THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO 0257 OF 2015

(Coram: Egonda – Ntende, Obura & Madrama, JJA)

MASEREKA RICHARD KALYOMA} .....APPELLANT

VERSUS

UGANDA} .....RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kasese (Matovu, J) delivered on the 15th of July, 2015)

JUDGMENT OF THE COURT

The appellant was indicted, tried and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act by the High Court sitting at Kasese Honourable Mr Justice David Matovu on 15th of July 2015.

The particulars of the offence are that the appellant and others still at large on 10th of June 2013 at Kanyamunyu cell in Kasese district murdered Biira Teddy. Secondly, the deceased was robbed of the sum of Uganda shillings 1,600,000/=, a mobile phone and the appellants immediately before during or immediately after the robbery used a deadly weapon with a gun to kill the deceased. The appellant was convicted as charged and sentenced to 33 years imprisonment on the count of murder and 13 years imprisonment for the offence of aggravated robbery.

Being aggrieved against conviction and sentence, the appellant lodged an appeal in this court on the following grounds:

1. That the learned trial judge erred in law and fact in holding that there was sufficient circumstantial evidence irresistibly incriminating the appellant in the commission of the offences with which he was charged and thereby erroneously convicted him.

2. That the learned trial judge erred in law in sentencing the appellant to harsh and manifestly excessive sentence of 33 and 13 years respectively in the circumstances.

Representation

At the hearing of the appeal, the appellant was represented by learned counsel Mr Claude Arinaitwe while the respondent was represented by the learned Senior State Attorney Ms Rachel Namazzi.

Submissions of the appellant

Mr Claude Arinaitwe adopted his written submissions on court record as the submissions of the appellant in this appeal.

He submitted that from the record of proceedings of the trial court, there is no direct evidence of participation of the appellant in the commission of the offence with which he was convicted. Therefore the court relied on circumstantial evidence only. He submitted that the law on circumstantial evidence is well-settled and is that before drawing any inference of guilt from circumstantial evidence, there is need to be sure that no circumstances exist that would either weaken or altogether destroy the inference of guilt. The duty of the court is to establish whether the circumstantial evidence adduced in the trial prove the guilt of the accused beyond reasonable doubt which is the standard required by the law to prove the guilt of an accused person (see **Musoke v R [1958] EA 715, Ahimbisibwe Allan & Another v Uganda; Court of Appeal Criminal Appeal No 820 of 2014**).

From the authorities he submitted that the law is that for a conviction to be based on circumstantial evidence, such evidence must lead to the irresistible inference that the accused committed the crime or as is often said, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

As far as the facts of the case are concerned, the learned trial judge relied on the evidence of the police sniffer dog which was introduced to the crime scene and that led people to the home of the appellant. He submitted that the evidence of the sniffer dog was by itself sufficient to prove the guilt of the appellant. PW2, the husband of the deceased Mr Baluku Moses, was not around when his wife was murdered. He found the appellant and his co-accused at his home whereupon the police took them to their homes after the sniffer dogs had stopped at their respective homes. Nothing was retrieved from the appellant's home by the sniffer dog. PW3 testified that the dog did not retrieve any exhibits from the appellant's home. Further, that the dog was introduced at around midday when the scene of the crime had already been tampered with by neighbours including the appellant who had answered the alarm the night the deceased was attacked and even helped in carrying the deceased from the house to the roadside to wait for a vehicle to take her to hospital.

The appellant's counsel further submitted that the appellant's evidence was consistent and coherent when he testified that he answered the alarm immediately the deceased was attacked. He also testified about how he went to the home of the deceased and participated in lifting the deceased from a pool of blood and carried her with others to the roadside to wait for a vehicle to take her to hospital. The appellant was at the vigil with other people and only went home to collect his sweater and came back to the scene. The sniffer dog was introduced when the appellant was engaged in

the burial program. PW1 testified that it was the appellant who informed them about the death of the deceased corroborating the appellant's testimony that he was around before the appellant died and thereafter. Furthermore, the police handler testified that the sniffer dog evidence was by itself not conclusive evidence. It showed a possibility that the appellant could have reached the scene but not when he did so. He submitted that in **Allan and another v Uganda** (supra) this court held that the evidence of the sniffer dog should be accompanied by the evidence of the person who trained the dog and who can describe accurately the nature of the test employed. Furthermore, before the evidence of a sniffer dog is admitted, it should be treated with great care. The court should ask for the evidence as to how the dog was trained and for evidence as to the reliability of the evidence (See **Omondi & another v R [1967] EA 802 at 807**). Furthermore, the following principles are elicited from the precedents namely:

1. The evidence must be treated with utmost care by court and given the fullest sort of explanation by the prosecution.
2. There must be material before the court establishing the experience and qualifications of the dog handler.
3. The reputation, skill and training of the tracker dog is required to be proved before the court.
4. The circumstances relating to the actual training must be demonstrated. Preservation of the scene is crucial. And the trail must not have become stale.
5. The human handler must not try to explore the inner workings of the animals mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might probably be drawn from a particular action by the dog.

6. The court should direct its attention to the conclusion on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from materials not subject to the truth eliciting process of cross-examination (See and **Uganda v Muheirwe and Another High Court at Mbarara Crim Session Case No 11 of 2012**).

The appellant's counsel submitted that the learned trial judge admitted the dog evidence without complying with the stated well known requirements for admission of such evidence.

The other circumstantial evidence relied on by the trial judge is a grey trouser with blood allegedly recovered from the appellant's house. The appellant's counsel submitted that the manner of retrieval of the trouser leaves a lot to be desired. Firstly, the sniffer dog never retrieved or even led to the retrieval of the trouser. If the trouser was in the appellant's house, when the sniffer dogs entered the house, there is no reason why the dog did not discover it if indeed it had bloodstains of the deceased on it. If the trouser belonged to the appellant, it must have a scent and therefore the sniffer dog ought to have sniffed it out. The evidence shows that the sniffer dog did not lead to the retrieval of the trouser from the appellant's house. The sniffer dog entered the house and came out. The trouser was allegedly recovered by PW4 long after the dog had left the house but strangely he made no mention of the recovery of the bloodstained clothes from the appellant's house. Secondly the trouser is not listed in the exhibits tendered as exhibit PE 8. In the exhibits there is mention of a grey skirt and not a trouser. It is the appellant's submission that the grey trouser did not belong to him and he denied ownership of it. Counsel contended that the trouser must have been cooked up by the police to help nail the person they suspected to be the murderer of their colleague's wife.

Furthermore, counsel submitted that the other piece of circumstantial evidence relied on by the learned trial judge was based on exhibit P4. It led

the learned trial judge to conclude that the appellant worked at a quarry whose stones were similar to the stone exhibited. No fingerprints were taken of the appellant and those on the stone to establish that indeed the appellant handled the stone found at the scene. There was no evidence led to the effect that the appellant worked at a quarry or that the quarry belonged to him other than an allegation to that effect by PW5, a police officer who had never worked in the neighbourhood of the quarry and who was stationed in Kasese but had gone to the scene upon being called by PW4.

None of the circumstantial evidence was sufficient to prove beyond reasonable doubt the participation of the appellant in the commission of the offence for which he was convicted. In the premises the learned trial judge erred in relying on the circumstantial evidence to convict the appellant. Counsel invited the court to quash the conviction and set aside the sentences.

In the alternative, the appellant's counsel submitted that the learned trial judge erred in law in sentencing the appellant to a harsh and manifestly excessive sentence of 33 years and 13 years respectively in the circumstances.

Submissions of the respondent

In reply to the appellant's submissions on the first ground of appeal, Ms Rachel Namazzi opposed the appeal. She submitted that the appellant on the date of the murder on 10th of June 2013 went to see the deceased and wanted to borrow money but the deceased declined to lend him any money. He warned the deceased to sleep early because security operatives were coming to patrol at night and that was the same date she was brutally attacked with her family. The money of the deceased was stolen. The deceased did not die immediately but a short time after the attack.

The prosecution case was that after her demise, the next morning, the sniffer dog was brought on the scene of the crime and introduced to the scent inside. There was a big stone at the entry of the house. Between the deceased place and the appellant's place were three houses but the sniffer dog went straight to the appellant's house. This was the circumstantial evidence. Prosecution relied on the sniffer dog after being introduced at the scene and prosecution recovered several exhibits among which include a bloodstained trouser. After the police sniffer dog left the appellant's house, a police officer searched the house with this team and recovered three exhibits which included a bloodstained trouser taken to be that of the appellant. She further contended that it was evident from the movement of the sniffer dog which went first to the appellant's house that the appellant was implicated because several other people came to the scene but the sniffer dog did not go to their houses but went to the appellant's house first. She prayed that the conviction of the appellant is upheld.

Consideration of the appeal

We have carefully considered the grounds of the appellants appeal, the submissions of counsel, the precedents cited as well as the applicable law generally.

This is the first appeal and our duty is to retry matters of fact by subjecting the evidence to fresh scrutiny and arriving at our own conclusions. The duty of a first appellate court was considered in detail by the East of the Court of Appeal sitting at Dar es Salaam in the case of **Dinkerrai Ramkrishan Pandya v R [1957] 1 EA 336 at 337** where the East African Court of Appeal held that:

> ... the Supreme Court of Kenya (Sheridan, C.J., and Thacker, J.) set out what we believe was the true legal view of its duty as a first appellate court in these circumstances. We need only quote the following passages from the judgments cited and applied by the Supreme Court. In The Glannibanta (2) (1876), 1 P.D.

283, the Court of Appeal (James and Baggallay, L.JJ., and Lush, J.) said this (at p. 287):

> "Now we feel, as strong as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

In Coughlan v. Cumberland (3), [1898] 1 Ch. 704 the Court of Appeal (Lindley, M.R., Rigby and Collins, L.JJ.) put the matter as follows:

> "The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong . . . When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

The duty to subject the evidence to fresh scrutiny springs from rule 30 (1) of the Rules of this court which provides that the duty of this court in an appeal from the decision of the High Court in the exercise of its original jurisdiction is to reappraise the evidence and draw inferences of fact. With that duty in mind we have considered the first ground of appeal which is that:

> The learned trial judge erred in law and fact in holding that there was sufficient circumstantial evidence irresistibly incriminating the appellant in the commission of the offences with which he was charged and thereby erroneously convicted him.

Further, we shall consider the alternative ground on sentence only if the first ground of appeal is answered in the negative.

On the first ground of appeal, the ingredient of the offence as to whether the deceased was unlawfully killed with malice aforethought is not in controversy. Secondly, the fact that the deceased was robbed of a sum of Uganda shillings 1,600,000/= is also not in controversy. What is in controversy in this appeal is whether there was sufficient circumstantial evidence upon which the trial court based its conviction of the appellant. Two accused persons had been charged with the offence of murder and aggravated robbery. The first accused Mr Masereka Richard Kalyoma was convicted as charged while the second accused Mr Kisembo Baluku Joseph was acquitted of all the charges. On the question of participation of the appellant, the learned trial judge held at page 2 of his judgment that what remained in contention is the participation of the accused persons. He further said as follows:

> In fact no person saw the people who killed Bira Teddy, we therefore rely on circumstantial evidence in this case.

The circumstantial evidence relied on was that after the death of the deceased, a police dog was introduced to the scene of the crime by PW3,

Police Officer Mark Orach. Secondly, PW4 is said to have recovered a grey trouser exhibit P5 from the home of the appellant and which trouser had bloodstains on it. Thirdly, the learned trial judge found that the stone which was used to gain entry into the home of the deceased came from the quarry where the appellant worked. The learned trial judge held that:

> It is therefore the finding of this court that the circumstantial evidence in this case irresistibly points to the guilt of A1, who worked in the stone quarry where exhibit P4 is suspected to have come from, the police dog went to his home and a grey trouser with blood exhibit P5 was retrieved from his home.

The above excerpt summarises the grounds upon which the appellant was convicted as charged. We have carefully considered the testimonies of the various witnesses.

PW1 Biira Allen, is a daughter of the deceased who was about 18 years at the time of the commission of the offence. At the time of the incident she was sleeping and it was in the middle of the night when she heard people waking up her mother and asking her to open the door. Then she heard a loud bang and a stone had been used to break into the house. She did not see the assailants at all. She heard them talking. In cross examination, she admitted that she made a statement taken by the police which was admitted in evidence. In cross examination, she testified that she would recognise the voice of the appellant if she heard it. However, she did not recognise the voices of the people who assaulted and killed the deceased. She is the only direct witness who could have identified the people who assaulted the deceased. In cross-examination she also testified that she followed the sniffer dog which had been introduced to the scene of the crime the following day after midday. We also note that she testified that the attack took about one hour and the assailants kept on talking as they looked for the money. Had the appellant been one of the assailants, PW1 would have recognised his voice.

On the other hand the police statement of PW1 contains some revelations. The first revelation is that the appellant was the one who informed them that their mother, (the deceased) had passed on and that the appellant had got a phone call from the people who had taken the deceased to hospital. This clearly indicates that the appellant was in the vicinity when she informed PW1 and others about the death of the deceased. This evidence contradicts the testimony of PW1 that the appellant did not participate in the funeral arrangements or was not involved in carrying the deceased when she was injured.

Furthermore, she stated in the police statement that they remained at home mourning for her mother and later the dead body was brought back home and after that she saw police sniffer dogs with other policemen arriving. Such conduct would be conduct inconsistent with that of a person who had just assaulted the deceased person. It is also glaringly clear that the deceased did not mention to PW1 that the appellant was among the people who assaulted her. This is in light of the fact that PW1 testified that she talked to the deceased who informed her that they had stolen her Uganda shillings 1,600,000/= and her mobile phone. The appellant is a neighbour but was not mentioned by the deceased or in the very least there is no testimony that she did.

PW2 is the widower of the deceased, a police officer and the father of PW1. His testimony is quite clear that he was called on phone and informed about the death of his wife. By the time he was first called, the deceased had been attacked and was still alive in hospital. The first phone call he received was around 1.00 am at night. Thereafter the second phone call informing him about the death came around 3.00 am at night that is when he was informed that his wife had died. At 6.00 am in the morning, he talked to the District Police Commander to seek permission to travel to his home. At the time these incidents happened and he received the two

phone calls, he was at Kilembe Police Station. When he travelled home and reached his home, a police dog was brought upon instruction. He followed the police dog as it went to the home of the appellant. He was not sure whether the police dog retrieved anything.

PW3 Sgt Mark Orach was called to handle the matter. He introduced the dog at the scene and it sniffed the stone used to break into the deceased's house and the blood and cartridge found at the scene presumably used in the commission of the offence. The blood is assumed to be the blood of the deceased. Thereafter the sniffer dog went to the home of the appellant and when it came out it led to a stone quarry and he suspected the stone used in the breaking in at the crime scene could have been picked from the quarry. In cross examination PW3 testified that he concluded that both accused persons could have reached the scene. He further indicated that this was not conclusive. He testified that the dog did not retrieve any exhibits from the home of the accused persons. The inference of the police officer cannot rule out the fact that the appellant was at the scene after the commission of the offence and does not conclusively without other evidence pin the appellant as having been at the scene of the crime at the time of commission of the offence.

PW4 detective Cpl Baluku M Constantine received a call about the commission of an offence and rushed to the scene of the crime. They cordoned off the scene and searched the house in the morning and found one misfired bullet and one cartridge. In the morning hours he called for sniffer dogs and the dog which was sent started sniffing in the home of the deceased in the bedroom where she was shot from and it also sniffed the stone on the doorway. That is when it led to the home of one Richard (the appellant). They came across one pair of trousers dotted with blood in the house of the appellant. It was a grey striped trouser. The misfired bullet, the cartridge and trouser were exhibited. The rock was also exhibited. In cross

examination, he testified that he did not mention the retrieval of a trouser in his statement recorded by police at first and it was an oversight not to do so.

The list of exhibits we have examined does not have a striped trouser. The list has, one misfired bullet of an SMG rifle (AK-47 gun), one cartridge of an AK-47 (SMG gun), one hard stone weighing about 20 kilos and one grey dotted skirt with bloodstains believed to belong to the deceased person. The alleged trouser was not on the list of exhibits and had not been kept by the officer who received for safe custody and recorded the exhibits. How the trouser subsequently featured among exhibits at the trial remains a mystery particularly as to where it was kept. There is also a flat contradiction as to whether the exhibit was recovered from the home of the deceased were a skirt was recovered or a trouser was subsequently recovered from the home of the appellant.

We note that PW6 recorded the exhibits and in cross examination testified that he was the one who recovered the trouser when the dog left. In cross examination he further testified that he found the exhibits were recovered at the scene. The question remains as to who recovered the trouser and from where?

Further testimony of PW6 shows that the accused was at the vigil in the home of the deceased. In re-examination he confirmed that he meant that the exhibits were at the scene by the time he reached. He was involved in the arrest of both accused persons.

We have compared the testimony of the prosecution witnesses to the testimony of the appellant who testified as DW1. The testimony of DW1 who is the appellant is consistent with some statements made by the prosecution witnesses. He testified that the deceased was attacked around 3.00 am at night. He heard the children making an alarm and woke up his

wife. He went there with Kasende and Sirike Muheesi and Kabeya John. He found other residents including the chairman of the Local Council of the area and several other people whom he mentioned in his testimony. He found PW1 crying. What is material is that he participated in picking the deceased from a pool of blood and taking her to the compound. Secondly, he rushed to get transport but found that the vehicle had no fuel. Another vehicle came and he participated in taking the deceased to the vehicle. Later on, he was called by one Baluku after the deceased had been taken to the hospital that she had passed away. He told the children that the deceased had died. This is corroborated by the testimony of PW1.

It is much more probable from an assessment of the evidence on record that the appellant was at the scene immediately after the commission of the crime. Secondly, PW6 confirmed that the appellant was arrested at the scene of the crime. The evidence also demonstrates that the sniffer dog was introduced when the appellant was at the funeral of the deceased in the home of the deceased. He also testified that the police searched all the persons who had touched the body of the deceased. He was at the home of the deceased when the dog was introduced. The testimony of the appellant, is corroborated by the testimony of DW3 Boniface Muhindo who testified that the appellant participated in the carrying of the deceased after her injuries. It was therefore probable that the appellant responded to the alarm of the children of the deceased after the commission of the offence. PW1 testified that the commission of the offence took about one hour and they made the alarm after the event. This must have been around 2.00 am to 3.00 am which is approximately the time the appellant testified that he heard the alarm.

There is no explanation as to what happened to the gun. There is no explanation as to why the prosecution did not subject to analysis the blood

found on a certain trouser which trouser was denied by the appellant as belonging to him.

Finally, the court assessors advised that both appellants should be acquitted. This is what they said:

> However, there is no corroborative evidence to prove the participation of both accused persons in killing Biira Teddy.
>
> Also in count 2 the prosecution proved theft, use of a deadly weapon which was a gun but they failed to place the accused at scene of crime.
>
> We advise you to acquit both accused persons on both counts.

The learned trial judge stated that he partly accepted the joint opinion of the assessors in relation to the second accused person but disagreed with them in relation to the appellant. The sole basis of his disagreement is the circumstantial evidence that he referred to which included the trouser exhibit P5, and the behaviour of the dog. Some comments were made about whether the testimony of the appellant regarding his participation in the funeral arrangements was true or false. We do not need to consider this piece of evidence though it is clear from the testimonies we analysed that the appellant was at the scene of the crime after the commission of the crime by some unknown persons.

The learned trial judge considered the case of **Simon Musoke v R [1958] EA 715** on the issue of relying on circumstantial evidence to convict an accused person. We agree with the law cited but do not agree that it was correctly applied in the circumstances of the case. The ratio in that case is captured in the quotation relied on by the learned trial judge excerpted from **Simoni Musoke v R [1958] 1 EA 715 at 718 – 719** that:

> The learned judge did not expressly direct himself that, in a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the

accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. As it is put in Taylor on Evidence (11th Edn.), p. 74–

> "The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."

There is also the further principle, which in view of the doubt as to how long the appellant remained at the funeral ceremony on the night of January 18, 1958, is particularly relevant to the first count, and which was stated in the judgment of the Privy Council in Teper v. R. (2), [1952] A.C. 480 at p. 489 as follows:

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

From the facts we have analysed, there are clearly several other facts which can destroy or weaken the inference of guilt of the appellant. These include other hypotheses relating to the sniffer dog evidence such as the fact that the appellant was at the scene of the crime after the commission of the crime and participated in touching the deceased. Thereafter he left and went to his home to pick a sweater and came back. That could explain why the sniffer dog went to the appellant's home. PW3, the police officer who introduced the sniffer dog stated *inter alia* that:

> I concluded that A1 and A2 could have reached the scene. It is not conclusive that they went.... This dog did not retrieve any exhibits from the accused's homes.

The conclusion of the learned trial judge that the police dog went to the home of the appellant and a grey trouser with blood exhibit P5 was retrieved from his home is not based on the sniffer dog evidence or the testimony of the police officer who led the dog but other discredited evidence on how the grey trouser was retrieved and by who that we have analysed above. Even if there was such evidence, it was necessary to establish whether the blood on such a trouser belonged to the deceased which was not done. Further, it was necessary to establish that the grey

trouser belonged to the appellant and the person who retrieved it and where it was kept.

Regarding reception of the evidence of the sniffer dog, this court considered the principles for admission of sniffer dog evidence in **Wilson Kyakurugaba v Uganda; Court of Appeal, Criminal Appeal No 51 of 2014** where it cited with approval six of seven principles summarised by Gaswaga J in **Uganda v Muheirwe and another HCT – 05 – CR – CN – 0011 of 2015** regarding admissibility and reliance on dog evidence that:

(1) The evidence must be treated with utmost care (caution) by court and given the full is sort of explanation by the prosecution.

(2) There must be material before the court establishing the experience and qualifications of the dog handler.

(3) The reputation, skill and training of the tracker dog [is] require [d] to be proved before the court (of course by the handler/trainer who is familiar with the characteristics of the dog).

(4) The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial. And the trail must not have become stale.

(5) The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.

(6) The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils of too quickly coming to that conclusion from material not subject to the truth eliciting process of cross examination.

This court approved the above six principles and added that there are two aspects that are important to be observed. Firstly what is the threshold for such evidence to be received by the trial court? Secondly of the reception or admissibility how is such evidence to be considered? The court stated that:

> In the first place with regard to admissibility we regard it essential that the training and experience of the dog handler and his association with the dog in question be established. Secondly, there must be established in evidence the nature of training, skill and performance of the dog in question with regard to the particular subject at hand; be it tracking scents, or drugs, or whatever specialised skills it allegedly possesses so as to establish its credentials for that skill. The foregoing are prerequisites before the admissibility of such evidence."

In the facts and circumstances of this case, it is our conclusion that the threshold for admissibility of evidence of the sniffer dog was not reached. This is because, PW3 the dog handler testified about his training and experience and the fact that he came with the very dog in 2008 but he did not give any experience of the dog in tracking in such matters. There is no testimony about the experience of the dog in tracking suspects in similar cases. The skill and performance of the dog in question in similar cases was therefore not established. The threshold for admissibility of such evidence was not reached. Even if for the sake of argument one took the view that the experience of the trainer or handler of the dog was sufficient, the trainer could not and did not establish that the scent that the dog picked had not been tampered with and no certain conclusions could be made from the evidence. Lastly, in cross examination as stated above, PW3 only confirmed that the accused persons could have reached the scene. Furthermore, he stated that:

> It is not conclusive that they went.

He did not conclude that the appellant reached the scene at the time of commission of the offence. The dog evidence was a crucial link in the prosecution case against the appellant and the learned trial judge heavily leaned on it. In the absence of the dog evidence, the prosecution case against the appellant collapses. We find that the dog evidence was not properly admitted and when it was admitted, it was not treated with caution as required by the principles for admissibility of such evidence.

In the premises, the circumstantial evidence relied upon by the learned trial judge to convict the appellant has other plausible hypotheses such as the presence of the appellant at the scene of crime only after commission of the offence by unknown persons and the evidence does not conclusively lead to the inference that the appellant committed the offences he was convicted of. The appellant was entitled to the benefit of the doubt and on that ground we find that the conviction of the appellant was erroneous in law and cannot be sustained. We accordingly quash the conviction and set aside the sentence of imprisonment imposed on the appellant and order that he be set free forthwith unless he is held on other lawful charges. In light of the above decision, there is no need to consider the second ground of appeal against severity of sentence.

Dated at Fort Portal the 30th day of July 2019

Frederick Egonda – Ntende

Justice of Appeal

Hellen Obura

Justice of Appeal

Christopher Madrama

Justice of Appeal