THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

Criminal Appeal No. 209 of 2011

Coram: Barishaki, Musota, & Tuhaise, JJA

1. **Kakungulu James *alias* Kunsala**
2. **Ndinwa Mansul *alias* Kowa** **.....Appellants**
3. **Mwanani Yafesi *alias* Balilaine**

Versus

Uganda.....Respondent

(Appeal from the judgment of the High Court sitting at Pallisa in HCT-04-CR-SC-0257-2013, delivered by Henry I. Kawesa J, on 28th July 2016)

JUDGMENT OF COURT

The appellants were indicted for murder contrary to sections 188 and 189 of the Penal Code Act Cap 120. The particulars of the offence were that the appellants and others still at large on the 8th day of April 2013 at Kapyani 1 village in Kibuku District, murdered Sitalo Habib. The appellants were each convicted of murder and each sentenced to 17 years imprisonment. They filed a memorandum of appeal with 6 grounds which read as follows:-

1. That the learned trial Judge erred in law and fact when he ignored the contradictions and inconsistencies in the

prosecution witnesses thus occasioning miscarriage of Justice.

2. The learned trial Judge erred in law and fact when he convicted the appellants on evidence of identification without considering proper conditions thus occasioning a miscarriage of justice to the appellants.
3. The learned trial Judge erred in law and fact when he ignored the defence of the appellants thus occasioning a miscarriage of justice to the appellants.
4. The learned trial Judge erred in law and fact when he passed a sentence which was manifestly harsh and excessive against the appellants thus occasioning a miscarriage of justice to the appellant.
5. The learned trial Judge erred in law and fact when he failed to evaluate the evidence as a whole thus occasioning miscarriage of justice.
6. Wherefore, the appellant prays this honourable Court that:
   a) the appeal be allowed
   b) conviction be quashed and sentence be set aside.

We note, however, that ground 6 is not a ground of appeal though the appellants numbered it as such. It rather contains the appellants' prayers to this Court, and we shall treat it as such.

Background

There was a feud over land between the family of the deceased (Habib Sitalo) and the family of Wanzala (also deceased). At a meeting presided over by the police and elders, Habib Sitalo (the deceased) was accused of bewitching Wanzala whose foot was injured. A1 Kakungulu James *alias* Kunsala (1st appeallant) and A2 Ndinwa Mansur *alias* Kowa (2nd appellant) made threats that if their father dies, they will kill Habib Sitalo.

Wanzala died in the morning of 8th April 2013. That same morning, the appellants, together with others not before court, using pangas and spears, attacked the deceased at his home, then chased him as he was trying to escape. He finally succumbed to the injuries inflicted on him at a mango tree, about a kilometre away from his home in Kapyani village, Kibuku District. The death of Sitalo Habib was reported to the Police at Kasasira.

The assailants fled the scene of crime after the incident, but the appellants were eventually arrested at various dates and places. They were prosecuted before the High Court in 2016.

Representation

At the hearing of this appeal, Mr. Musedde John, learned Counsel, represented the appellants, while Mr. Peter Mugisha, learned State Attorney, represented the respondent. The appellants were present in Court at the hearing of this appeal.

Submissions for the Appellant

At the hearing of this appeal, the appellants, through their Counsel, dropped ground 4 of the appeal. Their Counsel submitted on grounds 1, 2 and 5 together, and on ground 3 separately.

On grounds 1, 2 and 5, Counsel referred this Court to page 9 of the record of appeal and submitted that, though the learned trial Judge made a finding that the conditions of identification by PW1 and PW2 were conducive and sufficiently placed the accused persons at the scene of crime, this evidence was contradicted by PW3, PW4, PW5 and PW6 who were also at the scene, and they all testified that they never saw the appellants at the scene of crime.

Counsel contended that these were very grave contradictions which were not explained, and that they cast doubt on whether the appellants had been properly identified by the witnesses.

Counsel argued that given their respective ages, and close relationship with the deceased and the appellants, PW3, PW4, PW5, PW6 were more credible and reliable witnesses whose evidence the learned trial Judge should not have ignored.

He cited **Nambale V Uganda, Court of Appeal Criminal Appeal No. 126/2010** and submitted that the learned trial Judge overlooked the discrepancies and inconsistencies in the prosecution witnesses' testimonies.

Counsel also submitted that the evidence of PW1 should not have been relied on. He argued that there was no concentration from PW1 who appeared to be multi-tasking by welcoming the assailants, seeing through the cracks on the door, rising an alarm, and identifying the assailants. Counsel contended that PW1 could not have welcomed the assailants as if she was welcoming visitors.

Counsel submitted that further, PW1 could not have remembered what she was testifying upon, when, in her evidence in chief, she stated that:-

> *"He was cut and he died. I only remember it was in April. Can't recall other details."*

The appellant's counsel also submitted that PW2, who testified that he sleeps in a different hut about 15 meters away, just like PW1, was also multi-tasking, that is, peeping through the door and observing assailants; raising an alarm while gripped with fear; and above all, he was not sure of the distance between him and the assailants who were knocking the door of his father's hut.

Counsel submitted that, in his examination in chief, PW2 testified that he was 15 meters away, but during cross examination, he testified that he was 25-30 meters away from the assailants. According to counsel, this casts a doubt on the evidence of PW2. Counsel argued that if PW2 could not properly estimate the distance between the two huts in a compound where he stays and lived for many years, how can

he be expected to accurately describe something he claims he saw while under fear, in a very limited time, from a distance and during the night?

Counsel cited the cases of **Abdalla Nabulere & Another V Uganda [1979] HCB 77** and **Moses Bogere V Uganda, Supreme Court Criminal Appeal No. 1 of 1997** regarding the conditions and factors which go to the quality of identification. He argued that in the circumstances of the instant case, the quality of identification was not good.

Counsel contended that PW1 and PW2 were in fear, peeping through small openings, while raising alarms. The time was at 6 am with insufficient light. He argued that 6 am was still night time as defined under section 2 (q) of the Penal Code Act cap 120 which defines "night" to mean the interval between half-past six o'clock in the evening and half past six o'clock in the morning. He argued that all this impairs visibility.

Counsel submitted that had the learned trial Judge taken the foregoing into account, he would not have held that there was sufficient morning light for proper identification. He faulted the learned trial Judge for relying on the identification of the appellants by PW1 and PW2 to convict the appellants.

The appellant's counsel further submitted that the finding of the learned trial judge that PW3 was one of the witnesses who saw the appellants hitting and chasing the deceased was

not correct because it is not reflected anywhere in the evidence. He also submitted that while the prosecution witnesses revealed that six pangas were used by the assailants, only one panga was exhibited and produced in court; and that there is no evidence on record to show that the panga had the deceased's blood stains or the appellants' fingerprints. He argued that in the absence of such evidence, it is difficult to tell whether the exhibited panga was carried by any of the appellants, or by other persons named by the witness.

According to the appellant's counsel, the unanswered questions are; who carried the panga which was exhibited?, and whether the exhibited panga was ever used in cutting the deceased. Counsel submitted that the same argument applies to the spears which had no blood stains and the fact that there was no evidence showing who was carrying which spear. According to Counsel, it is difficult to tell whether the spears which were exhibited were ever used in stabbing the deceased.

Counsel also maintained that it was important for the broken door to the deceased's hut to be produced in court as an exhibit to enable the trial court ascertain the size of the crack through which PW1 was able to see and identify the appellants and other people.

Counsel contended that it is not clear how a man who had been cut by the appellants while inside the house was able to

escape and get killed at the mango tree said to be 2 or 3 kilometres away. He contended that if a sketch plan of the scene of crime had been drawn and tendered in evidence, it would have been easy for the trial court to appreciate the scene and make a more informed decision.

Counsel referred this Court to the evidence of PW1 to the effect that there was a grudge between the appellants and the deceased relating to land wrangles in the area, which made it clear that there were multiple threats to the life of the deceased. He submitted that PW1 does not tell which people were threatening the deceased over the land, and how many they were. He contended that PW1 could have named the appellants while preoccupied with this kind of thinking regarding the grudge. According to Counsel, PW1 and PW2 sounded like they had been coached to implicate the appellants.

Counsel further challenged the evidence of PW9 an Assistant Inspector of Police, to the effect that the 1st appellant had said that, if his father died, they would not allow people to mourn before they kill the deceased (Sitalo). He contended that if the statement was made in the presence of a very senior police officer like PW9, he should have immediately arrested and caused the culprit to be charged. According to Counsel, the possible facts are either that the statements were never made, and were therefore a concoction intended to malign the 1st appellant; or PW9 was negligent; or PW9 weighed it and found it carried no weight.

Counsel finally submitted that the learned trial Judge failed to address his mind to the exhibits tendered in court, and to properly evaluate the evidence as a whole, thus occasioning miscarriage of justice.

On ground 3, the appellant's counsel submitted that the learned trial Judge's finding that the prosecution had sufficiently placed the appellants at the scene of the crime was based on the evidence of PW1 and PW2. He submitted that the learned trial Judge ignored the evidence of PW3, PW4, PW5, and PW6 who were at the scene, and who all testified that they never saw the appellants at the scene. He argued that the evidence of PW3, PW4, PW5, and PW6 corroborates the unsworn statements made by the appellants that they were not at the scene of crime when the crime was committed.

According to Counsel, if the learned trial Judge had carefully evaluated the evidence of PW1 and PW2 alongside that of PW3, PW4, PW5, PW6, PW7, and PW9, he would not have made the finding that the appellants were sufficiently placed at the scene of crime. He submitted that the trial Judge departed from the evidence of PW3, PW4, PW5, PW6, PW7, and PW9 without giving reasons for not believing it, yet the evidence was that the appellants were not at the scene of crime. He cited **Bogere Moses and Another V Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (unreported)** to support his submissions.

Submissions for the Respondent

The respondent's counsel submitted on each ground of appeal separately.

On ground 1, Counsel submitted that the inconsistencies in the testimony of PW1 and PW2 referred to by the appellants' counsel related to what the assailants were wearing. He argued that they were minor and did not go to the root of the case, as some could be explained away by forgetfulness due to the lapse of time.

According to the respondent's counsel, the learned trial Judge was alive to the above principles since he addressed them in his judgment where he observed that there was no mistaken identity; that the contradictions were minor; and that PW1 and PW2 positively identified the appellants not by clothing alone but by their voices and the fact of being close relatives whom they knew very well. He submitted that failure to correctly see the colour of their jackets was not fatal as it never went to the root of the chain of causation. According to the respondent's counsel, the quality of identification was good, and the witnesses were reliable and truthful.

On ground 2, the respondent's counsel submitted that the learned trial Judge was alive to the factors favouring correct identification when he rightly made a finding, after evaluating the adduced evidence, that the conditions for correct identification of the appellants by PW1 and PW2, as

highlighted in the already cited case of **Abdalla Nabudere and 2 Others V Uganda**, were conducive. He contended that the appellants' counsel's submissions cannot be sustained, since PW1 and PW2 had a very good opportunity of seeing the accused persons prior and after the commission of the heinous act. He concluded that the learned trial Judge correctly evaluated the evidence on identification of the appellants.

On ground 3, the respondent's counsel submitted that the evidence of PW1 and PW2, placed the appellants at the scene of crime. He contended that the appellants' simply denying being at the scene of crime, yet providing no supporting evidence of their alibi against the strength of the prosecution evidence, does not mean that their defence was never considered. He cited the case of **Uganda V Firimingio Kakooza [1984] HCB 1** to support his submissions.

The respondent's counsel submitted that the appellants' participation in the commission of the crime was sufficiently proved by the prosecution, which justified the learned trial Judge's finding that the prosecution sufficiently placed the accused at the scene of crime.

Resolution of the Appeal by Court

This is a first appeal. This Court, as a first appellate court, has a duty to re-evaluate the evidence adduced at the trial and come to its own conclusion, pursuant to rule 30 (1) of the Judicature (Court of Appeal Rules) Directions 2005. It must

however bear in mind that, unlike the trial court, it had no opportunity to hear and see the witnesses testify. Also see **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No. 10/1997**; **Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997.**

Grounds 1, 2 and 5

We shall first address the question of whether there were contradictions, inconsistencies and discrepancies in the testimonies of the prosecution witnesses, and if so, whether they seriously affected the value of the evidence.

In **Alfred Tajar V Uganda, EACA Criminal Appeal No. 167 of** 1969, it was held that grave inconsistencies, unless satisfactory explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies will not usually be rejected unless the court thinks they point to deliberate untruthfulness. However, in a later case of **Nambale V Uganda, Court of Appeal Criminal Appeal No 126/2010**, this Court held that discrepancies and contradictions in the testimony of witnesses on material points should not be over looked as they seriously affect the value of the evidence. In **Okwanga Anthony V Uganda, Supreme Court Criminal Appeal No. 20 of 2000**, it was held that minor contradictions and inconsistencies do not go to the root of the case, they could be explained away by forgetfulness due to lapse of time. Similarly, in **Nashaba Paddy V Uganda, Supreme Court Criminal Appeal No. 39 of**

2000, it was held that grave inconsistencies and discrepancies in the prosecution case, unless satisfactorily explained, will result in the evidence being rejected, while minor ones have no effect on the main substance of the prosecution case.

In the instant case, the appellants' counsel mainly challenged the evidence of PW1 and PW2 who testified that they saw the appellants at the scene of crime. According to the appellants' counsel, this evidence varied from that of PW3, PW4, PW5 and PW6 who all denied having seen the appellants at the scene. Another area of contradiction pointed out by the appellants' counsel referred to the prosecution witnesses' inconsistencies regarding the description of the colours of the appellants' jackets at the time of committing the offence, which the learned trial Judge found to be minor.

The appellants maintain that the inconsistencies and discrepancies in the prosecution evidence were grave, contrary to the findings of the learned trial Judge, such that it casts doubt on whether the appellants had been properly identified by the witnesses.

PW1, the deceased's wife, testified that she saw the appellants, and others not before court, assault the deceased; that she saw the 1st appellant chasing the deceased and throwing a panga at him; that she also saw the 3rd appellant spear the deceased from behind and even

remove the spear; and that the 2nd appellant was holding a panga.

PW2, a son to the deceased, testified that he saw the three appellants, among others not before court attack his father's home; that he saw the 3rd appellant bang and hit the deceased's door until it opened, after which the deceased came out of the house and started running. PW1 came out and followed the deceased while making an alarm. PW2 did not follow. He remained home and followed another direction.

PW3 testified that on the 8th April 2013 at 6.00 am he saw people by pass his home. They were Joefry, Budhala, Zabuloni and Jack. He did not see the appellants among the people chasing the deceased.

PW4 testified that he was resting at his house at around 7.00 am. He heard an alarm. He saw Jack, Zabuloni, Mayanja, Joefry pulling and assaulting the deceased. He never saw the appellants. He only heard that they had slaughtered the deceased. He went to the scene after the event and the assailants were not there. In cross-examination, he maintained that he never saw the appellants cut or spear the deceased.

PW5 testified that early in the morning of 8th April 2013, he saw the deceased being chased by Jack, Mayanja, Budhala, and Mwanani Yafesi (3rd appellant) was behind the first group. He did not see the appellants cut the deceased.

PW6 testified that he did not know who cut his son. He found him already killed.

The adduced evidence reveals that the crime did not take place in one stationary place. There was movement as the deceased ran out of his house, where the attack started, being pursued by the assailants to the mango tree, the point where he succumbed to the injuries inflicted in him.

In our considered opinion, the evidence of the witnesses could not be the same as they all observed the incident from different points at different points, between the deceased's home and the mango tree where the deceased finally succumbed to the assaults and died. PW1 and PW2 first observed the events at their home, and as the deceased ran past the homes of PW3 and PW4. The deceased also ran past Golomba where PW5 was. PW6 only went to the scene of the crime. His evidence does not indicate that he witnessed any of the events prior to the death of the deceased.

In essence, the actual eye witnesses who saw the appellants cut and spear the deceased, or participate in the commission of the crime, were PW1 and PW2. PW3 and PW4 only saw people pass by their respective homes and the appellants were not among them. PW5 saw the deceased being chased by Jack, Mayanja, Budhala, and the 3rd appellant Balilaine was behind the first group. He did not see the appellants cutting the deceased. PW6 the father of the deceased did not see who cut his son. He found him already killed.

The question to address is whether the conditions for identification of the three appellants were conducive for PW1 and PW2, as eye witnesses, to properly identify them.

The Court of Appeal then, in **Abdalla Nabudere and 2 Others V Uganda [1979] HCB 77** laid down the following guidelines for court to follow for proper identification of the accused:-

> *"The judge should then* ***examine closely the circumstances in which the identification came be made, particularly, the length of time the accused was under observation, the 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."* (emphasis added).

The adduced evidence on record shows that PW1 and PW2 knew the appellants very well. The 1st and 3rd appellants were sons of PW1's brother in law and PW2's brothers (in reality, cousins). The 2nd appellant was PW1's brother in law and PW2's uncle. The time of the attack was very early in the morning between 6 am and 7 am, when the light is sufficient for proper identification. It does not matter that legally, this is defined as "night" under the Penal Code Act.

The adduced evidence also shows that PW1 observed the assailants for a time, first as they banged and entered her house, and secondly, when she ran after them. These were

people who were known to PW1 and who spoke when they broke into her house. Obviously, she knew their appearances and their voices. Similarly, PW2 was familiar with the appellants. The two witnesses could not have mistaken the appellants for anybody else among the mob.

In our considered opinion, based on the adduced evidence and the relevant legal authorities, the evidence of PW1 and PW2 squarely placed the appellants at the scene of the crime.

The evidence of PW1 and PW2 was corroborated by that of PW3, PW4, PW5 and PW6 regarding the circumstances under which the deceased was killed, that is, his running away from the assailants who chased him from his home up to a mango tree where he succumbed to the stabbings and cuts inflicted on him.

The record of appeal reveals at page 9 that the learned trial Judge took all the foregoing into account when he stated in his judgment as follows:-

> *"Having carefully watched all witnesses in court, and carefully reviewed all evidence, I am convinced that the conditions for identification by PW1 and PW2 of the accused were conducive. It was towards morning. There was morning light. The accused talked to the deceased. They forced the door open. There was a sort of mob which followed, and as deceased tried to run a chase ensued. PW1 ran towards them and kept a distance and*

saw whatever happened. I am further convinced that the holes in the doors of PW1 and PW2 were sufficient from their description in evidence to let the witnesses observe what was happening."

The appellants maintain in this appeal that the inconsistencies in the description by the prosecution witnesses of the colours of the jackets of the appellants casts doubt on whether the appellants had been properly identified by the witnesses. They contend that the learned trial Judge erred in law and fact when he found such inconsistencies, discrepancies and contradictions to be minor.

The testimony of PW1 was to the effect that Kunsala the 1st appellant was putting on a red jacket and had a panga; that Kowa the 2nd appellant was wearing a jacket and a shirt and had a panga; and that Balilaine the 3rd appellant was putting on a dark greyish shirt. According to PW1 all the appellants had jackets but he recognized them.

The testimony of PW2 was to the effect that the appellants had put on jackets; that Kunsala the 1st appellant had a red jacket, Kowa the 2nd appellant had a dark green jacket, and Balilaine the 3rd appellant had a black jacket.

We note that both witnesses described the colour of the jacket the 1st appellant was wearing as red. Both witnesses also stated that the appellants were wearing jackets. PW2 went further to describe the colours of the jackets of the 2nd

and the 3rd appellants as dark green and black respectively. We do not even find any major contradiction concerning the colours of the jackets the appellants were wearing, only that PW2, unlike PW1 described the colours of all the three jackets while PW1 only described the colour of the jacket worn by the 1st appellant. In our opinion, this issue should not even have been raised by the appellant, let alone be alluded to by the learned trial Judge.

Thus, after subjecting the evidence on record to fresh scrutiny, we agree with the learned trial Judge that PW1 and PW2, the two eye witnesses to the murder, properly identified each of the three appellants as having participated in the murder of the deceased Habib Sitalo.

The appellants faulted the learned trial Judge for his finding that they caused the death of the deceased. The appellants' counsel submitted that PW1 testified that six pangas were used, yet only one panga was produced in court and exhibited, but the evidence does not show who carried it. He argued that in absence of bloodstains of the deceased and fingerprints on the panga, it is difficult to tell whether the panga or the spears which were exhibited were ever used in stabbing the deceased. He also contended that it was important for the broken door to be produced in court as an exhibit to enable the court ascertain the size of the crack through which the witness was able to see and identify the appellants and other people.

It is not a legal requirement that in order to secure a conviction for the offence of murder, the weapon that was used to kill the deceased must be produced in court. A clear description of it by the witnesses who saw the weapon is sufficient. It was held in **Komwiswa V Uganda [1979] HCB 86** that when an exhibit used as a weapon cannot be produced in evidence, it should be described as carefully and exactly by the witnesses who saw it used.

In **Mungai and Others V Republic [1968] EA 782**, the then Court of Appeal of East Africa held that there is no burden on the prosecution to prove the nature of the instrument which was used to inflict the harm, nor was there any obligation to prove how the instrument was used.

In **Woolmington V DPP [1935] 462**, the duty of the prosecution was clearly stated that it must prove the ingredients of murder beyond reasonable doubt, namely that death occurred, the death was caused unlawfully, the death was caused with malice aforethought, and the accused participated in the commission of the alleged offence.

In this case, it is not in doubt that Habib Sitalo was killed, and that he was killed unlawfully with malice afore thought. The appellants challenged the learned trial Judge's findings that they participated in the unlawful killing of the deceased.

In order to determine the question of whether the appellants caused the death of the deceased, we have looked at the evidence of PW1 and PW2. PW1 testified that she saw the 1st

reasonable doubt the fact that the appellants caused the death of the deceased.

The learned trial Judge therefore correctly evaluated the evidence as a whole before making the finding that the appellants caused the death of the deceased.

This disposes of grounds 1, 2 and 5 of the appeal which, in our opinion, based on the evidence on record, and the authorities cited, have no merit and cannot succeed.

Ground 3

The appellants maintain that the learned trial Judge did not consider the appellants' defence of alibi; that the prosecution evidence points to the absence of the appellants from the scene of crime from which the learned trial judge departed without giving reasons for not believing the defence evidence.

The Supreme Court in **Bogere Moses and Another V Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (unreported)** held as follows:-

> *"Court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on court*

appellant throwing a panga at the deceased who was running ahead of them. She also saw the 3rd appellant spear the deceased from behind. The 2nd appellant was holding a panga. PW2 also testified that he saw the 3rd appellant bang and hit the deceased's door until it opened.

The evidence of PW1 and PW2 is corroborated by the post-mortem report exhibit PE1 which reveals that the deceased had cut wounds on the throat, neck and back; and that the cause of death was severe bleeding and shock. This, combined with the evidence of PW1 and PW2 which squarely placed the appellants at the scene of crime as analysed above, proves beyond reasonable doubt that the appellants caused the death of the deceased.

The circumstances of this case, as deduced from the evidence on record, are that the murder of the deceased was not occasioned by a single person. There was a mob that first broke into the deceased's home and then chased him while throwing pangas and spears at him until he eventually died a distance away from his home. The three appellants were part of this mob, and the others are still at large. The prosecution evidence clearly places the appellants at the scene of the crime, hence satisfactorily proving the fourth ingredient that they participated in the commission of the offence.

Thus, as a first appellate court, having subjected the evidence on record to fresh scrutiny, and having evaluated it as a whole, we find that the prosecution proved beyond

to evaluate both versions judiciously and give reasons why the other version is accepted……"

In Abudalla Nabulere and 2 Others V Uganda [1979] HCB 77 the then Court of Appeal held that it is not for the accused to prove his alibi. The Court stated:-

"We do not think that where none is set up, the trial judge is required to speculate as to whether or not an alibi is available to the accused. The appellants did not set up any alibi worth considering at the trial. They contented themselves with rehearsing what they did the morning following the murder. We do not think on the evidence it was open to the trial court to assume from that evidence that the appellants set up an alibi. The learned trial judge correctly thought they did not."

In **Bogere Moses and Another V Uganda Supreme Court Criminal Appeal No. 1 of 1997**, it was stated by the Supreme Court as follows:-

"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time.... Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions

judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable. In the instant case we have found it difficult to avoid the conclusion that the learned trial Judge considered and accepted the prosecution evidence alone, and then rejected the defence summarily simply because he had accepted the prosecution evidence. That was in our view a misdirection."

In **Uganda V Firimingio Kakooza [1984] HCB 1**, it was held that:-

"Where an accused person puts forward an alibi in answer to a charge, the accused has no duty to establish his alibi it being the duty of the prosecution to disapprove it by placing the accused through evidence at the scene of the crime at the material time."

The record of appeal shows on pages 35 to 37 that the 1st appellant Kakungulu James testified that at the material time he was at his home, about 1 kilometre from the scene of crime. He only learnt about the killing of the deceased on his way to the garden to dig. The 2nd appellant Mansur Ndiya testified that he knew nothing about the death of the deceased and that he was not at the scene of crime. The 3rd appellant Mwanani Yafesi testified that at the material time, he was at his home, and he went to the scene of crime when

he heard they had killed the deceased. He found the deceased lying there dead.

We have weighed the prosecution's evidence against the appellant's evidence. PW1 and PW2 clearly placed each of the appellants, whom they also identified in the dock, at the scene of crime. Their evidence was corroborated by the other prosecution witnesses and the exhibits regarding the circumstances surrounding the unlawful killing of the deceased. There is sufficient proof of the participation of each of the appellants in the killing of the deceased. They were involved in the chain of events that led to the death of the deceased. The 1st and 2nd appellants each had a panga, and the 3rd appellant had spears. The appellants were part of the initial group that broke into the home the deceased. Not only were they at the scene of crime, they were also armed, and they chased the deceased even when he tried to run away. They were part of a mob whose actions led to the killing of the deceased.

Thus, based on the adduced evidence and the law applicable, and having considered both the prosecution and the defence evidence, we are inclined to believe the evidence of the prosecution which squarely placed the appellants at the scene of crime.

Thus, ground 3 of this appeal has no merit and it accordingly fails.

It is our finding, therefore, that all the ingredients of murder in this case were proved beyond reasonable doubt. We agree that the learned trial judge was correct when he convicted each of the appellants of the offence for which they were indicted.

We have noted that the appellants dropped ground 4 of the appeal which was faulting the learned trial Judge for passing a manifestly harsh and excessive sentence that occasioned miscarriage of justice to the appellants. We shall therefore not address the merits of this ground of appeal. Though we have noted that the offence committed by the appellants was very heinous and carries a maximum penalty of death, we will not tamper with the sentence of 17 years imprisonment imposed against each of the appellants by the learned trial Judge, who considered the mitigating factor that the accused persons were first offenders. It was also not illegal in that the learned trial Judge, when passing it, took into account the three years each of the accused had spent on remand. The sentence will run from 28th July 2016 the date of their conviction, for each of the appellants.

We accordingly dismiss this appeal and uphold the conviction and sentence of the lower court.

Dated at Jinja this ....3rd.....day of .....February.....2020.

.....

Hon. Mr. Justice Cheborion Barishaki

Justice of Appeal

Hon. Mr. Justice Stephen Musota

Justice of Appeal

Hon. Lady Justice Percy Night Tuhaise

Justice of Appeal