THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.595 OF 2014
(Arising from High Court Criminal Case No. 237 of 2000)

ARINAITWE RICHARD :::::::::::::::::::::::::: APELLANT

VERSUS

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

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

(Appeal from the decision of the High Court of Uganda at Kampala before Hon. Justice V.A.R Rwamisazi Kagaba dated 18th December, 2003 and against the decision of Hon. Justice Joseph Murangira dated 22nd November, 2013).

JUDGMENT OF THE COURT

Introduction:

The appellant was indicted before the High Court with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. On the 18th December, 2003, he was convicted by the trial Court (Hon. Justice V.A.R Rwamisazi Kagaba) of the same offence and sentenced to death. Pursuant to the decision in ***Attorney General Versus Suzan Kigula and 417 others, Supreme Court Constitutional Appeal No. 03 of 2006***, the appellant's case was one of those remitted by the Supreme Court to be heard on mitigation of sentence before the High Court. Upon the appellant being heard on mitigation, the High Court (Hon Justice Joseph Murangira) substituted the death sentence to life imprisonment on 22nd November, 2013. Being dissatisfied with the decision of the High Court, the appellant appealed against both conviction and sentence.

Background:

The relevant facts as accepted by the learned trial Judge were as follows:

On 28th July, 1998, a one Cecilia Marie Goetz, an American National, who was staying at Hotel Equatorial, in the City of Kampala was murdered. The prosecution adduced the evidence of 12 witnesses to prove its case, central to which was the evidence of Semanda Paddy (PW1), a bell boy at Hotel Equatorial who testified that on the fateful night, he had gone to the deceased's room to deliver fax messages. Upon knocking on her door, the deceased did not answer but instead a man who was unknown to him did, and asked to take the deceased's fax messages promising to deliver them to her. PW1 obliged and returned to his post at the reception area. Shortly after delivering the fax messages to the man, PW1 saw the same man pass by the reception area carrying an unknown load.

Shortly after the said man had left the Hotel, someone called asking for the deceased. On calling the deceased's room, the reception workers received no reply. They sent PW1 to physically check on the deceased. PW1 went up to the deceased's door and knocked on the deceased's door but she did not open. On peeping into the deceased's room, PW1 observed that it was messed up and there were blood stained pillows. PW1 returned to the reception area and reported to his supervisor, one Malinga, who along with PW2 John Oluka went to the deceased's room where they found the deceased lying lifeless on her bed. PW2 reported the matter to the Hotel Manager who directed him to go to the Central Police Station and report the murder. Police officers from the Central Police Station visited the scene of crime that night and cordoned it off.

After a period of three months, the appellant was arrested on 30th October, 1998 in respect of a robbery case at Entebbe. In the course of the investigations, a knife with a manufacturer's inscription "Jack Pyke" was allegedly recovered from a vehicle towed from the appellant's compound in upper Kololo. The said knife was compared with the sheath engraved with the manufacturer's inscription "Jack Pyke" recovered from the murder scene at Hotel Equatorial and the two matched. Subsequently, at an Identification Parade conducted by the Uganda Police, PW1 identified the

appellant as the man who was found in the deceased's room shortly before she was murdered hence connecting the appellant to the murder of the deceased.

Upon indictment for the murder in question, the appellant pleaded not guilty hence the trial. During the trial, the appellant was initially represented by Counsel Pontius Ayigihugu from the stage of plea taking to the part testimony of PW9 during cross examination. This was for the period from 18/05/2002 to 27/08/2003. Counsel Ayigihugu then applied to Court to be allowed to withdraw from the conduct of the case, and he was accordingly released. The accused then opted to conduct his case without the assistance of counsel.

When the prosecution had closed its case, the appellant was required to make his defence. However, he opted to exercise his right to remain silent.

The trial Court found the appellant guilty of the offence of murder, hence this appeal.

Grounds of Appeal:-

The appellant appealed on 6 grounds as follows:

"1. **The Learned trial Judge erred in law when he allowed the hearing against the appellant to proceed without legal representation thus occasioning a miscarriage of justice to the appellant;**

2. **The Learned trial Judge erred in law and fact when he held that the evidence of PW1 was sufficient to prove the identification of the appellant thereby arriving at an erroneous decision;**

3. **The Learned trial Judge erred in law and fact to hold that the discrepancies in prosecutions' evidence were minor thereby wrongly convicting the appellant.**

4. **The Learned trial Judge erred in law and fact when he did not properly evaluate the evidence on record thereby arriving at an erroneous decision;**

5. **The Learned trial Judge erred in law and fact when he convicted the appellant for murder without proof of his participation thereby arriving at erroneous decision;**

6. **In the alternative without prejudice to the above grounds, that the trial Court erred in law and fact when it passed a harsh and severe sentence to the appellant thus occasioning a miscarriage of justice to the appellant."**

Representation:

At the hearing of the appeal, Learned Counsel Jurugo Isaac and Elizabeth Nyasingwa appeared for the appellant, while Learned Senior State Attorney Asiku Nelly appeared for the respondent.

Counsel for the appellant filed written submissions in support of the appeal and made oral highlights of the same at the hearing of the appeal. Counsel argued grounds 1, 2 and 3 consecutively, grounds 4 and 5 together and concluded with ground 6 of the appeal. On the other hand, counsel for the respondent made oral submissions in opposition of the appeal when the appeal came up for hearing, dealing with the grounds in the same order as the appellant.

We are alive to the duty of a 1st appellate court being to re-appraise the evidence adduced at trial and draw our own inferences there from, 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 **Sections 188** and **189** of the **Penal Code Act, Cap.120** for which the appellant was 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.

From the evidence on record, it was not contested that the deceased Cecilia Marie Goetz was stabbed on several parts of her body, which caused her death. We are satisfied that the deceased was maliciously killed unlawfully. Therefore, the first three ingredients were proved beyond reasonable doubt at trial. What is contested is the participation of the appellant in maliciously causing the death of the deceased.

Ground 1

The Learned trial Judge erred in law when he allowed the hearing against the appellant to proceed without legal representation thus occasioning a miscarriage of justice to the appellant.

On this ground of appeal, counsel for the appellant submitted that from the beginning of the trial, the appellant had hired counsel Pontius Ayigihugu on private brief. The reason why the appellant discontinued counsel Ayigihugu's services was due to professional negligence which included absenteeism from Court on several occasions without justification. Counsel pointed out that earlier in the proceedings at trial, a rift had arisen as to whether the case should proceed with or without defence counsel and the trial Judge informed the appellant that he had an option to hire another lawyer on private brief, be represented by a lawyer on state brief or to represent himself. The appellant opted to proceed with defence counsel Pontius Ayigihugu. However, that another rift arose between the appellant and his lawyer in respect to a dental illness and issues of loss of confidence raised by counsel Ayigihugu against the appellant. The above resulted into discontinuation of Mr. Ayigihugu's services by the appellant and counsel was discharged by the Court.

It was counsel's submission that upon the discharge of Mr. Ayigihugu's services, the trial Judge erred to merely reiterate his earlier guidance that the appellant had three options including the appellant conducting his own case. In counsel's view, the appellant opted to represent himself basing on the learned trial Judge's guidance much to his prejudice yet the appellant had been charged for a capital offence and was entitled to the services of a

lawyer at the state's expense. Counsel relied on ***Attorney General Versus Suzan Kigula & 417 Ors (Supra)*** and Article 28(3)(e) of the Constitution, and submitted that in a case in which a crime a person is charged with carries a death sentence, the person must have legal representation without the option of the accused representing himself. In counsel's view, the above was an inherent right of the accused which was non derogable.

It was counsel's further submission that the appellant did not possess the legal expertise and art of advocacy to conduct the remaining part of his trial and never challenged incriminating evidence adduced against him by PW9, PW10, PW11 and PW12. Further, that the appellant did not make closing remarks or submissions. It was counsel's view that the fact that the learned trial Judge allowed the trial of the appellant without legal representation rendered the whole trial null and void as it contravened the provisions of the Constitution.

Counsel invited this Court to find merit in this ground of appeal.

In reply, Ms. Asiku, Learned Senior State Attorney, submitted that there was no miscarriage of justice that was occasioned to the appellant when the learned trial Judge advised that the appellant had options including the right to represent himself. She pointed out that during trial, the appellant asked the Court to let him handle his own case. However, the learned trial Judge first declined to grant the above application and adjourned the matter to ensure that the defence counsel would appear at the next hearing. However, at a subsequent hearing, the appellant again informed Court that he wanted to conduct his case and that he had discontinued the services of his lawyer. Thereupon, the Court outlined the options that where open to the appellant, to wit, hiring another lawyer on private brief, provision to him of a lawyer on state brief, or to represent himself. The appellant opted to represent himself.

It was counsel's submission that the appellant was accorded the right to legal representation which he waived. In counsel's view, it was not upon the trial Judge to force the appellant to be represented by legal counsel.

Counsel prayed that this Court finds no merit in this ground of appeal.

We have considered the submissions of Counsel of either side and carefully perused the court record and the Judgment of the trial Court in regard to this ground of appeal.

On 25th September, 2002, during the cross examination of D/AIP Kasangaki John (PW8) by counsel Ayigihugu for the appellant, the appellant informed Court that he preferred to handle his own case without counsel. He stated the reasons for choosing to handle his own case as follows:

> *"Basing on what has occurred where the learned Judge has as before, stepped in to paraphrase the questions asked by my Counsel and so, obscuring the real sense of the question, which has not occurred not only today, and also previously, I have been led as an accused to draw the conclusion that justice is not being done because it is not appearing to be done in the first place.*
>
> *Therefore, I prefer and choose to handle my own case without the Counsel".*

The learned trial Judge made a ruling that counsel Ayigihugu would be treated as having been discharged from the case. He however encouraged the appellant and Mr. Ayigihugu to reconsider or revisit their decision. The trial Judge then informed the appellant that he had three options namely:

a. To engage another lawyer at his own expense;
b. To be represented by a lawyer who will be assigned to him by the State at State expense; and
c. To represent himself and conduct his own case.

On 18th October, 2002 when the case next came up for hearing, counsel Ayigihugu and the appellant informed Court that the decision to discharge Counsel Ayigihugu had been reconsidered and that he would continue defending the appellant.

On 27th August, 2003 after the learned trial Judge had made a ruling that the appellant was not suffering from such ailment as to make him unfit to stand trial, counsel Ayigihugu addressed Court as follows:

"The accused has asked me to communicate to your Lordship that he is seriously suffering from toothache and that he needs treatment. That this was the only chance to be treated.

He (accused) says that the way he sees things in this Court, he does not think that either me or another lawyer can help him in his defence. In the circumstances, he has chosen to conduct his defence himself and he has discharged me as his lawyer".

The appellant also informed Court that he had discontinued the services of counsel Ayigihugu.

The record indicates that the Court then explained to the appellant his right to be defended in the three ways available as follows:

a. *He can engage another lawyer (Advocate) who he will pay at his own cost;*
b. *He may opt to have the State (Government) engage a lawyer at the State expense; and*
c. *He may conduct his own defence.*

The appellant informed Court that he would conduct his own case and proceed with the cross examination of PW9.

Article 28(3)(e) of the Constitution is to the effect that a person charged of an offence carrying a death sentence or imprisonment for life is entitled to legal representation either on private brief or state brief. Murder, with which the appellant was charged carries a maximum sentence of death and thus falls under the provisions of Article 28(3) (e) of the Constitution. The above provision is couched in mandatory terms. Failure for the Court to ensure that an accused person is represented by legal counsel under the above provision would invalidate the whole trial.

However, we also find that the above right can be waived by the accused. The Court cannot enforce the right onto an accused person who is not willing to have the assistance of counsel in the prosecution of his/ her case. The facts and circumstances of the case can guide Court in determining whether an accused has waived his right/entitlement to legal representation.

In the present case, it is not in dispute that among the options the trial Judge advised the appellant as being available to him upon the discharge of counsel Ayigihugu was the right to represent himself. It is also not in dispute that the first two options given to the appellant were to hire another lawyer on private brief or for the state to avail him a lawyer. As indicated above, the appellant had on a previous occasion intimated to Court that he wanted to represent himself. However, the appellant and his Lawyer later decided to carry on with the case. The appellant on another occasion still intimated to Court that he wanted to represent himself on the basis that he did not think that either counsel Ayigihugu or another lawyer could help him in his defence. From the above, we formed the opinion that the appellant was determined to prosecute his own case without the assistance of counsel.

It is also on record that the appellant was at the time of arrest, an undergraduate pursuing a Law degree from Makerere University. He made an informed decision to represent himself and was not coerced into it by the Court. The Court made known to him that he had an option to hire another Lawyer or to be availed a Lawyer on private brief, but he chose the option to represent himself.

In the circumstances of this case, we find that the appellant waived his right to legal representation. We find no reason to fault the trial Judge for allowing the appellant to proceed with the trial without the assistance of counsel.

We, therefore, find no merit in this ground of appeal.

Ground 2

The Learned trial Judge erred in law and fact when he held that the evidence of PW1 was sufficient to prove the identification of the appellant thereby arriving at an erroneous decision.

On this ground of appeal, counsel for the appellant submitted that had the learned trial Judge objectively evaluated the evidence of PW1, he would not have found it credible to prove that the said witness identified the appellant on the fateful night. Counsel pointed out that the evidence of

PW1 was inconsistent in respect of the identification of the appellant and was discredited during cross examination.

Counsel made reference to the evidence of PW1 in Court that he was able to see the face of the appellant through the half open door in the deceased's room at Hotel Equatorial on the fateful night for about twenty minutes. However, that in his Police statement tendered in Court as an exhibit, PW1 had stated that he did not see the face of the assailant and did not mention the duration of time spent observing the assailant. It was counsel's submission that PW1's excuse that he had been misheard by the Police Officer who recorded the Police Statement was not tenable since he testified that he understood the contents of the Statement when it was recorded and was read to him before he signed it. In counsel's view, PW1 was not telling the truth to Court and he never saw the appellant on the fateful day.

It was counsel's further submission that the trial Judge did not make reference to the above inconsistencies in the evidence of PW1 while summing up to the assessors to determine whether he was a credible witness or not.

Counsel invited this Court to subject the evidence of PW1 to fresh scrutiny in respect to the contradictions and inconsistencies in his testimony in Court and the Statement recorded at Police when his mind was still fresh. In counsel's view, the contradictions and inconsistencies in the evidence of PW1 go to the root of the fact of identification.

Counsel further submitted that PW1 had contradicted himself in respect of where he saw the assailant. While in Court he testified that it was the appellant he had seen in room 321 at Hotel Equatorial and at the Hotel reception. He however told Detective Assistant Inspector of Police Kasangaki John (PW8), the Investigating Officer immediately after the Identification Parade that he came across the appellant in the corridor of Hotel Equatorial. In counsel's opinion, the excuse by PW1 that he was misheard by PW8 the Investigating Officer was untenable as PW1 understood the language in which the Statement was recorded and the Investigating Officer had no motive of misquoting PW1. Counsel submitted

that the reception and room 321 were completely different places and one could not be mistaken for the other genuinely.

Counsel further submitted that PW1 and PW8 who was the officer that conducted the Identification Parade contradicted themselves in the manner in which the Parade was conducted. PW1's testimony was that each of the nine volunteers at the Parade wore different clothes, and were of different ages, height, size and general appearance. In counsel's view, the manner in which the Identification Parade was conducted as described by PW1 was not in conformity with the law established in ***Ssentale Versus Uganda (1968) EA 365***. In contradiction with the above evidence, PW8 testified that the participants were of medium size and were of similar height.

Counsel submitted that the failure to follow the proper identification parade procedure prescribed by the law exposed the appellant to being easily but erroneously identified since the participants were of different age, size, height and general appearance. Counsel relied on ***Mweru Ali & Others Versus Uganda, Court of Appeal Criminal Appeal No. 89 of 1999*** for the above submission.

It was counsel's further submission that there was no evidence to show that PW1 pleaded with the assailant to let him access the deceased and that the said conversation lasted for 20 minutes. Counsel pointed out that the words exchanged between PW1 and the assailant were few and the duration of the conversation could not have lasted for 20 minutes. In counsel's view, it was in error for the learned trial Judge to base his conviction on such an unbelievable assumption and amidst many inconsistencies in the evidence of PW1.

Counsel further submitted that the appellant was not arrested on the basis of PW1's description. On the contrary, the appellant was arrested in respect of a robbery case and he ended up being a suspect in the present case. In counsel's view, from the onset PW1 did not know whether it was the appellant who committed the murder. Further, that PW1 could have had an afterthought of incriminating the appellant in order to get off the hook as a suspect in the case after being arrested and detained on several occasions.

Counsel prayed that this Court finds merit in this ground of appeal.

In reply, the learned Senior State Attorney submitted that the trial Judge did not err by finding that the evidence of PW1 squarely placed the appellant at the scene of crime and the appellant was identified as having been in the room where the murder occurred. Further, that although it was on record that PW1 did not see who killed the deceased, the evidence of PW1 placed the appellant at the scene of crime at the time when the offence was committed. It was her further submission that the evidence of PW1 was circumstantial evidence that was allowed in law and could be admitted as long as the Court cautioned itself.

The learned State Attorney made reference to the evidence of PW1 on record that on the fateful day, he was in shock and thus made many statements at Police. However, that only one Police statement was tendered in Court and the other additional statements were not brought to the attention of Court. In her view, this Court should not come to a conclusion that PW1's evidence contradicted one statement he recorded at Police considering that the other statements were not tendered in Court.

Counsel concluded that the testimony of PW1 was a true account of what happened on the fateful day and in regard to the killing of the deceased. She prayed that this Court finds no merit in this ground.

In rejoinder, counsel for the appellant submitted that the additional statements referred to by the learned State Attorney were not tendered in Court. If the prosecution intended to refute the contents of the Police statement relied upon by the defence, they should have tendered the additional statements in Court to support their case.

Counsel reiterated his prayer that this Court finds merit in this ground of appeal.

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

From the evidence adduced at the trial, it is apparent that this case essentially depended on circumstantial evidence, and the trial Judge was alive to this fact. In reaching his decision, he stated as follows:

> "The evidence on which the prosecution relies is mainly circumstantial. I guided the assessors as I now warn myself that such evidence of facts and circumstances which the court will consider and apply to prove a certain fact and or guilt of the accused. Such evidence (circumstantial) must be approached with maximum caution. It is settled law, that where a case is grounded on circumstantial evidence the inculpatory facts must point to the guilt of the accused person to the exclusion of any other reasonable hypothesis. The court will only convict the accused basing on that evidence where the conclusion based on those facts, points to one and only conclusion, that of his guilt. Where that evidence leaves a reasonable doubt as to the guilt of the accused or the facts can be explained on any other hypothesis, then the accused shall be found not guilty".

Regarding circumstantial evidence, the court in ***Byaruhanga Fodori Versus Uganda, Supreme Court Criminal Appeal No.18 of 2002,*** stated as follows;

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt.*

One of the inculpatory facts relied upon in convicting the appellant by the trial Court was the evidence of PW1 placing the appellant at the scene of crime on the fateful day.

PW1 was employed by Hotel Equatorial as a bell boy. He testified that on the fateful day at about 9:30 pm, some faxes were received by the reception for the deceased. He was then given the faxes for delivery to room 321 where the deceased was staying. PW1 knocked on the door of room 321 about three times but no one answered or opened the door. Thereafter, a man slightly opened the door and PW1 informed the man who opened the door that he wanted to see the deceased so that he could hand over the faxes to her. However, that the man took the faxes from

him and told him that he could go. He further testified that he was standing two feet from the said man and that he saw his face by means of the light in the corridor. He indicated that he spent twenty minutes with the man before returning to the reception. PW1 further testified that while at the reception organizing meal cards for the guests, the man he had identified in room 321 passed by the reception holding something in his hands. After a short while, PW1 was again sent to room 321 by the receptionist to tell the deceased to place the telephone receiver of her phone properly. Upon his return to room 321, that is when it was discovered that the deceased had been murdered.

PW1 further testified that after some time, he was called to Central Police Station and detained. He was taken to a cell where five people were lined up and told to identify the person he saw in room 321 on the fateful night. He testified that the person he had seen in room 321 was among the five people. PW1 identified the appellant as being the man he had seen in room 321 during the said Identification Parade. During trial, he indicated that the appellant was the man who took the faxes from him on the fateful day.

The law regarding identification was settled in ***Abudala Nabulere & Anor Versus Uganda, Court of Appeal Criminal Appeal No. 9 of 1987***, as follows:

> *"...The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, he distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger. In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution..."*

From the evidence on record, it is common ground that the appellant was not known to PW1 prior to the incident. However, PW1 testified that he was able to identify the appellant by the light in the corridor when the

appellant slightly opened the door to room 321 and talked to PW1. He also testified that he was able to identify the appellant when he passed the reception area of Hotel Equatorial on the fateful day.

However, as rightly stated by counsel for the appellant, PW1 had not mentioned in his statement recorded at Police that he saw the face of the assailant when he delivered the faxes to room 321 on the fateful day. He stated as follows in the Police Statement tendered in Court:

> *"There was light and I could see the man's head with short hair in a French cut. I didn't look at his face but from the small part of the open door, I saw that he was tall".*

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 as it is in this case. See ***Chemonges Fred versus- Uganda, Supreme Court Criminal Appeal No. 12 of 2001***.

While the above was a contradiction in the testimony of PW1 in Court and the statement he had recorded at Police in regard to the identification of the appellant as being the person who was in room 321 on the fateful night, we find that it did not go to the root of the matter. This was considering that in the same Police Statement, PW1 again stated that he saw the person with the same features as the one he saw in room 321 pass by the reception with a cloth around his neck. It is the same person he says he identified at the Identification Parade. We find that the contradiction that he had not seen the face of the person he saw in the room could not form the basis of disregarding the evidence of PW1 as there is independent evidence in support of the identification in issue.

It was also pointed out that while in Court, PW1 testified that he was able to identify the appellant at an Identification Parade at Police and that it was the appellant he had seen in room 321 at Hotel Equatorial and at the Hotel reception. He however told D/AIP Kasangaki John PW8 the Investigating Officer immediately after the Identification Parade that he came across the appellant in the corridor of Hotel Equatorial. This was as

per the Identification Parade Report. We find that this was also a minor contradiction in the evidence as to the identification of the appellant as the perpetrator of the crime. We are convinced that the PW1 did not in any way intend to mislead Court in regard to this contradiction.

The other contradiction raised was in regard to the Identification Parade conducted at Police in respect of the appellant. D/AIP Kasangaki John (PW8) testified that he was instructed by the OC CID to hold an identification parade and that the suspect was the appellant. He testified that the Identification Parade that was carried out in a corridor after room 6 and the volunteers were 8 with the appellant as the 9th. Further, that the volunteers were men of dark complexion, medium size and tall. During the Identification Parade, the appellant placed himself in the 4th position, and he explained to them the purpose of the parade. During the Identification Parade, PW1 touched the appellant and said that he had seen him at the scene of crime on the night of the murder at Hotel Equatorial. Thereupon, the appellant asked PW1 what time of the day he had seen him and PW1 responded that it was at night. PW8 further testified that after the Identification Parade, the appellant said that the Parade was fairly conducted and signed on the Police Form 69 which was the Identification Parade Report tendered in Court.

On the other hand, PW1 testified that the volunteers at the Identification Parade were standing in a cell and they varied in size, were of different height and were dressed differently.

The law regarding conducting an Identification Parade was stated in ***Ssentale Versus Uganda (Supra)*** as follows:

> *"1. That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.*
>
> *2. That the officer in charge of the case, although he may be present, does not carry out the identification.*
>
> *3. That the witnesses do not see the accused before the parade.*
>
> *4. That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*

5. That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.

6. Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.

7. Exclude every person who has no business there.

8. Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.

9. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.

10. See that the witness touches the person he identifies.

11. At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.

12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "pick out somebody", or influence him in any way whatsoever.

13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably".

In the present case, the first complaint raised by counsel for the appellant was that rule No. 4 stated above was not complied with, and thus the Identification Parade was not properly conducted. The above argument was based on PW1's testimony that the volunteers at the identification parade varied in size, were of different height and were dressed differently. We, however, find that rule 4 as stated in ***Ssentale Versus Uganda (Supra)*** is not couched in mandatory terms. The words used are "as far as possible". It would be unrealistic to say that the 8 volunteers would be of exactly the age, height and size. As long as the volunteers as far as possible have close physical features with the accused, then that would suffice. In the present case, we find that the Identification Parade was as far as possible carried out in accordance with the law. PW8 whose evidence was found credible described the men who were volunteers in the

Identification Parade as being all of dark complexion, medium size and tall. The appellant thereafter signed the Identification Parade Report acknowledging his satisfaction in the manner in which the Parade was conducted.

While there was a contradiction in the evidence of PW1 who stated that the Identification Parade was conducted in a cell and PW8 who testified that the Parade was conducted in a corridor after room 6, this in our view was not material. It was not contested that an Identification Parade was conducted at the Police Station. We find that PW1 and PW8 were credible witnesses and neither of them intended to mislead Court as to the exact location the Identification Parade was conducted.

Ground 2 of the appeal, too, must fail.

Ground 3

The Learned trial Judge erred in law and fact to hold that the discrepancies in prosecutions' evidence were minor thereby wrongly convicting the appellant.

Under this ground of appeal, counsel continued to complain about several contradictions, which in his view went to the root of the appellant's conviction. Although some of the complaints by counsel on this ground overlap with those under ground 2, we shall handle this ground separately in order to thoroughly dispose of this appeal.

On this ground of appeal, counsel for the appellant submitted that the learned trial Judge erred in finding that the contradictions and inconsistencies in the prosecution case were minor. Counsel made reference to the finding of the learned trial Judge that the contradiction in the evidence of PW1 and PW8 as to the exact location of conducting the relevant Identification Parade had been explained away by PW8 who was knowledgeable on the geography of Central Police Station. In Counsel's view, the learned trial Judge erred in finding that the above contradiction was minor considering that both PW1 and PW8 were alleged to have been in the same place when the Identification Parade was carried out. It was further the contention of counsel that PW1 having confirmed that he was

literate could not thereafter mistake a cell for a corridor. Further, that the PW8 had contradicted himself when he testified that the Identification Parade was conducted in a room next to room 6 after earlier testifying that the said Identification Parade was conducted in a corridor. It was counsel's further submission that PW1 and PW8 contradicted themselves in regard to the manner in which the Identification Parade was conducted. To support the foregoing submissions, counsel pointed out that PW1 had testified that the volunteers were dressed differently and were of different sizes yet PW8 had testified that the volunteers were of medium size and of the same height.

Counsel further pointed out that there was a contradiction in the evidence of PW3 and PW7 in respect of whether the deceased's body was found at the scene of crime by the said officers. While PW3 testified that the body was not found at the scene of crime at the time the officers arrived, PW7 testified that the body was lying on the bed. Counsel made reference to the decision of the learned trial Judge that the above contradiction was resolved in the evidence of PW12 who testified that on the night of the murder, the deceased's body was taken to Mulago Hospital. In that regard, that by the time PW3 and PW7 arrived at the scene of crime, the body was not there. In counsel's opinion, the above contradiction could not be said to be minor and neither was it explained by PW12 was found by the trial Judge. Counsel pointed out that PW3 and PW7 had gone to the scene of crime at the same time and it was questionable why they narrated different versions of what they found at the scene of crime.

Counsel further submitted that the learned trial Judge erred in relying on the evidence of PW12 to rectify the contradictions in the evidence of PW3 and PW7. This was considering that the evidence of PW12 was contradictory to the evidence of other prosecution witnesses having testified that the deceased died on 27/07/1998 contrary to the evidence of other prosecution witnesses who testified that the deceased died on 28/07/1998. Further, that while PW12 testified that PW3 and PW7 went to the scene of crime on 28/07/1998, PW3 and PW7 testified that they went to the scene of crime on 29/07/1998.

Counsel made reference to the evidence of PW2 Oluka John, a security Officer at Hotel Equatorial who testified that Police Officers visited the scene of crime on the night of the murder, and one of the officers present was SGT Muhwezi (PW3). However, that the above evidence was contradictory to the evidence of PW3 and PW7 who testified that they went to the scene of crime on the morning of 29/07/1998 and found all the exhibits which they collected from the scene of crime. It was counsel's submission that the above was a major contradiction considering that the appellant was convicted basing on the exhibits collected from the scene of crime. Counsel contended that the learned trial Judge erred in failing to analyze the evidence of PW2, PW3, PW7 and PW12 in regard to when the exhibits were removed from the scene of crime.

In reply, the learned Senior State Attorney conceded that there were some inconsistencies in the prosecution case as pointed out by counsel for the appellant. While PW1 had testified that there were five (5) volunteers at the Identification Parade and that it took place in a cell, PW8 testified that there were nine (9) volunteers and the Identification Parade was conducted near room 6.

It was counsel's submission that under the law on conducting Identification Parades, the above inconsistencies were minor and did not affect the process on how the Identification Parade was carried out. Counsel pointed out that the Identification Parade was conducted by a qualified officer and that PW1 had later clarified and testified that the volunteers at the Identification Parade were 9. In regard to the location where the Identification was carried out, counsel submitted that it was common ground that it took place at the Police Station.

The learned State Attorney further submitted that the Identification Parade was properly conducted and the appellant signed on the Report that was tendered to Court and indicated that he was satisfied with the manner in which the Identification was carried out.

Regarding the exhibits, it was the respondent's submission that according to the evidence of the prosecution witnesses, the prosecution exhibits were

not tampered with. She made reference to the evidence of PW3 and PW7 in that regard.

In respondent's view, the above contradictions and inconsistencies pointed out by counsel for the appellant were minor.

The law relating to contradictions and inconsistencies was re-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 Tatar 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".*

Excepting those handled under ground 2, the basis of the appellant's case under this ground related, firstly to the contradiction in the evidence of PW3 and PW7 in respect of whether the deceased's body was found at the scene of crime by the said officers.

PW3, Detective Sergeant Muhwezi Leuben, the Scene of Crime Officer had testified that on 29/07/1998, he was instructed by CID to go to the scene of crime which was in room 321 on 2nd floor of Hotel Equatorial. Upon his arrival he was shown things like broken pieces of the toilet seat, a knife cover, telephone set, scattered papers, broken key holder, bed sheets and pillows all in room 321. He examined the scene by inspecting the inside of the toilet seat, the toilet door, the walls inside the toilet. Further, that he used aluminium powder and developed marks from the scene. He also examined and lifted marks from the knife cover which was engraved with the words "Jack Pyke", developed marks on the key holder, examined the telephone set and lifted marks. He thereafter handed over the lifts to the Police Headquarters Identification Bureau for expert examination. He testified that he went to the scene of crime with Senior Superintendent of Police Ochom Edward. During cross examination, he testified that during his visit at the scene of crime, he did not find a dead body.

PW7 D/SGT Joseph Yoga testified that on 29/07/1998, he was instructed by his then boss Nsababera to go to Hotel Equatorial on information that there was a murder case. Upon his arrival at the scene of crime, there was a dead body lying on the bed with a pool of blood. He testified that at the scene, they found a sheath of a knife bearing a writing "Jack Pyke", pieces of a broken toilet tank, pillows, a pair of bed sheets and a blanket. He thereupon exhibited the items on an exhibit slip. During cross examination, PW7 indicated that he did not find the dead body at the scene of crime, contrary to what he had stated during his examination in chief. He explained that he had initially stated that he found a body at the scene of crime because he did not record a statement at Police and he was called to give evidence on short notice.

The learned trial Judge was alive to the above contradiction in the evidence of PW7 and PW3. In addressing the said contradiction, the learned trial Judge stated as follows:

> *"Another contradiction was between the evidence of Sgt. Muhwezi (PW30 who said the body was not there whereas PW7- Yoga said the body was on the bed. The confusion between the evidence of these two officers arose from which occasion of visiting the scene of crime. The body was in the room when Ochom (PW12) visited the scene of crime on the night of murder but the body was not there when PW3 and PW7 (Muhwezi and Yoga) returned to the scene as Ochom had directed it be taken to Mulago". (Sic).*

PW12 ACP Edward Ochom testified that on the night of 27/07/1998 at around midnight, he was picked from his home by a police patrol vehicle and was informed of the murder of the deceased. He went to the scene of crime in room 321 at Hotel Equatorial. There were pieces of papers scattered on the floor and a leather sheath of a knife lying on the floor. Further, that he directed that everything in the room should be left intact and undisturbed including the leather sheath. However, that he directed for the dead body to be taken to Mulago Hospital Mortuary. The body was removed from the scene and taken to Mulago Hospital by D/inspector Tabu (PW6). On 28/07/1998 at around 9:00am, he returned to the scene with D/SP Nsababera, D/IP Tabu, D/Sgt Yoga and scene of crime officer D/Sgt Muhwezi.

First of all, we note that while it is evident from the record that the deceased was murdered on the 28/07/1998, PW12 alluded to the fact that he went to the scene of crime on 27/07/1998. We do not find this contradiction material. We are alive to the difference in time from when the deceased was murdered and the time of the trial. We are convinced that this was a guiltless error as to the exact date when the murder was committed. There was no intention to mislead Court by PW12.

Further, PW7 later confirmed that there was no body found at the scene of crime. He explained the reason for this contradiction being that he had not recorded a Police Statement and that he had been invited to Court to give evidence on short notice. We are convinced that this was a minor contradiction that did not go to the root of the matter.

We accept the finding of the learned trial Judge that the evidence of PW12 further clarified on the evidence of PW3 and PW7 upon explaining that the body of the deceased was taken to Mulago hospital on the night of the murder. Therefore, PW3 and PW7 could not have found the body when they visited the scene of crime the next morning after the murder.

The next contradiction pointed out by counsel for the appellant was that PW2 Oluka John, a security Officer at Hotel Equatorial testified that Police Officers visited the scene of crime on the night of the murder, and one of the officers present was SGT Muhwezi (PW3). However, that the above evidence was contradictory to the evidence of PW3 and PW7 who testified that they went to the scene of crime on the morning of 29/07/1998.

The evidence of PW2 was that at about 10:20 pm on 28/07/1998, he received a call from the Hotel reception asking him to check room 321. Upon reaching room 321 together with PW1, he found the door half open. There was a broken part of the key on the floor. On close observation, he saw a dead body of a white woman off the bed. However, that neither him nor PW1 entered the room and did not touch any object in the room. He then went and reported to Police and returned to the scene with about 10 police officers. It was his testimony that the scene of crime officer was among the police officers who visited room 321 on the night of the murder and that he did not recall his name.

We do not find that the above was a material contradiction in the evidence of PW2. First of all, it was not clear whether PW2 specifically referred to PW3 by stating that the scene of crime officer was present at the scene on the fateful night. He stated that he did not remember the name of the said crimes of scene officer. In our view, it would not be proper to presume that PW2 was referring to PW3 considering that he was not a police officer. In addition to the above, we find that the evidence that the scene of crime officer went to the scene of crime on the night of the murder could not imply that the exhibits were tampered with. We do not allow that argument raised by counsel for the appellant.

Basing on our findings above, this ground of appeal, too, must fail.

Ground 4 and 5

The Learned trial Judge erred in law and fact when he did not properly evaluate the evidence on record thereby arriving at an erroneous decision.

The Learned trial Judge erred in law and fact when he convicted the appellant for murder without proof of his participation thereby arriving at erroneous decision.

On grounds 4 and 5 of the appeal, counsel for appellant made reference to the Judgment of the trial Court where the learned trial Judge expunged the Charge and Caution Statement for being non compliant with the provisions of the law. However, that learned the trial Judge rejected the opinion of the assessors on the basis that there was sufficient circumstantial evidence which proved the appellant's participation in the murder of the deceased. In counsel's view, the circumstantial evidence relied upon by the trial Judge was not sufficient to prove the participation of the appellant in the commission of the offence. It was counsel's submission that had the learned trial Judge properly and objectively evaluated the circumstantial evidence on record, he would have come to a different conclusion.

Counsel relied on ***Jamada Nzabaikukize Versus Uganda, Supreme Court Criminal Appeal No. 01 of 2015***, to submit that the learned trial Judge ought to have evaluated the evidence that allegedly placed the appellant at the scene of crime against the evidence that removed him

from the scene and then give reasons for believing one version against the other. Counsel contended that in the present case, the leaned trial Judge only considered the circumstantial evidence that placed the appellant at the scene and ignored the evidence that exonerated the appellant as having been at the scene of crime on the fateful night.

Counsel submitted that various inferences in the prosecution case weakened the circumstantial evidence which was relied upon by the learned trial Judge. These were: contradictions in the evidence of PW1 and the Statement recorded at Police; there was no evidence to show that PW1 talked to the assailant for 20 minutes as was alleged; PW1 contradicted himself as to the place he saw the assailant on the fateful night; and PW1 and PW8 contradicted each other in regard to how and where the Identification Parade was conducted.

Counsel further submitted that while the learned trial Judge relied on the evidence of PW2 that the appellant regularly visited Hotel Equatorial and thus knew where room 321 was, however, PW2 had not mentioned in the Statement recorded at Police that the appellant was known to him before the murder. In counsel's view, the above was a material contradiction and the evidence of PW2 in regard to the above was weak.

Counsel further made reference to the trial Court Judgment in regard to the finger and palm impressions of the appellant lifted by PW6 that were compared with and found to be identical with the impressions lifted from the crime scene. It was counsel's submission that the evidence of PW2, PW3 and PW7 indicated that the finger prints findings were not intact and had been tampered with. In counsel's view, the contradictions in the prosecution evidence weakened the conclusion that the finger prints findings connected the appellant to the crime.

Counsel further submitted that the evidence of PW4 who was the finger prints expert was not consistent with his report of findings submitted in Court. He pointed out that PW4 in his report did not detail the evidence the said witness gave in Court. On the contrary, that the said report of findings was an ambiguous document that combined analysis of four different offences namely murder, attempted robbery, burglary and theft. The

outcome of the report was that some of the marks lifted from unstated exhibits were identical with that of the appellant and some were not. Further, that the above creates a hypothesis that the marks relied upon by PW4 could have been got from other places.

It was counsel's further submission that PW4 was also not consistent as to the type of technology he used to arrive to the findings in the expert report tendered in Court. Counsel made reference to the evidence of PW4 that he was able to compare the prints after subjecting them to laboratory tests where they were enlarged and thus enabling him to make his comparison. In that regard, that PW4 could have used his naked eyes to compare the marks. Further, that more ambiguities were identified in the evidence of PW4 when he testified that his letter and report dated 24/11/1998 was never replied to and no fresh finger and palm prints were sent to him.

In counsel's view, the evidence of PW4 lacked credibility and ought to have been impeached by the trial Court.

Counsel further submitted that the inconsistencies in the evidence of PW9 in regard to the recovery of the knife weakened the prosecution case. Counsel pointed out that the search certificate was only signed by PW9 yet he testified that the Search Certificate had been signed by the appellant and other police officers present. Further, that PW9 admitted having conducted the search of Motor Vehicle Reg. No. 700 UAS where he allegedly recovered the knife. In addition to the above, there was no evidence on record indicating that Motor Vehicle Reg. No. 700 UAS belonged to the appellant. Neither there was evidence to corroborate the evidence of PW11 that he had ever seen the appellant driving the said Motor Vehicle. There was no proof that the ignition keys of the said Motor Vehicle were recovered from the appellant's bedroom since they were not recorded on the Search Certificate. In counsel's opinion, the above created a lacuna in the prosecution case.

Counsel made reference to the Judgment of the trial Court that the conduct of the appellant hiding in the ceiling and assaulting PW9 in order to escape arrest amounted to circumstantial evidence proving that he had committed the offence of murder. Counsel submitted that the inference

above was unfairly reached since PW9 was arrested the appellant in respect of a different offence and the questions that were put to the appellant during the arrest were in respect of a different offence. While the trial Judge rightly rejected the evidence of the three pistols recovered from the ceiling, it was wrong for him to conclude that the appellant's conduct during arrest on a robbery case connected him to the murder of the deceased.

It was counsel's submission that the circumstantial evidence relied upon to prove the appellant's participation in the murder was all weak and could not point to the guilt of the appellant.

Counsel prayed for this Court to find merit in grounds 3 and 4 of the appeal.

For the respondent, the learned Senior State Attorney submitted in reply that the appellant was properly and clearly identified as having participated in the murder of the deceased. Counsel invited Court to peruse the evidence of PW1 and the Officer who arrested the appellant (PW9) and recovered exhibits. Further, that the conduct of the appellant at the time of his arrest was not that of an innocent man. Counsel also relied on the evidence of PW4 who compared the finger and thumb prints of the appellant and those lifted from the scene of crime, and found them matching.

It was the respondent's submission that the circumstantial evidence on record all pointed to the appellant as having been the perpetrator of the crime. She pointed out that the prosecution evidence was strong and sufficient in identifying the appellant and placing him at the scene of crime.

We reiterate the duty of this Court as the 1st appellate court being to re-appraise the evidence adduced at trial and draw our own inferences there from.

In the evaluation of the evidence before him, the learned trial Judge first laid out the evidence of the witnesses as adduced at trial, then went ahead to make a review of the evidence on record, addressing each ingredient of the offence independently. The learned trial Judge struck off the record a

charge and caution statement (Confession) recorded from the appellant by SP Edward Ochom (PW12). This was based on his finding that the statement was not voluntarily made. Upon making a finding that the circumstantial evidence on record was sufficient and pointing to the appellant's guilt, the learned trial Judge convicted him of murder. The learned trial Judge made a summary of the circumstantial evidence relied upon in convicting the appellant as follows:

> *"i) The accused's presence in Room 321 of Hotel Equatorial about the same time as the deceased is found murdered.*
>
> *ii) The accused's strange behavior of refusing Semanda (PW1) to reach the deceased and deliver the fax messages.*
>
> *iii) The accused's regular presence in the hotel premises for gym exercises which would suggest he had knowledge about the location of the rooms including room 321 – of the deceased. (See Oluka PW2).*
>
> *iv) The finger and palm impressions of the accused lifted by PW6 (Ojiambo) which were identical with the impression lifted from the knife sheath (jacket) and both found to belong to Richard Arinaitwe by PW4 (ACP Israel Mubiru in his report –Exhibit P1).*
>
> *v) The fitness of the knife, Exhibit P14 found in possession of the accused into the sheath – Exhibit P.10, both bearing the manufacturer's engraved words of "Jack Pyke".*
>
> *vi) The accused's possession and use of motor vehicle No. 700 UAS as testified upon by Mayanja (PW1) and the recovery of the knife (Exhibit P14) by D/C Musumba (PW9) from the same vehicle.*
>
> *vii) The hiding of the accused in the ceiling in order to escape from being arrested by a team of Police Officers who included D/C Musumba (PW9) and PW11 – Mayanja their guide to the accused's residence.*
>
> *viii) The boxing or assault of Musumba by the accused and running away to avoid arrest by Musumba after Musumba got him from the ceiling.*
>
> *ix) Accused's refusal at first to open motor vehicle No. 700 UAS. This refusal exhibits knowledge on the part of the accused that there was a knife, Exhibit P. 14, the killer weapon, which he had hidden in that car.*

x) The recovery of the ignition and door keys of motor vehicle No. 700 UAS, from the accused's bedroom, though the vehicle No. 700 UAS and the ignition keys were never exhibited. But it was these keys that were used to open the doors of the vehicle".

One of the complaints raised by counsel for the appellant was that while the leaned trial Judge relied on the evidence of PW2 that the appellant regularly visited Hotel Equatorial and thus knew where room 321, the same witness had not mentioned the above fact in his Police Statement. At trial, PW2, who was a security officer at Hotel Equatorial testified that before the fateful night, he had known the appellant as a member of the Hotel Health Club and that the appellant was a regular visitor of the Hotel. Further still, that at one time, the appellant was alleged to have stolen UGX 60,000/=from a fellow guest at the Health club and PW2 handled the case. Further, that the Health Club was below room 321. During cross examination, PW2 was asked why he did not give information as to the above previous knowledge of the appellant in his Statement recorded at Police. He explained that he did not mention the past of the appellant in his Police Statement because he was never asked about it by the recording officer, since the statement was a result of questions and answers.

We are satisfied with the explanation given by PW2 above. PW2 was found by the learned trial Judge, who had the benefit of observing his demeanour to be a credible witness and we shall be guided by the impressions that witness made on the learned trial Judge. We, therefore, cannot fault the learned trial Judge for his reliance on PW2's evidence to pin the appellant to the murder of the deceased as the evidence in question placed the appellant squarely at the scene of crime. Further, there was no denial on the part of the appellant as being a member of the Health Club. We, therefore, do not find merit in the above complaint faulting the learned trial Judge for failure to evaluate evidence in this regard.

In counsel's view, the evidence of PW4 lacked credibility and ought to have been impeached by the trial Court. PW4 was Mubiru Mukasa Israel, a finger print expert, who testified that on 29/07/1998, he received exhibits and finger and palm marks on the lifted cobex sheets from PW3 the Scene of Crime Officer. Further, that he also received sets of finger and palm

impressions under the names of Arinaitwe Richard from the in charge CID, Mrs. Nsababera on 5/11/1998. On 5/11/1998, he compared the lifted finger and palm marks on the cobex sheets with the finger and palm impressions under the names of Arinaitwe Richard. His findings were that the impressions given to him for comparison were made by the same person. Further, that before he arrived at his decision, he caused photographs and enlargements of the right forefinger, the right palm and all the scenes of crime marks to be made (enlargements) in the Police photographic laboratory under his direct supervision. Thereafter, he compiled a report of his findings, which was tendered in Court.

From the record, we note that the expert analysis made by PW4 was in respect of 4 different offences namely: murder, office breaking and theft, burglary and theft and attempted robbery in Entebbe. On 24/11/1998, PW4 wrote to the O/C CID Kampala and the O/C CID Entebbe pointing out his findings. The letter partly read as follows:

> *"Comparison has been carried out with the marks lifted from the above scenes and some of them are identical with the finger and palm prints of Richard Arinaitwe.*
>
> *The identified marks in all the above cases reveal sufficient ridge details to merit prosecution. You are therefore requested to take the necessary action then submit here fresh set of his finger and palm impressions at least (7) seven clear days before the date of hearing of the case to enable court exhibits to be prepared.*
>
> *Further set of his fingerprint accompanied by Police Form 39 will be required for record purposes".*

There was no proof on record to show that the OC/CID wrote back to PW4 submitting the fresh set of finger prints as was requested by PW4 in the above letter. During cross examination, PW4 admitted that no fresh prints were sent to him in response to his letter dated 24/11/1998. According to counsel for the appellant, the above formed a hypothesis that the finger prints initially received by PW4 were not sufficient to connect the appellant to the offence. In counsel's view, that was the reason why PW4 requested for fresh finger prints from the OC/CID. We find the above argument without any basis and disallow it. The Letter dated 24/11/1998 from PW4

reproduced above was for the purpose of enabling court exhibits to be prepared and for record purposes. The letter clearly stated its reasons as indicated above.

Counsel for the appellant also raised a complaint that PW4 in his report did not detail the evidence he gave in Court. In counsel's view, PW4 was not a consistent witness in the above regard. We have carefully perused the said report of findings and compared it with the evidence given by PW4 during the hearing at trial. It is not true that the report was in respect of different offences as submitted by counsel for the appellant. The report dated 12/06/2002 was in respect of a comparison of the prints received from D/CPL Muhwezi (PW3), who was a Scene of Crime Officer in this case, and the prints received from D/SP Nsababera on 5/11/1998. While it is true that the letter dated 24/11/1998 was in respect of the findings made by PW4 in respect of 4 different offences allegedly committed by the appellant, there was nothing on record to show that the final report was also in respect of the said 4 offences. The complaint raised by counsel for the appellant that the above created a hypothesis that the marks relied upon by PW4 could have been got from other places is without any basis.

Further, there was no proof that the equipment or means of analysis used by PW4 in arriving at his findings was questionable. Accordingly, we disallow the complaint raised for the appellant in regard to the type of technology used by PW4 in arriving at his findings.

The other issue pointed out by counsel for the appellant was that inconsistencies in the evidence of PW9 in regard to the recovery of the knife weakened the prosecution case.

The evidence of PW9 Masumba Patrick was that in October 1998, he was attached to Entebbe Police Station. While at Entebbe, he investigated a case of robbery involving a motor Vehicle No. 416 UBJ. According to PW9, upon conducting a search with the Central Registry of Motor Vehicles, it was established that the registered owner of Motor Vehicle No. 416 UBJ, was Mubiru Christopher. It was then established from the said Mubiru Christopher that he had sold the motor vehicle to a one Mayanja about a year back. Subsequently, Mayanja was arrested with his colleague on

29/10/1998. On 30/10/1998, PW9 went with D/Sgt Bazigu to Central Police Station and Mayanja with his colleague Magala were handed to them and they headed for Entebbe. While still on the way, PW9 was informed by Mayanja that the Motor Vehicle had been hired to the appellant on 4/10/1998 when the robbery is said to have taken place. Thereupon, Mayanja led PW9 to the appellant's house in Kololo. In the compound of the house, there was a parked white motor vehicle Reg. No. 700 UAS-Toyota Corona and a boy was washing it. Upon inquiring from the boy where the appellant was, the said boy referred PW4 to the appellant's sister who was standing in front of the house, who in turn informed PW4 that the appellant had gone to Makerere University. PW4 then touched the exhaust pipe of the Motor Vehicle that was being washed and found it warm. The boy who was washing the motor vehicle then ran towards the back of the house and the appellant's sister entered the house and closed the door.

PW4 then commandeered a Patrol vehicle, and further communicated to CPS for another patrol vehicle which arrived in 10 minutes with one officer named AIP Onyango who joined PW4.

PW4 further testified that he entered the appellant's house with three officers and AIP Onyango remained outside with three other officers surrounding the house. Upon reaching the garage, PW4 and the three other officers climbed into the ceiling where they found the appellant hiding behind the water tank inside the ceiling. Thereupon, the appellant was asked to get down from the ceiling and he did so. The appellant then boxed PW4 and wanted to hit his face but PW4 guarded himself with his hand. The appellant ran out of the house but the officers who were positioned outside the house arrested him. The appellant was asked for the keys to Motor Vehicle Reg. No. 700 UAS which he said he did not have. A breakdown was sent from CPS and the said motor vehicle was towed away to Jinja Road Police Station.

PW4 further testified that upon climbing back into the ceiling where the appellant was found hiding, three pistols were recovered from there. From the appellant's bedroom, the keys for Motor Vehicle Reg. No. 700 UAS

were recovered among other things, and they were all taken to Jinja Road Police Station. At Jinja Road Police Station, the appellant was ordered to open Motor Vehicle Reg. No. 700 UAS. A knife bearing the words "Jack Pyke" was recovered between the seat of the driver and the co-driver's seat, behind the gear handle. The knife was entered on the Search Certificate. He further testified that the appellant, the officers who were present and PW4 signed on the Search Certificate.

Upon PW4 taking the appellant and the items recovered to CPS, a one SSP Ochom went to his office and returned with a knife sheath. The knife sheath was also engraved with the words "Jack Pyke". The knife was fitted into the sheath and it fitted properly.

During cross examination, PW4 testified that the Search Certificate was not witnessed by anybody and only bore his signature and that he was alone when he searched Motor Vehicle Reg. No. 700 UAS and that the appellant was then in custody a Jinja Road Police Station.

We have perused the Search Certificate and it was only signed by PW4. In counsel for the appellant's view, the above weakened the prosecution case. While we find that this would ordinarily weaken the prosecution evidence, we find that the evidence of PW9 was corroborated by other evidence which made it believable. PW12 ACP Ochom Edward testified on 30/10/1998, that he went to the office of a one Sakra who was D/SSP. He found the appellant in the dock and there were exhibits of three pistols and two knives in respect of a robbery case at a Hotel in Entebbe. Thereupon, PW12 suspected that the person who committed the robbery might be the same person who had participated in the murder of the deceased. He then instructed the OC CID to bring the sheath that had been recovered from room 321 at Hotel Equatorial so that they could compare it with the knives which had been recovered from the appellant. The Sheath and one of the knives bore the same writing "Jack Pyke". When he tried to fit the said knife into the sheath, it fitted with ease. Upon asking the appellant whether the knife was recovered from his car, the appellant accepted. The evidence of PW12 corroborated the evidence of PW9 that the knife was recovered from the appellant's car.

Counsel also argued that there was no evidence on record indicating that Motor Vehicle Reg No. 700 UAS belonged to the appellant and there was no evidence to corroborate the evidence of PW11 that he had ever seen the appellant driving the said Motor Vehicle. The learned trial Judge made a finding that the appellant had the physical possession and mental control of the said motor vehicle. This was basing on the evidence that it was found in the appellant's compound on the day of his arrest and the evidence of PW11 Musa Mayanja who testified that he had seen the appellant driving the said motor vehicle two days before his arrest. PW11 was the person who had led PW4 to the appellant's house at Kololo. We find that what was material proof that the appellant possession of the motor vehicle. We are satisfied with the evidence of PW11 and PW4 above that the appellant was in possession of the said Motor Vehicle in which the knife engraved with the words "Jack Pyke" was recovered.

Some of the arguments raised by counsel for the appellant under this ground of appeal have already been addressed in grounds 2 and 3 of the appeal. These are: contradictions in the evidence of PW1 and the statement recorded at Police; there was no evidence to show that PW1 talked to the assailant for 20 minutes as was alleged; PW1 contradicted himself as to the place he saw the assailant on the fateful night; and PW1 and PW8 contradicted each other in regard to the how and where the Identification Parade was conducted. We reiterate our findings above in regard to the above arguments raised by counsel for the appellant.

We find that the learned trial Judge properly evaluated the evidence before him and rightly relied on the circumstantial evidence put before him by the prosecution before convicting the appellant.

Grounds 4 and 5 of the appeal, too must fail.

Ground 6

The trial Court erred in law and fact when it passed a harsh and severe sentence to the appellant thus occasioning a miscarriage of justice to the appellant.

On this ground of appeal, counsel for the appellant submitted that the sentence of life imprisonment passed against the appellant was close to the death sentence considering that he would be required to serve the rest of his life in prison. Counsel faulted the learned trial Judge for only relying on the aggravating factors against the appellant without taking into consideration the mitigating factors.

Counsel further submitted that the trial Court while sentencing had taken into consideration the fact that the appellant attempted to murder a judicial officer by strangulation, the said judicial officer was not called to give evidence in Court. Counsel pointed out that it was unfortunate that the Court had also taken into consideration that the appellant was always heavily guarded by prison officers while attending Court as one of the aggravating factors against the appellant while sentencing him. Further, that the Court relied on evidence that was rejected in the Judgment like the appellant having a bad record in prison which was not supported by evidence.

Counsel relied on ***Adamo Vs. Uganda, Court of Appeal Criminal Appeal No. 50 of 2006***, where the Court set aside the death sentence by substituting it with a sentence of 15 years imprisonment with a view of according the accused an opportunity to reform. On the basis of the above, counsel submitted that the sentence of life imprisonment passed against the appellant was not appropriate in the circumstances of this case. In counsel's view, whereas the murder of the deceased was tragic, the facts did not place it as being a worst case scenario.

Counsel prayed for this Court to find merit in this ground of appeal and to find that the sentence passed against the appellant was wrong in principle and in law.

In reply, counsel for the respondent submitted that the appellant had initially been sentenced to death. However, on mitigation, the sentence was reduced to life imprisonment. In counsel's view, the sentence given to the appellant was not harsh and excessive. This was taking into consideration that the maximum sentence for murder was death. Further,

that considering the nature in which the deceased was murdered, the sentence of life imprisonment was justified in this case.

Counsel invited this Court to find that the sentence passed by the trial Court was appropriate. He relied on ***Kasadda David and ors Versus Uganda, Criminal Appeal No. 055 of 2007***, for the above submission. However, that in the event that this Court finds that the trial Court did not take the appellant's mitigating factors into consideration, counsel prayed that the sentence of life imprisonment should be substituted with a sentence of 36 years imprisonment.

Counsel prayed for this Court to dismiss the appeal and uphold the conviction and sentence passed by the trial Court.

In rejoinder, counsel for the appellant submitted that the trial Court did not take into consideration the mitigating factors but only took into account the aggravating factors. Counsel prayed for this Court to interfere with the sentence passed by the trial Court for the above reason.

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, Hon. Justice Joseph Murangira who passed the sentence was faulted for failure to take into consideration the appellant's mitigating factors.

We have carefully looked at the reasons given by the Court in sentencing. We find that while the learned resentencing Judge took into consideration and specifically mentioned all the aggravating factors raised against the appellant, the Court did not mention any of the mitigating factors. It can, therefore, be deduced that the appellant was convicted on the basis of the aggravating factors alone, which is improper.

We have taken into consideration that the deceased was murdered in a violent manner by stabbing and the said murder was planned and executed without any remorse. We have also taken into consideration the mitigating factors raised for the appellant that the appellant was useful and a law student at Makerere University and thus had a future ahead of him. Further, that a sentence was supposed to be rehabilitative so that the convict would go back and live responsibly in the community. Further, that the appellant was remorseful and was of good conduct as per the prison records.

It is true that at the time of this conviction, the appellant was a young man of 21 years pursuing a Bachelor of Laws Degree from Makerere University. The appellant was a very young man but was also a very hardened criminal at such a young age. He has so far spent over 20 years in incarceration, having been arrested on 30th October, 1998. We shall take into consideration the age of the appellant at the commission of the offence, and the report from the Prisons Authorities which shows a marked improvement in the behavior of the appellant. He is stated to have participated in several rehabilitative programmes. This, in our view would provide an incentive for the appellant to participate in the programmes and to take steps to address factors that underlie his past criminal behavior. We have also considered the possibility of the appellant constituting a danger to the community if released, but we have taken the view that the benefits that would accrue by way of rehabilitation and the recognition of mitigating factors outweigh the danger to the community. The age of the appellant at the time of the commission of the offence is a very big mitigating factor which ought to have been considered by the resentencing Court. It did not consider it. In **Kabatera Steven vs Uganda, Court of Appeal Criminal Appeal No. 123 of 2001**, the Court, in allowing the appeal where the lower Court had not taken into account the age of the offender while sentencing, stated that:

> **"The only factor that he did not take into account was the age of the appellant. We are of the opinion that the age of an accused person is always a material consideration that ought to be taken into account before a sentence is imposed."**

Finally in view of the above analysis, we believe that a sentence of 30 years would be adequate in the circumstances. We shall deduct the period spent by the appellant on remand while attending trial, which is 5 years and 3 months from the said sentence of 30 years imprisonment. Having so done, the sentence of life imprisonment imposed by the learned resentencing Judge is hereby set aside, and is replaced with a sentence of 24 years and 9 months to be served from the date of conviction which was 18th December, 2003. The Appellant shall therefore serve a term of imprisonment for 24 years and 9 months from the date he was convicted.

It is so ordered.

Dated and signed this ..... day of 2019

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Elizabeth Musoke
JUSTICE OF APPEAL

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Hellen Obura
JUSTICE OF APPEAL

.....

Ezekiel Muhanguzi
JUSTICE OF APPEAL

8/8/19 Appellant present
Mr. Brian for the Resp.
Mr. Juma Isaac
Mr. Ngawinga
for the Appellant.
Court: Signed delivered in the presence of the above.
8/8/19