when the declarant was under a settled hopeless expectation of death. It has, therefore, been stated on several occasions that dying declarations should carry less weight in East Africa than in England: see, for example, **R. v. MUYOYA bin MSUMA (1939) 6 EACA 128** and **DALA s/o MKWAYI v. R (1956) 23 EACA 612**, at page 613, among the earliest cases decided on this issue. It is now settled law that where a dying declaration is admitted in evidence, it should be scrupulously scrutinized, and in order to be acted on corroboration is highly desirable.

However, as was succinctly stated by the Court of Appeal for Eastern Africa in **R. v. ELIGU s/o ODEL & ANOTHER (1943) 10 EACA 90**, that is not to:

> *"say that corroboration is always necessary to support a conviction. To say so would be to place such evidence on the same plane as*

> *accomplice evidence and that would be incorrect".*

All the same, it is trite law now that apart from what are really exceptional cases where the reliability of the deceased's statement cannot be impugned or questioned, corroboration has been held by all Courts in East Africa and India, to have been necessary. This was clearly highlighted by the Court of Appeal for Eastern Africa in the case of **PIUS JASUNGA s/o AKUMU v. R (1954) 21 EACA 331** as follows: -

> *"We have examined the decisions of this Court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration".*

See also: **R v. MOHAMED SHEDAFFA & THREE OTHERS (1984) TLR 95, AFRICA MWAMBOGO v. R (1984) TLR 240**, etc.

Inviting us to reject exhibit P2, Mr. Makange argued that as it is in a narrative form and not in a question and answer format, there is

no guarantee that its contents are the exact words spoken by Haikasia. He also challenged the statement because it was neither read out to Haikasia nor was it signed by PW1 who recorded it but by PW5 only. Lastly, he vehemently argued that Exh. P2 is not a dying declaration as it was not made spontaneously under expectation of death so as to remove the possibility of a concoction.

Mr. Kitambwa was of the firm view that exhibit P2 is a dying declaration as it contains the details on the cause of death of Haikasia among others. He firmly maintained that the declarant need not die immediately and that it was signed by PW1 and witnessed by PW5. At first Mr. Kitambwa impressed upon us that exhibit P2, which needed to be corroborated, was amply corroborated by the evidence of the other prosecution witnesses. When asked to point out such corroborative evidence, he conceded that there was none. He accordingly abandoned his efforts to convince us that the dying declaration of Haikasia was corroborated.

There is no doubt that Mr. Makange was wrong in his assertion that exhibit P2 was not signed by PW1 and/or read out to Haikasia.

We have examined the said statement and we are satisfied that it was signed by PW1, and it contains a statement to the effect that it was read out to Haikasia. Equally untenable is Mr. Makange's argument that the statement must be made under the expectation of death and the declarant should have died immediately thereafter. We have already demonstrated sufficiently that that is not the law in this country.

From our reading of exhibit P2 and our understanding of the law as earlier expounded on, we are of the firm view that it amounts in law to a dying declaration. The next question is whether exhibit P2 needed to be corroborated and whether it was corroborated.

Both Mr. Makange and Mr. Kitambwa are agreed on the legal requirement of corroboration. They say it needed to be corroborated, in the circumstances of this case. They only parted company when it came to the question as to whether it was corroborated. Even the learned trial judge was of the view that exh. P2 needed to be corroborated and went on to hold that it was actually corroborated.

We agree with both counsel in this appeal as well as with the learned trial judge that exhibit P2 needed to be corroborated before a conviction for murder was based on it. We are saying so advisedly because, as rightly argued by Mr. Makange, we have no assurance that it contains the accurate words which were spoken by Haikasia when being questioned by PW1. Again we are saying so while fully aware that exhibit P2 contains a declaration to the effect that it was read out to her. This declaration, however, does not render exhibit P2 to be indisputably true. This is because, firstly, she never signed it, although for an explained good reason. Secondly, and more importantly PW1 certified thereon that it was recorded in the presence of PW5, as follows: -

> *"……maelezo haya yameandikwa mbele ya sister NEEMA MAEDA wa idara ya upasuaji K.C.M.C. Moshi."*

The said Neema Maeda testified as PW5. Her unchallenged evidence was to the effect that while she was attending the eight burnt persons in the I.C.U. ward, she saw police officers record statements from the said patients. She never actually participated in

the interviews. She unequivocally testified that she only signed on one of the recorded statements "because the victim could not write or sign because she was seriously burnt." She went on to testify that she did not even read the contents of that statement which she identified to be exhibit P2.

The evidence of PW5 assumes great significance in the determination of the weight to be attached to and/or the genuineness of exhibit P2 from two perspectives. One, it belies PW1, who indicated on exhibit P2 that it was recorded in the presence of PW5 and he so testified in Court. The credibility of PW1 who recorded the statement of Haikasia, is therefore, thrown in doubt as well as the reliability of exhibit P2. Two, the fact that statements of some of the other victims were taken by the police and were not tendered in court leads to a reasonable inference that they might have contained information contradicting exhibit P2. We think that had the learned trial judge taken these facts into consideration in her summing up to the assessors and in her judgment, she would probably have arrived at a different verdict.

There are other factors we have considered which were never considered by the learned trial judge. The evidence of the appellant's wife was crucial in determining the truthfulness of the contents of exhibit P2. The wife could have corroborated the dying declaration of Haikasia wherein she is shown to have told PW1 that she (the wife) had accused Grace and Mina to the appellant and this apparently angered the appellant, as held by the trial judge, who then "douched an inflammable liquid in the house and lit it" after moving the wife and their baby to safety. That the prosecution failed to call her, lessens the weight to be attached to exhibit P2 if at all it contains any truth.

Furthermore, we wish to point out clearly that we have carefully and objectively scrutinized the entire evidence on record. We did not come across any *iota* of evidence going to show that the appellant had resolved to commit suicide, otherwise he would not have remained in the house he had allegedly deliberately put on fire. If Haikasia had told PW1 nothing but the truth, we have failed to understand why the appellant, who was keen on eliminating only the deceased, returned to the house and barricaded himself inside and

set the house on fire with "an inflammable liquid". He could have easily and safely done so by remaining outside, locking the door from outside and torching the house from there. In that way he could have easily eliminated everybody inside and Haikasia could not have survived to tell PW1, what she allegedly told him. After all dead men tell no tales. We think had the learned trial judge directed her mind to this factor she would not have easily dismissed the appellant's defence as an after-thought.

In the light of the above discussion, we are convinced that if exhibit P2 represents the statement of Haikasia to PW1 it amounts to a dying declaration. However, for the reasons we have tried to give and as the learned trial judge found, it needed to be corroborated. Unlike the learned trial judge, and in line with the views of Mr. Makange and Mr. Kitambwa, we are of the firm view that such corroborative evidence is totally wanting here. What the learned judge took to be corroborative evidence is only evidence of consistency of Haikasia's belief, if she even told the witnesses so, but her repetitions were no guarantee of the accuracy or truthfulness of what she alleged: see **R v. MUYOYA bin MSUMA** (supra).

For the foregoing reasons we allow this appeal in its entirety. The convictions for murder are hereby quashed and the death sentence set aside. The appellant to be released from prison forthwith unless he is otherwise lawfully held.

DATED at DAR ES SALAAM this 1st day of November, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(I. P. KITUSI)
DEPUTY REGISTRAR

Delivered under my hand and Court Seal in Open Court/Chambers at

…… this …… day of …… 2007.

……

DISTRICT REGISTRAR