**THE REPUBLIC OF UGANDA**
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**
**CRIMINAL APPEAL NO.220 OF 2017**
**(Arising from Criminal Case No. 52 of 2015)**

1. **MELLAN MARERE**
2. **NDYAREEBA PATRICK**
3. **TWINAMATSIKO ONESMUS**
4. **BAKARURUMA NELSON**
5. **MUHOOZI DISMUS FUDEL**
6. **TWEHEYO RICHARD**
7. **ANDINDA BENSON BASHEIJA :::::::::::::::::::::::::: APELLANTS**

**VERSUS**

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

**CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA.**
**HON.JUSTICE HELLEN OBURA, JA**
**HON. JUSTICE EZEKIEL MUHANGUZI, JA**

*(Appeal from the decision of the High Court of Uganda sitting at Rukungiri before Hon. Justice Moses Kazibwe Kawumi dated 7th June, 2017 in Criminal Session Case No. 52 of 2015).*

## JUDGMENT OF THE COURT

### Introduction:-

The appellants were indicted before the High Court with the offence of murder contrary to Sections 185 and 189 of the Penal Code Act. On the 07th June, 2017, they were all convicted by the trial Court of the same offence. The 1st appellant was sentenced to 29 years and 10 months imprisonment, the 2nd to 5th appellants were sentenced to 35 years imprisonment and the 6th to 7th appellants were sentenced to 34 years and

8 months imprisonment. Being dissatisfied with the decision of the trial court, the appellants appealed against both conviction and sentence.

**Background**:-

The facts of this case are that on 25th November, 2015 at Burora Cell, Katungu Parish, Rugyeyo Sub-County in Kanungu District, a one Muhimbise Charles and others were involved in a community project of digging a water trench near the home of the deceased (Rukandonda George). The deceased resisted the idea as the water trench would direct water to his compound. A scuffle ensued between the deceased and Muhimbise Charles and the latter was injured and became unconscious. The deceased locked himself in his house but particular people in a mob destroyed the windows and the doors of the house before setting it ablaze with the deceased inside. By the time Police from Kanungu arrived at the scene to control the situation, the deceased had already been killed. The 1st to 7th appellant's were then arrested and charged on allegations that they participated in the murder of the deceased.

The prosecution case against the 1st appellant, a District councilor representing Rugyeyo sub-county in Kanungu District was that she instigated people to burn the house in which the deceased was before the arrival of police and encouraged them to add wood and fuel to the burning house. The case against the 2nd to the 7thappellants was that each one of them directly participated in the murder of the deceased.

The appellants denied the charges brought against them. The 1st appellant testified that she did not instigate anyone as was alleged by the prosecution and that she did not know any of the people who were at the scene. The 2nd appellant denied participation in the murder of the deceased and that he did not see any of the appellants at the scene. The 3rd appellant testified that although he saw many people at the home of the deceased, he did not go there on the fateful day. The 4th Appellant denied the charges and testified that he only got to know of the deceased's death upon his arrest on 9th December, 2015. The 5th appellant denied the charge

and testified that he did not go to the deceased's home on the fateful day. The 6th appellant also denied the charge and testified that he did not go to the deceased's home on the fateful day because he was grazing his animals. The 7th appellant denied the charge and testified that he could not identify any of the people he saw at the crime scene on the fateful day.

The trial Court found the appellants guilty of the offence of murder and convicted them, hence this appeal.

**Grounds**:-

The 1st appellant appealed on 6 grounds independently from the 2nd to the 7th appellants. Her grounds of appeal are that:

1. The Learned trial Judge erred in law and fact when he misdirected himself on the evidence on record and convicted the 1st appellant of murder without evidence of her physical participation in the assault of the deceased;

2. The Learned trial Judge erred in law and fact when he misapplied the doctrine of common intention to convict the appellant;

3. The Learned trial Judge erred in law and fact to rely on and believe the evidence of PW1, PW2, PW3 and PW4 which formed the basis of the conviction of the appellant which was full of contradictions and inconsistencies that had not been explained away;

4. The Learned trial Judge erred in law and fact to find the appellant and her co-convicts guilty of murder and yet gave different sentences to each of the convicts;

5. The Learned trial Judge erred in law and fact when he failed to find that the appellant at best only incited the mob at the scene of crime and therefore not culpable for murder but perhaps for the lesser offence of incitement under section 51 of the Penal Code Act;

6. The Learned trial Judge erred in law and fact to pass a sentence that was excessive in the circumstances on the appellant.

The 2nd to 7th appellants appealed on 6 grounds as follows:

1. The Learned trial Judge erred in law and fact when he relied on insufficient evidence to convict the 2nd-7th appellants;

2. The Learned trial Judge erred in law and fact when he convicted the 2nd -7th appellants when in the circumstances of the case it was hard to prove who actually committed the crime;

3. The Learned trial Judge erred in law and fact when he convicted the 2nd -7th appellants, when the prosecution had failed to prove beyond reasonable doubt that it was the 2nd – 7th appellants who had committed the crime;

4. The Learned trial Judge erred in law and fact when he ignored the defence of alibi as put forward by the 2nd, 3rd, 4th,6th and 7th appellants;

5. The Learned trial Judge erred in law and fact when he convicted the 2nd – 7th appellants relying on the evidence of PW1, PW2, PW3 and PW4 , which was full of contradictions and inconsistencies;

6. In the alternative, the Learned trial Judge erred in law and fact when he sentenced the 2nd – 7th appellants to 35 years in custody when it was harsh and excessive in the circumstances.

At the hearing of the appeal, Learned Counsel Owen Murangira and Julius Galisonga appeared for the 1st appellant; Counsel Nakamatte Esther appeared for the 2nd – 7th appellants, while Learned Senior State Attorney, Namazzi Rachael appeared for the respondent.

Counsel filed written submissions in support and in opposition of the appeal respectively and made highlights of the same when the appeal came up for hearing.

Counsel for the 1st appellant abandoned ground 4 of the appeal and argued each ground of appeal separately. We shall address grounds 1, 2 and 5 of the appeal together considering that they are related, and then address grounds 3 and 6 separately.

On the other hand, counsel for the 2nd– 7th appellants abandoned ground 4 of the appeal and argued grounds 1, 2 and 3 together first, and grounds 5 and 6 consecutively. We shall take the same approach in addressing the grounds of appeal.

We are alive to the duty of a 1st appellate court to re-appraise the evidence adduced at trial and draw inferences therefrom, bearing in mind that this Court did not have the opportunity to observe the demeanor of witnesses at the trial. (***See Kifamunte Henry Versus Uganda, SC Criminal Appeal No.10 of 1997, Bogere Moses Versus Uganda, SC Criminal Appeal No.1 of 1997***).

Regarding the offence of murder contrary to Section 188 and 189 of the Penal Code Act for which the 7 appellants were convicted, the prosecution had a duty to prove the following ingredients beyond reasonable doubt:

i. Death of a human being
ii. The death was unlawful
iii. The death was caused by malice aforethought
iv. The accused participated in causing the death.

It was not contested that the deceased was burnt to death in his house intentionally. Therefore, the first three ingredients were proved beyond reasonable doubt at trial. What is contested is the participation of the appellants in maliciously causing the death of the deceased.

**The 1st appellant's grounds 1, 2 and 5**:-

*The Learned trial Judge erred in law and fact when he misdirected himself on the evidence on record and convicted the appellant of murder without evidence of her physical participation in the assault of the deceased;*

*The Learned trial Judge erred in law and fact when he misapplied the doctrine of common intention to convict the appellant;*

*The Learned trial Judge erred in law and fact when he failed to find that the appellant at best only incited the mob at the scene of crime and therefore not culpable for murder but perhaps for the lesser offence of incitement under section 51 of the Penal Code Act.*

On grounds 1, 2 and 5 of the appeal, counsel for the 1st appellant submitted that the evidence of PW1 that the 1st appellant was at the scene where the deceased had injured Charles Muhimbise was contradictory to the evidence of PW2 who testified that the 1st appellant found when PW1 and others were taking Charles Muhimbise to the Health Centre. In counsel's view, the above was a grave contradiction as it was important in determining whether the 1st appellant participated in the murder of the deceased and the trial Judge erred in ignoring it when it had not been explained away by the prosecution.

Counsel further submitted that the evidence of PW1 in Court was contradictory to his Statement made at Police, and could therefore not be relied upon. He pointed out that while PW1 had testified in Court that he heard PW1 tell people that Charles was dead upon his return to the scene from taking the said Charles to hospital, he however recorded in his Police Statement that while in saloon for hair grooming, he heard the 1st appellant say that the deceased had killed a person. Counsel indicated that PW1 had contradicted himself as to where he was at the time he heard the 1st appellant say that the deceased had killed a person, and this contradiction was never explained by the prosecution.

Counsel further submitted that the above notwithstanding, the statement that the deceased had killed a person was being made by most people at the scene. Counsel made reference to the evidence of PW3 that he had been informed by a one James Byamujura that the deceased had killed Charles, the evidence of PW6 that he had been informed by someone on a motorcycle that the deceased had killed a person, the evidence of PW7 that Geresemu started making an alarm that the deceased had killed Charles and the evidence of PW8 that he was told by the community that the deceased had killed Charles. It was counsel's submission that basing on the above, the statement that the deceased had killed Charles could not be in line with the finding that the 1st appellant urged people to avenge the death of Charles as it was a statement made by most people.

Counsel made reference to the evidence at trial that the 1st appellant urged those who were demolishing the deceased's house to expedite what they were doing before the arrival of police. He made reference to the evidence of PW3 that upon reaching the scene on the fateful day between 9:00 – 9:30 am, he stood near the 1st appellant who was with John the Muluka Chief and a police officer who was armed, as people were demolishing the deceased's house. In counsel's view, this showed that police officers from Nyakabungo were already at the scene and thus the statement that the 1st appellant was telling people to expedite before police arrived could not be sustained.

It was counsel's further submission that while it was the prosecution evidence that the 1st appellant instructed a one Geresome to block PW6 from going to report to Police, however, PW6 testified that it was Gere who had blocked him. Counsel pointed out that Geresome was acting on his own and the allegation that it was first appellant who had given him instructions was false. Counsel further submitted that the trial Court's finding that the police officers from Kanungu were brought by PW6 did not take away the fact that the 1st appellant was the one who called the police officers from Nyakabungo.

Counsel further made reference to the evidence of PW1 that the 1st appellant had told a one Mathias to burn the mattress. However, that PW5 testified that the mattresses were brought by the 3rd appellant and others and that it was Chris who lit the fire. In that regard, that the trial Judge could not find that Mathias burnt the mattress on the instigation of the 1st appellant yet the evidence on record indicated that the fire was lit by Chris.

Counsel made reference to the finding of the learned trial Judge that all the accused formed a common intention to avenge the death of Charles at the instigation of the 1st appellant. He then submitted that the prosecution did not make an effort to prove the state of mind of the appellant regarding the offence for which she was convicted. Further, that it was not in dispute that the 1st appellant did not participate in doing any overt act that led to the death of the deceased.

It was counsel's further contention that it was pertinent for the prosecution to prove that the 1st appellant had on her mind the intention of murdering the deceased. Counsel submitted that the appellant could have uttered some words with inadvertent recklessness but this did not make her culpable of the offence that was committed without her participation. Counsel relied on ***Blakely Sutton Versus DPP [1991] RTR 405, QB*** for the above submission. In that regard, counsel submitted that the learned trial Judge misapplied the doctrine of common intention to convict the 1st appellant.

Counsel further submitted that perusal of the prosecution evidence points to several contradictions which could not have been relied upon to convict the 1st appellant. However, that even if the said evidence was to be relied upon, it only points to the offence of incitement of violence and not participation in the assault of the deceased.

In reply, counsel for the respondent pointed out that the evidence on record did not indicate that the 1st appellant had assaulted the deceased. Rather, the evidence points to the 1st appellant making utterances, urging the people to kill the deceased and destroy property and encouraging them to fetch more fuel, wood, mattresses to burn the deceased. In counsel's

view, the 1st appellant's utterances made her a joint offender to the crime of murder. Counsel relied on ***Simbwa Versus Uganda, Court of Appeal Criminal Appeal No. 023 of 2012*** for the above submission.

It was counsel's further submission that the utterances and actions of the 1st appellant did not fall under the provisions of section 51 of the Penal Code Act for the lesser offence of incitement. Counsel made reference to the finding of the learned trial Judge that the 1st appellant who was a person in a position of authority as the District Councilor thus wielding influence, called upon people to kill the deceased and to burn the house well knowing that the deceased was inside. Counsel pointed out that the above shows that the 1st appellant formed a common intention with the rest of the appellants to kill the deceased.

Counsel invited Court to find that the 1st appellant's utterances and actions made her a participant to the murder under the doctrine of common intention.

We have considered the submissions of Counsel on either side and carefully perused the court record and the Judgment of the learned trial Judge.

The first contention raised by the 1st appellant was that the learned trial Judge convicted her of murder of the deceased without evidence of her physical participation.

The evidence raised by the prosecution against the 1st appellant was that she instigated the other appellants to commit the crime. PW1, Ngabirano Ezraha, catechist at Burora Church of Uganda testified that on 25th November, 2015 at about 7:00 am, he went to Burora Trading Centre in order to arrange for someone to carry his timber to the workshop. He then met the 1st appellant and Charles (DW8) near the home of the deceased where a water trench was to be dug which was 10 meters from the deceased's home. Further, that the deceased came from home and started quarrelling with Charles and a scuffle ensued between the two. As a result, Charles was injured on the head and he fell down, and the 1st appellant

shouted that the deceased had killed Charles. He further testified that he then took the deceased to the hospital with a one Superman. Upon PW1's return from the hospital after about 10 – 15 minutes, he found the 1st appellant telling people that Charles was dead. At the deceased's house, the 1st appellant was telling people that the deceased had killed Charles and locked himself in the house and that the 1st appellant told the 5th appellant to assist those who were burning the house.

PW2, Lydia Kanogozi testified that she found the 6th appellant and Charles digging the trench at about 7:00am and the deceased came and stopped them. As a result, Charles and the deceased started fighting and Charles fell down. Further, that while the destruction of the house was taking place, the 1st appellant was telling the people to expedite the destruction before the arrival of police. PW3, Tumwikirize Patrick also testified that at the scene, he was standing near the 1st appellant who was telling people to hurry in the destruction before police came. PW4, Sunday Yohab testified that the 1st appellant would tell whoever would arrive at the scene to participate in the destruction pointing out that Charles was dead. Further, that when two Police Officers from Nyakabungo arrived, one of them fired in the air but the 1st appellant encouraged the people to continue with the destruction as police looked on. PW5, Peace Twinomujuni testified that the 1st appellant was shouting that Charles of the omuzobika clan had been killed and called upon people to give a hand in the killing of the deceased. PW6, Rev Shem Turyahikayo testified that upon his arrival at the scene, he heard the 1st appellant telling the 2nd to the 6th appellants who were destroying the house that Charles had been killed and that the killer should also be killed.

On her part, the 1st appellant denied the allegations that she had instigated the people to kill the deceased as was alleged by the prosecution. She testified that while walking from her home to Rugyeyo Community Hospital, she heard noise from Burora. She found people at the playground and was informed by the people she found at the playground that the deceased had killed Charles. She saw a one Aggrey and Tindyebwa carrying Charles to the hospital. She then went to the deceased's home

where she found many people including students from the Technical Institute shouting and saying that the deceased had killed their teacher. She testified that she did not remember any person she saw at the scene. Further, that she called the sub county Chief of Nyakabungo who sent 2 police officers.

The learned trial Judge did not find the defence by the 1st appellant credible. In finding the 1st appellant guilty, the learned trial Judge stated as follows:

> *"As the area Local Councilor, A1 must have known at least some of the people at the scene but she adamantly told Court she saw nobody she knew which cannot be true. As the area leader, she did not at all attempt to stop the crowd from creating the havoc they did but according to evidence of PW3, PW5 and PW7 she urged them to expedite the demolition and even advised on the quickest way of lighting the fire by burning the mattress covers.*
>
> *Each of the prosecution witnesses narrated what they saw her do or say at different times including telling a one Mathias to light the mattress cover and ordering a one Geresomu to block PW6 from going to Police. In view of all the above, I make a finding that A1 fully participated in the murder of the deceased".*

The learned trial Judge then made a finding that the 1st appellant formed a common intention with the other appellants to avenge the alleged death of Charles by murdering the deceased.

The 1st appellant did not deny her being present at the deceased's house when the crime was being committed. We are also convinced by the prosecution evidence that the 1st appellant was present at the scene where the deceased and Charles had a scuffle leading to the latter's injury. Counsel submitted that there was a contradiction in the evidence of PW1 and PW2 as to the time when the 1st appellant arrived at the scene. We have carefully perused the evidence of PW1 and PW2 and we find that there was no contradiction as to the time when the 1st appellant arrived at

the scene. PW1 testified that the scuffle between the deceased and Charles begun in the presence of the 1st appellant and PW2 stated that the fight begun when the 1st appellant was already in the Trading Centre. We, therefore reject counsel for the 1st appellant's submission in that regard.

Counsel for the 1st appellant also pointed out that there were deviations in the evidence of PW1 at trial and the statement recorded at police. He pointed out that while PW1 had testified in Court that he heard PW1 tell people that Charles was dead upon his return to the scene from taking the said Charles to hospital, he however recorded in his Police Statement that while in saloon for hair grooming, he heard the 1st appellant say that the deceased had killed a person. In his Judgment, the trial Judge rightly stated that the purpose of police statements is to compare the evidence given on oath with what was recorded to verify any deliberate untruthfulness. In this case, we have perused the evidence by PW1 at trial as well as the statement recorded at police. We did not find any material deviation as alleged by counsel as to the time when PW1 first heard the 1st appellant say that the deceased had killed Charles. In his Police statement, PW1 stated that he heard the 1st appellant say that the deceased had killed a person. In his evidence on oath, PW1 testified that upon Charles falling down, the 1st appellant shouted that the deceased had killed Charles. We, therefore, do not find any grave or material deviation as to point to deliberate untruthfulness on the part of PW1.

It is common ground that the deceased was killed publicly with many people present. Both the prosecution and defence witnesses alluded to this fact. Therefore, the submission of counsel for the 1st appellant that many people were saying that the deceased had killed Charles cannot be ruled out. However, the circumstances and the evidence brought against the 1st appellant as put across by the prosecution is exceptional from what was being stated by the other persons.We note that in addition to telling people that the deceased had killed Charles, the 1st appellant is also said by the prosecution witnesses as having urged people to avenge the alleged death of Charles. As shown above, all the prosecution witnesses found credible point out the 1st appellant as having told people to carry out the unlawful

destruction of the deceased's house with knowledge that the said acts would likely result into the death of the deceased.

We accept the finding of the trial Court that the 1st appellant's total denial as to the knowledge of any person at the scene, being a local leader, was deliberate to hide the truth. It was obvious that some people must have been known to her. We find that while it is true that the appellant did not physically participate in the murder of the deceased, she was urging and supporting other people to carry out the heinous act of burning the deceased in his house which she objectively knew the possible consequence. Her over acts are relevant to the facts in issue which are admissible in evidence as to the commission of the offence.

We are not persuaded by the testimony of the 1st appellant that she was the one who called the police officers from Nyakabungo. We are more convinced with the unchallenged evidence of PW6 that he was the one who informed the police at Nyakabungo about the incident.

The law relating to common intention is provided for under Section 20 of the Penal Code Act as follows:

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence".*

We associate ourselves with the decision of Court in ***Simbwa Paul Versus Uganda, Court of Appeal Criminal Appeal No.023 of 2012***, in relation to common intention, where it was stated that:

> *"The case of Kisegerwa and Another v. Uganda Criminal Appeal No. 6 of 1978 (Court of Appeal) elaborates on the above provision thus: In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose*

*which led to the commission of the offence...an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault."*

**Further, in *Uganda Vs Beino Mugisha and Another Criminal Session case No. 64 of 1998* and *R. Vs Okule & Others [1941] 8 EACA 80,*** it was held;

*"for the principle of common intention to operate it is not necessary to establish that the two first sat to agree on a special plan. Whether or not the accused was part of the common intention can be deduced from his or her presence at the scene of crime and his or her actions or failure to disassociate himself from the pursuit of the common intention. It is even irrelevant whether the accused person did physically participate in the actual commission of the offences or not. It is sufficient to show that he associated himself with the unlawful purposes."*

We find that the 1st appellant's conduct of urging other people to destroy and burn the house of the deceased well knowing that he was inside, and the act of calling upon people to avenge the death of Charles yet he was alive indicates that she formed a common intention with the other persons who physically participated in murdering the deceased. The 1st appellant was aware that as a local leader, her actions of instigating people that the deceased had killed a person and urging them to avenge Charles's death would not end well.

Having accepted the evidence that the first Appellant urged other people to destroy and burn the house of the deceased well knowing that he was inside, we must consider whether the Appellant had an intention to kill. An intention to kill can be inferred from the words and actions of the accused person, the weapon used by the accused, the number of blows inflicted by

the accused and the parts of the body targeted by the accused. A person intends to kill where it is his or her purpose to bring about the death of another person and in the specific circumstances the evidence is such that the accused realized (appreciated) that death was virtually certain to result from his or her actions (barring some unforeseen intervention), ***R v Nedrick (Ransford Delroy)*** (1986) 8 Cr. App. R. (S.) 179 and ***R v Woollin[1999] 1 A.C. 82.*** The prosecution evidence, which we have accepted that the trial court was entitled to believe clearly shows that the 1st appellant procured and encouraged people to burn the house of the deceased person in order to avenge the death of Charles. She was aware that the deceased was locked inside the house, she encouraged people to add fuel to the fire and in the circumstance it can be inferred that she realized and appreciated that if the deceased did not manage to escape from the house, he would die. She had an intention to kill within ***R v Nedrick and R v Woolin.***

We, therefore find no reason to fault the learned trial Judge on grounds 1, 2 and 5 of the appeal.

**Ground 3**

*The Learned trial Judge erred in law and fact to rely on and believe the evidence of PW1, PW2, PW3 and PW4 which formed the basis of the conviction of the appellant which was full of contradictions and inconsistencies that had not been explained away.*

On this ground of appeal, counsel for the 1st appellant pointed out various contradictions and inconsistencies in the prosecution evidence which he considered grave.

Counsel pointed out that while PW1 had testified at trial that the 1st appellant shouted and told him that the deceased had killed Charles, he however had stated in his statement to police that while in saloon grooming his hair, he heard the 1st appellant say that the deceased had killed Charles. In counsel's view, the above created the question as to

where PW1 was when he allegedly heard the 1st appellant say that the deceased had killed Charles.

Counsel further submitted that while PW1 testified that A2 did not participate in destroying the deceased's house, however PW2 had testified that he saw A2 with others destroying and burning the house. Further, that the evidence of PW1 that the scuffle between the deceased and Charles begun before the digging of the trench had started contradicts the evidence of PW2 that the scuffle begun after the digging of the trench had commenced.

Counsel further pointed out that the evidence of PW1 that the 1st appellant was at the door telling Mathias to burn the mattress cover was inconsistent with the evidence of PW2 who did not mention Mathias among the persons who burnt and destroyed the house. Further, that while PW1 testified that he went to the Trading Centre at 7:00 am and met the 1st appellant, this was contradictory to the evidence of PW5 that the 1st appellant was not in the Trading Centre yet, she met people carrying Charles to the Health Centre.

Further, that while PW3 testified that he did not see A7 at the scene, this was contradictory the evidence of PW1 that A7 went to the scene with a bucket full of fuel. Counsel further pointed out that the evidence of PW1 that he took Charles to the hospital with a one Superman was contradictory to the evidence of PW2 that A6 took Charles to the Hospital.

Counsel relied on ***Haji Musa Sebirumbi Versus Uganda, Criminal Appeal No. 10 of 1989*** on the law relating to contradictions. He then submitted that the evidence of the prosecution witnesses was contradictory and full of inconsistencies and could thus not sustain the offence of murder against the 1st appellant.

In reply, counsel for the respondent submitted that the learned trial Judge analyzed the evidence of PW1 and PW2, noted the contradictions and did not consider them grave and intended to mislead Court. In counsel's view, the learned trial Judge rightly disregarded the contradictions. Counsel

relied on ***Janet Mureeba and others Versus Uganda, Court of Appeal Criminal Appeal No.56 of 2000*** in regard to the law on contradictions and inconsistencies.

Counsel submitted that the contradictions in the prosecution evidence were minor and did not go to the root of the case, and should thus be ignored.

The law relating to contradictions and inconsistencies was stated in ***Nasolo Versus Uganda, Supreme Court Criminal Appeal No. 14 of 2000*** as follows:

> *"The law governing inconsistencies in evidence was stated in Alfred Tajar Vs Uganda (1969) EACA Cr. Appeal No. 167 of 1969, to be that minor inconsistency unless the trial judge thinks it points to a deliberate untruthfulness does not result in evidence being rejected. The same case also laid the principle that it is open to a judge to find that a witness has been substantially truthful even though he/she had lied in some particular respect".*

We note that most of the contradictions raised by counsel for appellant were relating to what was stated at police by the prosecution witnesses and the evidence given at trial. Generally, the law relating to police statements is that they are not admissible as substantive evidence because they are not tested in cross-examination. They can only be relevant where they are contradictory to the evidence given in Court. See ***Chemonges Fred versus- Uganda, Supreme Court Criminal Appeal No. 12 of 2001***.

The first contradiction pointed out by the 1st appellant was that while PW1 had testified at trial that the 1st appellant shouted and told him that the deceased had killed Charles, he however stated at police that while in saloon grooming his hair, he heard the 1st appellant say that the deceased had killed Charles. We reiterate our finding under grounds 1, 2 and 5 of the appeal relating to this matter. We do not find any material deviation relating to the time when PW1 first heard the 1st appellant say that the deceased had killed Charles. In his Police statement, PW1 stated that he

heard the 1st appellant say that the deceased had killed a person. In his evidence on oath, PW1 testified that upon Charles falling down, the 1st appellant shouted that the deceased had killed Charles. Whatever contradiction there may have been was minor and did not go to the root of the case.

In counsel for the 1st appellant's view, the evidence of PW1 that A2 did not participate in the destroying of the deceased's house was contradictory to the evidence of PW2 that he saw A2 with others destroying and burning the house. While we find that this was a contradiction in the prosecution evidence, we are of the opinion that this did not in any material way point to untruthfulness in the prosecution evidence adduced against the 1st appellant. The evidence of the two witnesses above was corroborated by other evidence of several other prosecution witnesses. Also as pointed out by the learned trial Judge, we note that different witnesses observed the happenings at the scene of crime from different directions and at different times as they did not arrive at the scene of crime at the same time. This therefore explains some of the non material differences in their evidence.

The other contradiction pointed out by the 1st appellant was that the evidence of PW1 that the 1st appellant was at the door telling Mathias to burn the mattress cover was inconsistent with the evidence of PW2 who did not mention Mathias among the persons who burnt and destroyed the house. Further, that while PW3 testified that he did not see the 7th appellant at the scene, this was contradictory to the evidence of PW1 that A7 went to the scene with a bucket full of fuel. As pointed out above, witnesses observed the happenings at the scene of crime from different directions and there were many people. Each witness testified as to what they saw and the perpetrators they identified. We do not consider the above to be a material contradiction pointing to deliberate untruthfulness in the prosecution evidence.

It was also pointed out that the evidence of PW1 that he took Charles to the hospital with a one Superman was contradictory to the evidence of PW2 that A6 took Charles to the Hospital. It was not in contention that

after Charles got injured, he was taken to hospital. The evidence on record also shows that PW1 and PW2 were at the place where Charles was injured and also at the scene of crime. We are of the opinion that the above contradiction raised by counsel for the 1st appellant was not material as to point to deliberate untruthfulness in the evidence of PW1 and PW2 who were substantially truthful witnesses.

We find that the contradictions pointed out by counsel for the 1st appellant were minor and did not go to the root of the case against the 1st appellant that she spread false information of the death of Charles, and urged the accused persons and others to burn the house of the deceased knowing that he was inside. We find no reason to fault the learned trial Judge in ignoring the contradictions, and finding the prosecution evidence credible.

Ground 3 of the appeal is also disallowed.

**Ground 6**

*The Learned trial Judge erred in law and fact to pass a sentence that was excessive in the circumstances on the appellant.*

On ground 6 of the appeal, counsel pointed out that the 1st appellant was sentenced to 29 years and 10 months imprisonment. He pointed out that the 1st appellant had submitted at trial that she was a first offender, aged 64 years and had several community responsibilities, which were all material factors. Although the learned trial Judge commented on them, the sentence of 29 years and 10 months was excessive in the circumstances of the case in counsel's view. He pointed out that the 1st appellant is asthmatic and currently on aminophylline tablets and on record was also HIV CARE/CHART CARD. Further, that it was not in contention that the offence was committed by a mob. Counsel relied on ***Kamya Abdullah & Others Versus Uganda, Criminal Appeal No. 24 of 2015*** where a sentence of 30 years was reduced to 18 years imprisonment.

Counsel prayed for the sentence to be set aside.

In reply, counsel for the respondent submitted that murder was an offence punishable by death as per Section 189 of the Penal Code Act. Counsel relied on the Constitution (Sentencing guidelines for Courts of Judicature) (Practice) Directions, 2013 which provides that in sentencing a person for murder, the starting point was 35 years. Counsel submitted that in the present case, the trial Court deducted the two months spent on remand by the 1st appellant and then sentenced her to 29 years and 10 months. It was counsel's submission that the above was below the starting point of 35 years. In that regard, that the sentence was lenient.

Counsel prayed that the sentence be upheld by this Court.

It is trite law that this Court can only interfere with the discretion exercised by the lower Court in imposing sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. ***(See Kiwalabye Bernard Versus Uganda, Supreme Court Criminal Appeal No.143 of 2001)***.

In the present case, the trial Judge was faulted for imposing a sentence said to be excessive in the circumstances of the case.

While sentencing the 1st appellant, the learned trial Judge stated that;

> *"The offence committed is grave and it was committed in a gruesome manner.*
>
> *The deceased was burnt and all his property destroyed.*
>
> *The manner in which the offence was committed shows a deliberate set to cause death motivated by hostility against the deceased and his family.*
>
> *The maximum penalty would be a death sentence but this is reserved for the rarest cases. For that factors in mitigation, I will discount it for a custodial sentence.*

*A1 – is 64 years which I do not find useful in mitigation since advanced age is 75 years for sentencing purposes. As a community leader and a person of authority in the community she reneged from her responsibilities and insisted the commission of the offence.*

*I will however consider her poor health, family responsibilities and the 2 months she spent on remand...*

*For A1, Mellan Merere, I consider a sentence of 30 years appropriate. I will deduct the 2 months she spent on remand. She will serve 29 years and 10 months starting today, 7/06/2017*".

From the above, we find that the learned trial Judge took into consideration the appellant's aggravating and mitigating factors. He took into consideration the appellant's poor health and family responsibilities. In sentencing, the learned trial Judge also took into consideration the fact that the appellant had been on remand, and finally imposed a sentence of 29 years and 10 months.

In Kamya Abdullah and 4 Others Vs Uganda, Supreme Court Criminal Appeal No. 24 of 2015, the Supreme Court observed that:-

***"in sentencing, a Judge should consider the facts and all the circumstances of the case; that many of those who take part in mob justice do so without thinking and they do so because others are doing so. Furthermore that, a mob in its perverted sense of justice thinks it is administering justice while at the same time ignoring the importance of affording suspects the right to defend themselves in a formal trial."***

Their Lordships went on thus:

***"Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided***

***form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood."***

In that case, the Supreme Court reduced the sentence of 30 years to 18 years.

In the present case, which is a case of mob justice, we find the sentence of 29 years 10 months excessive in the circumstances. We accordingly reduce it to 18 years imprisonment after taking into account the period of 2 months she spent on remand. The sentence is to be served from the date of conviction.

This ground of appeal is partially allowed.

**2nd to 7th appellant's grounds 1, 2 and 3**

*The Learned trial Judge erred in law and fact when he relied on insufficient evidence to convict the 2nd-7th appellants;*

*The Learned trial Judge erred in law and fact when he convicted the 2nd - 7th appellants when in the circumstances of the case it was hard to prove who actually committed the crime;*

*The Learned trial Judge erred in law and fact when he convicted the 2nd - 7th appellants, when the prosecution had failed to prove beyond reasonable doubt that it was the 2nd – 7th appellants who had committed the crime.*

On the above grounds of appeal, counsel for the 2nd to 7th appellants rightly submitted that the prosecution had a duty to prove its case beyond reasonable doubt.

In regard to the 2nd appellant, counsel submitted that the prosecution did not adduce sufficient evidence to sustain the charges brought against him. Counsel made reference to the evidence of PW1 that the 2nd appellant had asked him to call a son to the deceased called Abraham after the gunshots. Counsel submitted that there was no way a person involved in the destruction and murder could call people to rescue the deceased. Further, that PW1 testified that at the time when police arrived, he was with the 2nd appellant at the Health Centre and that the 2nd appellant did not participate in the destruction of property and murder. Further, that also PW3 testified that he did not see the 2nd appellant and PW4 exonerated him of the murder. In that regard, counsel submitted that the evidence of PW6 against the 2nd appellant could not suffice in convicting the 2nd appellant.

Regarding the 3rd appellant, counsel submitted that while PW1 testified that he saw the 3rd appellant draw petrol from his motor cycle and throw it at the burning house, the same witness testified that he had sent the 3rd appellant away. Further, that PW1 did not mention the 3rd appellant as one of the persons who committed the crime in his police statement. Counsel further pointed out that while PW1 testified that 3rd appellant threw a bottle of petrol in the fire, PW3 testified that the 3rd appellant brought the fuel in a small jerrican while PW4 testified that the 3rd appellant had a 3 litre jerrican of fuel which he poured in the coffee plantation.

For the 4th appellant, counsel submitted that while PW1 testified that the 4th appellant and Kazungu entered the house and found the deceased burned, he again testified that the 4th appellant demolished the house and collected others to burn the house. In counsel's view, the above could not sustain the charge against the 4th appellant.

Regarding the 5th appellant, counsel submitted that while PW1 testified that the 5th appellant assisted in the crime, however he did not show how the said appellant actively participated. Further that even PW2 did not mention the role played by the 5th appellant. It was only PW4 who testified that the 5th appellant was among those who committed the crime but also did not mention the role he played. Counsel further submitted that while

PW5 testified that the 5th appellant brought cushions and PW7 testified that he saw the 5th appellant and others throwing stones at the window;, however, in the statement recorded at Police, PW7 stated that when demolition of the house begun, she hid until the demolition of the house was completed. In counsel's view, it was surprising that the said witness would watch the demolition of the house while in hiding.

For the 6th appellant, counsel submitted that while PW1 testified that the 6th appellant participated in the commission of the crime, he did not point out the role played by the said appellant. Further, that PW2 did not in any way implicate the 6th appellant other than stating that he found the latter taking Charles to the Clinic.

In regard to the 7th appellant, counsel submitted that PW1 testified that the 7th appellant was at the Technical Institute and not at the scene of crime and that also PW3 testified that he never saw the 7th appellant at the scene.

It was counsel's submission that the above evidence adduced against the 2nd to the 7th appellants was insufficient to prove the charge of murder against them. Counsel further submitted that the appellants' defenses were supported by the evidence of DW9 who testified that upon reaching the crime scene at 7:30 – 8:00 am, they did not see the appellants since there were many people at the scene and the house was already burning.

In reply, counsel for the respondent submitted that the learned trial Judge properly evaluated the evidence regarding the participation of each of the appellants and came to a finding that they all participated in the commission of the offence.

In reply to the submissions of counsel for the 2nd to 7th appellants regarding the 2nd appellant, counsel submitted that PW2 and PW4 had testified at trial that the 2nd appellant had participated in destroying the doors of the deceased's house and later stabbed the deceased with a spear. Further, that the destruction was also witnessed by PW6 , PW5 and PW7 saw the 2nd appellant carry mattresses to the sitting room which were

used to light the fire. Counsel submitted that the trial Court was right in finding that the 2nd appellant's alibi had been disproved by the prosecution and that he fully participated in the murder of the deceased.

Regarding the 3rd appellant, counsel submitted in reply that all the prosecution witnesses testified that he was involved in the murder by draining petrol from his motorcycle for lighting the fire and collecting dry grass to help in lighting it. Further, that PW1 who had allegedly sent him to Nyakabungo saw him actively participating in lighting the fire. Counsel submitted that the learned trial Judge rightfully found that the 3rd appellant's alibi had been destroyed by the prosecution witnesses who placed him at the crime scene.

In reply to the submissions raised by counsel for the 4th appellant, counsel made reference to the alibi raised by the 4th appellant that on the fateful day he was home and he only got to know about the incident when police arrested him. Counsel submitted that the evidence of PW2, PW3 and PW4 had placed the 4th appellant at the crime scene. Further, that it was unchallenged evidence that the 4th appellant had threatened to hit PW3 with a piece of timber. In that regard, that the 4th appellant's alibi was discredited and he was found to have fully participated in the murder of the deceased.

Regarding the submissions raised for the 5th appellant, counsel submitted that while the 5th appellant denied stepping at the deceased's home on the fateful day, however, it was at the same place where he learnt about Charles's injury. Counsel further submitted that the evidence of PW1 and PW4 placing him at the scene of crime and him actively participating in the incidents that led to the death of the deceased was more believable. In counsel's view, the alibi by the 5th appellant was destroyed by the prosecution evidence.

In reply to counsel for the 2nd to 7th appellants' submissions raised for the 6th appellant, counsel for the respondent made reference to the evidence of PW1 that the 6th appellant was among the people who followed the deceased to his house after Charles got injured. Counsel pointed out that

the 6th appellant was among the 1st people to destroy the deceased's house as per the evidence of PW7. Counsel was of the view that the account given by the prosecution witnesses regarding the 6th appellant's participation in the murder of the deceased was more believable.

Regarding the 7th appellant, counsel for respondent submitted in reply that while the 7th appellant claimed to have been at the Technical Institute on the fateful day, the said Technical Institute was just across the road from the deceased's home and he could see all the happenings. Counsel made reference to the trial Court's finding that it was not a coincidence that the 6th appellant and the 3rd appellant who both own motorcycles were the ones who allegedly supplied fuel used to burn the deceased's house. In that regard, the trial Judge rightly dismissed the alibi raised by the 7th appellant.

Counsel prayed that this Court finds that the prosecution proved its case beyond reasonable doubt and that the trial Court properly evaluated evidence and found it sufficient to incriminate the appellants.

The evidence against the 2nd appellant was that he participated in destroying the deceased's house and also stabbed the deceased with a spear. That was according to the evidence of PW2, PW4, PW5, PW6 and PW7.

In his defence, the 2nd appellant testified on oath that on the fateful day at 7:00am, he went to prepare for his grandfather's burial at Mpambizo village. At around 9:30am, he heard gunshots from Burora. Upon him calling PW7, he was informed that the deceased's house had been burnt. Upon his arrival at Burora, he found PW1 at Burora Health Centre and they were joined by PW7. He then went with PW1 to the deceased's house and police from Nyakabungo was there. Further, that he asked if they could put out the fire but police from Nyakabungo refused. At around 10:30am, police from Kanungu arrived. It was his evidence that he remained with PW1 and Tumwikirize Patrick until Police from Kanungu allowed them to put out the fire.

PW1 testified that the 2nd appellant did not participate in the murder of the deceased or the destruction of the house.

In finding the 2nd appellant guilty, the trial Judge pointed out a contradiction in the defence evidence which was considered material. The trial Judge stated as follows:

> *"I also find contradiction in DW1's evidence as to when he called PW1. Whereas DW1 claims to have called PW1 after hearing gun shots, PW1 told Court that he received the call before PW6 had gone for the Police men who fired the shots. The implication of that contradiction is that DW1 could not have first learnt of the happenings from the call he made to PW1 since the Policemen who fired the shots he heard from the funeral had not arrived."*

We accept the trial Courts finding above. We find that the 2nd appellant was not truthful as to the time when he got to know about the incident and his intention was to mislead Court in regard to his participation. We are convinced by the prosecution evidence that the 2nd appellant fully participated in the murder of the deceased.

The evidence against the 3rd appellant was that he drew fuel from his motorcycle to burn the deceased's house and participated in the destruction of the deceased's house. All the prosecution witnesses, whose evidence was found credible implicated the 3rd appellant in the murder. The 3rd appellant raised an alibi that PW1 sent him to Nyakabungo at 8:00am and upon his return between 12:00 and 1:00pm, police from Kanungu arrived. Further, that he did not branch off to the home of the deceased on the fateful day. However, even PW1 who had sent him to Nyakabungo testified that the 3rd appellant had participated in the murder of the deceased. As rightly stated by the learned trial Judge, the evidence on record shows that police from Kanungu arrived at 10:30am and not 1:00pm. We find that the prosecution evidence against the 3rd appellant was more credible and his alibi could not be sustained.

While all the prosecution witnesses implicated the 4th appellant in the murder of the deceased, he raised an alibi that on the fateful day, he remained at his home and only got to know about the incident 2 weeks later upon his arrest. The prosecution witnesses all implicated him as having participated in the murder. We also find it unbelievable that the 4th appellant could not have heard about the incident for two weeks considering that his home was in the same village as the deceased. The prosecution evidence was more believable and we disallow the alibi raised by the 4th appellant.

The evidence against the 5th appellant was that he actively participated in the murder of the deceased. PW1 testified that upon the 1st appellant encouraging him to assist those burning the house, the 5th appellant got a pick axe and broke the house as it was burning. PW5 testified that the 5th appellant participated in squeezing the deceased and that he brought cushions that were used to burn the house. PW6 testified that the 5th appellant was among those who were destroying the house. PW7 testified that the 5th appellant broke the glass windows together with the 2nd appellant, 6th appellant, 4th appellant and the 3rd appellant. On his part, the 5th appellant testified that on the fateful day while at a building site about 100 metres from the deceased's home, he heard noise and then went to the deceased's home. He was informed that Charles had been killed by the deceased. He then went to the Health centre at about 8:30am where he stayed for about an hour and went back to the building site. He further testified that about 9:00am, he went to the Trading Centre where he found the 2nd appellant with Tumwikirize and George.

According to counsel for 2nd to 7th appellants, although PW1 testified that the 5th appellant assisted in the crime, however he did not show how the said appellant actively participated. We do not accept the above submission. As per the record, PW1 testified that the 5th appellant got a pick axe and broke the house as it was burning.

As rightly submitted by counsel for the respondent, while the 5th appellant denied going to the deceased's home on the fateful day, it was at the same place where he learnt about Charles's injury. We also note that while the 5th appellant testified that he went to the Health Centre at 8:30 and spent an hour there, he also testified that at 9:00am he went to the Trading Centre where he found the 2nd appellant with Tumwikirize and George. We find the prosecution evidence against the 5th appellant more credible and he was properly placed at the scene of crime.

The evidence against the 6th appellant was that he also actively participated in the murder of the deceased. PW1 testified that upon his return from taking Charles to the hospital, he found the 6th appellant destroying the house and pulling out the door. Further, that the 6th appellant also carried firewood into the burning house. PW2 also testified that the 6th appellant was among those who demolished and burnt the deceased's house and also stabbed the deceased. PW3 testified that the 6th appellant participated in the burning of the deceased's house. PW5 testified that the 6th appellant was among those who squeezed the deceased. PW6 testified that upon his arrival at the scene between 8:00 to 9:00am, he found the 2nd to 6th appellants destroying and damaging the glasses to the deceased's home. However, he later testified that he did not see the 6th appellant. PW7 testified that the 6th appellant together with the 2nd, 3rd, 4th and 5th appellants followed the deceased to his house, threw stones at the windows and removed the door. In our view, the evidence was well corroborated in that regard. Further, that the 6th appellant together with the 2nd and 3rd appellants carried mattresses and tried to light the fire but failed.

On his part, the 6th appellant testified that on the fateful day, he met people carrying Charles to the hospital and went along with them. Upon Charles being taken away from the hospital, he then went to graze his cows.

We find the account given by the prosecution witnesses more believable. The prosecution witnesses indicated above, whose evidence was found

credible placed the 6th appellant at the scene of crime when they stated that they saw the 6th appellant participating in the murder of the deceased. His alibi was destroyed by the prosecution. We find no reason in faulting the learned trial Judge in finding the 6th appellant guilty.

PW1 testified that the 7th appellant brought fuel for burning the house. PW2 testified that he saw the 7th appellant parking his motorcycle, although he did not mention how he participated. PW3 testified that he did not see the 7th appellant at the scene of crime. PW4 testified that the 7th appellant brought fuel in a 3 litre bucket to burn the house. PW5 testified that the 7th appellant brought fuel in a bucket of Omo and gave it to Chris who in turn poured it on the mattresses. PW6 testified that the 7th appellant came with a bucket of fuel, lit the fire and carried timber to keep the fire burning. PW7 testified that the 7th appellant came with a bucket of fuel which he added to the fire.

The 7th appellant raised a defence that he did not step at the home of the deceased on the fateful day. He testified that on the same day, he was transporting students of Burora Technical Institute to Rukungiri and Kihihi. He denied taking petrol to the deceased's home.

It was undisputed that the 7th appellant was a bodaboda cyclist. We do not find it coincidental that he was implicated by the prosecution witnesses as having brought fuel to burn the deceased's house. While counsel for the 2nd to 7th appellants contended that the prosecution evidence could not be relied upon because the witnesses mentioned different items where the fuel was carried, we did not find the contradiction material as this could be possible due to the confusion during the incident. Instead, we find that the said evidence of the witnesses were corroborative and their evidence that the 7th appellant carried fuel to the scene of crime was credible. His alibi that he was at the Technical Institute, which was a few meters away from the deceased's home was destroyed by the prosecution evidence.

Consequently, the 2nd to 7th appellants' grounds 1, 2 and 3 of the appeal are also disallowed.

## 2nd to 7th appellants' Ground 5

*The Learned trial Judge erred in law and fact when he convicted the 2nd – 7th appellants relying on the evidence of PW1, PW2, PW3 and PW4, which was full of contradictions and inconsistencies.*

Counsel for the 2nd to 7th appellants submitted that the prosecution evidence was marred with so much inconsistencies and contradictions against the 2nd to 7th appellants and the learned trial Judge erred in law and fact when he sustained a conviction based on the same.

Regarding the evidence of PW1, counsel submitted that in his statement at Police, PW1 stated that he arrived at the Trading Centre at 7:00am and found Charles digging the trench. He then went to the salon to groom his hair. While in saloon, he heard someone making noise that the deceased had murdered Charles. Counsel contended that the above was contradictory to PW1's evidence at trial that upon reaching the Trading Centre, Charles came out of a shop with axes and pickaxes and then the deceased joined and the scuffle between the deceased and Charles ensued. Further, that PW2 testified at trial that she arrived at the scene at 7:00am and found A6 and Charles digging the trench. However, that in her Police Statement, she stated that when she arrived at the scene, she found Charles lying in a pool of blood and people were saying that the deceased had hit him with a hoe.

Regarding the evidence of PW7, counsel pointed out that in the Statement at Police, PW7 stated that the deceased went to the place where Charles was digging and hit him, while at trial he testified that Charles went with A2, A6, A4, Geresomu and Enock to the deceased's house and the deceased moved out of the house and struggled with Charles. Counsel thus submitted that PW7's statement at Police contradicted his evidence in Court.

For the evidence of PW5, counsel for the 2nd to 7th appellants pointed out that none of the appellants were implicated in the statement recorded at Police by PW5.

Counsel further pointed out that there were contradictions in the prosecution evidence as to who was digging the trench with Charles. Counsel submitted that: PW1's evidence suggested that there were no other people digging the trench with Charles; PW2 testified that at the time of her arrival, she found Charles digging the trench with A6; PW7 testified that Charles went to the deceased's house with A2, A6, A4, Geresome and Enock.

Counsel further submitted that there were contradictions as to who followed the deceased to his house after the scuffle with Charles. He pointed out that PW1 in his police statement stated that he saw Kyeyatire Enock hit the deceased's window glasses with the hammer. However, at trial, he testified that the deceased was chased by Enock, Gere and the 6th appellant. Further, that PW7 testified that the deceased was followed by the 2nd appellant and the 6th appellant while he recorded a statement at police indicating that the deceased was followed by Gere, Enock and Nayeebare.

Counsel submitted that the evidence of PW1 in relation to who took Charles to hospital was contradictory. While PW1 testified that he took Charles to hospital with Superman, in his Police statement he stated that he told Rwijage Aggrey and George to take Charles to hospital. Further, that PW2 recorded in her Police statement that Charles was taken to hospital by the 6th appellant.

In regard to who participated in the demolition of the house, counsel submitted that there were a number of unexplained contradictions. Counsel pointed out that PW1, in his Police statement implicated none of the appellants as the perpetrators of the crime. He only implicated them at trial. Further, that PW7 in his Police Statement implicated Gere and Enock Nayebare as the people who demolished the house. However, at trial, he testified that the 2nd to the 7th appellants were the perpetrators of the

crime. Counsel further pointed out that PW2 only implicated the 6th appellant of all the appellants in her police statement. However, at trial, she implicated all the appellants.

It was counsel's submission that the contradictions in the evidence of the above key witnesses on material points should not be overlooked by this Court and therefore, the 2nd to 7th appellants should be acquitted of murder.

In reply, counsel for the respondent made reference to the finding of the learned trial Judge that particular accused persons were alleged to have done particular things by either some or all the witnesses. The learned trial Judge attributed this to the fact that the said witnesses did not all go to the scene at the same time and left the scene at different times. In that regard, that differences in what each person saw or heard may not necessarily point to untruthfulness of the evidence that was given.

We reiterate our decision relating to the law on contradictions and inconsistencies and the law relating to credibility of statements recorded at police above.

The first contradiction pointed out by counsel for the 2nd to 7th appellants was that in the Statement at Police, PW1 stated that he arrived at the Trading Centre at 7:00am and found Charles digging the trench. In counsel's view, the above was contradictory to PW1's evidence at trial that upon reaching the Trading Centre, Charles came out of a shop with axes and pickaxes and then the deceased joined and the scuffle between the deceased and Charles ensued. We do not find the above contradiction as being material and pointing to deliberate untruthfulness in the evidence of PW1. We find that PW1 was a credible witness as found by the trial Court. The evidence of PW1 as to the time when the fight between Charles and the deceased ensued, the cause of the fight and his presence at the place where the fight took place was corroborated by other prosecution witnesses like PW2. We find that the above contradiction could not be used to discredit the evidence of PW1.

The other contradiction pointed out by counsel for the 2nd to the 7th appellants was that PW2 testified at trial that she arrived at the scene at 7:00am and found A6 and Charles digging the trench. However, that in her Police Statement, she stated that when she arrived at the scene, she found Charles lying in a pool of blood and people were saying that the deceased had hit him with a hoe. While the above was also an identifiable contradiction in the evidence of PW2, she however consistently narrated the events on the fateful day and she was found credible. We do not find that the contradiction as to the time when she arrived at the scene and what she found or saw regarding Charles and the deceased was material and did not point to deliberate untruthfulness in her testimony.

It was also pointed out that none of the appellants were implicated in the statement recorded at Police by PW5. In finding the evidence of PW5 credible at trial, the learned trial Judge stated as follows:

> *"PW5 and PW7 were cross examined on the failure to mention some of the accused persons in the Police statements they recorded. PW5 gave a reason that she feared to be killed since the accused were still at large. PW7 told Court that he was still frightened and he could not linguistically connect with the Police officer who recorded the statement".*

The learned trial Judge also made a finding that he had observed PW5 give evidence and she did not strike him as a person who was deliberately telling lies. Evidence of demeanor of a witness cannot be interfered with since it is only the trial court that had the opportunity to see the witness, that as it may be, we further observe that the reason why PW5 and PW7 had not mentioned some of the appellants in their statements recorded at Police was satisfactorily explained at trial. We are convinced that the two witnesses explained the true events at the trial. Besides, their evidence was corroborated by other prosecution witnesses as regards the participation of the appellants in the murder of the deceased.

The other complaint pointed out by counsel for the 2nd to the 7th appellants was that there were contradictions in the prosecution evidence as to who was digging the trench with Charles and as to who followed the deceased to his house after the scuffle with Charles. It is not in dispute that the offence was committed in a chaotic environment and different witnesses arrived at different times and observed the events of the day at different times and from different directions. That explains some of the minor contradictions in the evidence. Both the prosecution and defence witnesses do not dispute that Charles and the deceased did not agree in relation to the digging of the trench, and thus the fight. The evidence as to the participation of the appellants was majorly at the deceased's house. We find that the above contradictions raised by counsel for the appellants were not material, and did not go to the root of the case that appellants 2 – 7 participated in the murder of the deceased.

We find that the contradictions and inconsistencies raised by counsel for the 2nd to 7th appellants were minor. They did not point to deliberate untruthfulness in the prosecution evidence.

The 2nd to 7th appellants ground 5 of the appeal is also disallowed.

**2nd to 7th appellant's ground 6**

On this ground of appeal, counsel for the 2nd to 7th appellants relied on ***Kamya Abdullah & 4 ors Versus Uganda (supra)*** where the deceased was killed in a mob of about 50 people. The Court made a finding that a sentence of 30 years imprisonment against each of the appellants was not a proper exercise of discretion in the circumstances of the case. It was counsel for the 2nd to 7th appellants that the circumstances in the above case were not different from the circumstances in the present case.

Counsel prayed that this Court finds that the sentence passed against the 2nd to 7th appellants was harsh and should be reduced to 10 years. This was also considering that the appellants were first time offenders and they were young people still in their youthful years.

In reply, counsel for the respondent submitted that the offence of murder attracts a maximum sentence of death.

In counsel's view, a sentence of 35 years in a murder case where the deceased was burnt beyond recognition was not harsh and excessive. Counsel relied on ***Semanda Christopher & Anor Versus Uganda, Court of Appeal Criminal Appeal No. 77 of 2010*** and ***Bandebaho Benon Versus Uganda, Court of Appeal Criminal Appeal No. 319 of 2014*** for the submission that 35 years imprisonment was neither harsh nor excessive in the circumstances of the case.

Counsel prayed that the sentence passed upon the 2nd to 7th appellants be upheld by this Court.

We have already stated the principles upon which an appellate Court may interfere with the discretion exercised by a trial Court in sentencing.

From the Judgment of the trial Court, we find that the trial Judge considered the mitigating factors raised for the appellants while sentencing them. The trial Judge took into consideration that the 2nd to 7th appellants were in their youth, were presumed to be first offenders, had families to care for and deserved a chance to re-join society after serving their sentences. He then imposed a custodial sentence of 33 ½ years upon deducting the 1 ½ years spent on remand by the 2nd to 5th appellants. For the 6th to 7th appellants, a custodial sentence of 34 years and 8 months was imposed upon deducting the 4 months spent on remand.

However, we shall still refer to the Supreme Court authority of ***Kamya Abdullah and 4 Others Vs Uganda*** (supra) for the proposition that while sentencing, a judge should consider all the circumstances of the case; and that cases of mob justice should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood.

Appellants 2 – 7 participated in a mob justice killing instigated by the 1st appellant who spread wrong information that the deceased had killed

Charles. We, therefore, consider the sentences of 33½ years imposed on the 2nd, to 5th appellants, and 34 years and 8 months imposed on the 6th and 7th appellants to be excessive under the circumstances. We set these sentences aside and substitute them with 16 years imprisonment for each of the 2nd – 7th appellants.

In the result, we dismiss this appeal as regards conviction, and uphold the conviction of the appellants for murder. We allow the appeals against sentence by reducing the sentence against the 1st appellant to 18 years; and reducing the sentence of the 2nd to 7th appellants to 16 years each.

We so order.

Dated this 2nd day of June 2019

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**Elizabeth Musoke,**

**Justice of Appeal**

.....

**Hellen Obura,**

**Justice of Appeal**

.....

**Ezekiel Muhanguzi,**

**Justice of Appeal**