THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram: Kakuru, Mutangula Kibeedi & Mulyagonja, JJA)
CRIMINAL APPEAL NO.19 OF 2018

SSEMWANJE FAROUK::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Mr. Anthony Oyuko Ojok, J., dated 2nd February, 2018 in Kampala Criminal Session Case No. 100 of 2014)

JUDGEMENT OF THE COURT

Introduction

This is an appeal against the decision of the High Court of Uganda sitting at Kiboga in which the appellant was convicted of the offence of Murder c/s 188 and 189 of the Penal Code Act, on the 2nd of February 2018 and sentenced to 30 years and 11 months' imprisonment.

Background

The facts that were accepted by the trial judge were that Matovu Amon, an old man aged 93 years, lived in Najjanankumbi with his family of mainly grandchildren. That on 2nd December 2013, at about midday, Wamala Alex, the eldest of the deceased's grandchildren sent his three siblings Matovu Brian, Yiga Eric and Kamoga Newton George William to Masajja, a trading centre nearby. He sent them to collect gifts from another brother, who he told them had returned and had gifts for them.

The 3 boys went to Massajja as Alex instructed them to. Wamala stayed at home, alone with the deceased. The boys got to Massajja but they did not find their brother, so they did not get the anticipated gifts. On their way back from Masajja, the boys decided to go to an Internet Café. But the 2 asked Kamoga, the 9-year-old and the youngest of them to go back home, because he was still young and could not go to the Café with them.

Kamoga went back home but on arrival, he found his brother Alex and his friends at home. He did not know the friends by name but could identify them by their facial features. Alex then asked Kamoga to go and get them some water but he did not go. However, a person standing at the door stopped him from entering into the house. Shortly after that, four men emerged from the house sweating profusely.

The boy then ran into the house and found the deceased lying in one of the rooms with his legs and hands bound up with ropes. His mouth was gagged with a piece of cloth. The boy unbound the legs and ran to his aunt Nabachwa Catherine for help. Nabacwha went to the scene but found the old man dead.

Investigations led to the arrest of Nvule Twaibu and the appellant, both friends of Wamala Alex. At an Identification Parade held at Katwe Police Station, Kamoga identified the appellant as one of the participants in the crime.

The appellant was indicted, tried and convicted of murder and sentenced to 30 years' imprisonment. Being dissatisfied with both the conviction and the sentence he appealed to this court on the following grounds:

1. **The learned trial Judge erred in law and fact in finding that the appellant participated in the commission of the said offence.**
2. **The learned trial Judge erred in law and in fact when he disregarded the Appellant's Alibi.**
3. **The learned trial Judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.**

Representation

At the hearing of the appeal, the accused was represented by Mr. Henry Kunya, learned counsel on State Brief. The respondent was represented Ms. Barbra Kawuma, learned Assistant Director of Public Prosecutions. The accused person was not present in court due to Covid-19 control procedures but he followed the proceedings via video link to Luzira Prison.

Counsel for both parties were directed to file written submissions before the hearing of the appeal. The appellant's submissions were filed on 25th March 2021, while the respondent filed a reply on the 25th March 2021. The appeal was disposed of wholly on the basis of the written arguments.

Consideration of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules (SI 13-10). It is to reappraise the whole of the evidence before the trial court and draw its own inferences of fact. The court then comes to its own decision on the

facts and the law, but must be cautious of the fact that it did not observe and hear the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**).

That being the duty of this court, we proceeded to re-appraise the whole of the evidence on record with regard to the grievances that were set out in the memorandum of appeal. We considered the submissions filed by counsel, the authorities that they cited and others not cited that were relevant to the case.

We observed that Ground 1 and 2 of the appeal related to the evaluation of the evidence. Though counsel for the appellant argued them separately and counsel for the respondent did so in the same fashion, we found it appropriate to resolve the two grounds together. Ground 3 was resolved separately. The submissions of counsel on each ground of appeal were summarised immediately before disposing of the particular grounds of appeal.

Grounds 1 and 2

The appellant's complaint in Ground 1 was that the trial judge erred in law and fact when he found that the appellant participated in the offence. In Ground 2 he complained that the trial judge disregarded his defence of *alibi.*

Submissions of Counsel

The appellant's counsel did not contest the findings on the unlawful nature of the death of the deceased and that it was caused with malice aforethought. His contention was that no credible evidence

was adduced to prove the participation of the appellant because there was no direct evidence or an eyewitness to prove the same. Counsel further contended that the evidence of PW1, a child of tender years, was not corroborated. And that although the trial judge referred to an Identification Parade at which it was stated PW1 identified the appellant, the officer who conducted the Parade did not testify; neither was **PF69**, the report about the Parade tendered in evidence to prove that it was conducted.

Counsel for the appellant further submitted that though the trial judge alluded to circumstantial evidence as the basis of his decision against the appellant, no particular pieces of circumstantial evidence were cited to form the basis of the conviction. Counsel challenged the evidence presented as lacking in that the rope and the piece of cloth that were used to commit the crime were never produced in evidence to prove the strangulation of the deceased. He stated that in order to prove that the appellant indeed participated, one would have expected to have some remote link presented, such as finger prints, but no such evidence was presented.

Counsel then referred us to the decision in **Byaruhanga Fodor v. Uganda Supreme Court Criminal Appeal No.18 of 2002 in which the court referred to the decision in Simeon Musoke v. R [1958] EA 715,** with approval. The two related to the standard required to convict an offender on the basis of circumstantial evidence. He also relied upon the decision **Tundigwihura Mbahe v. Uganda Supreme Court Criminal Appeal No.9 of 1987** where circumstantial evidence was defined as evidence surrounding circumstances which by intensified examination are capable of proving a proposition with the accuracy of mathematics.

Counsel for the appellant went on to point out that there were contradictions in the testimony of PW1 when he stated, during cross-examination, that it was Alex who killed the deceased and later stated that it was Alex and his friends. That later on he stated that he did not see Alex and his friends bind up the deceased. He submitted that in view of the said contradictions, the trial Court erroneously arrived at its decision in the absence of credible evidence to link the appellant to the offence.

With regard to ground 2 of the appeal, counsel referred court to the unsworn statement of the appellant where he denied that he committed the offence by putting up an *alibi.* It was his submission that the trial judge erroneously relied on the evidence of PW1 to convict the appellant and completely disregarded his *alibi.* He relied on the decision in **Frank Ndahebe v. Uganda, Supreme Court Criminal Appeal No. 2 of 1993,** to support the argument that where an accused person puts up an alibi, it is the duty of the prosecution to place him at the scene of the crime.

He prayed that court allows Grounds 1 and 2 of the appeal.

In reply the respondent's counsel submitted that PW1 stated that he knew the appellant as a friend to his brother Alex. She referred to the testimony of PW1 where he stated that on 2nd December 2012, on returning home from Masajja, he found Alex and his friends at home. Further that they tried to stop him entering the house by persuading him to go and buy water but he insisted on entering. That when he did so he found the deceased bound with ropes and gagged with a cloth. Counsel then submitted that with this piece of evidence, the appellant was placed at the scene of crime.

The respondent's counsel further submitted that the conduct of the appellant and the others in attempting to send PW1 away when he returned and the act of running away after he returned was not consistent with innocence.

With regard to the contention that PW1's testimony lacked corroboration, counsel for the respondent submitted that PW1's testimony did not require corroboration. She relied on Section 40 (3) of the Trial on Indictments Act for the argument that although PW1 was a child of tender years at the material time, the trial judge found that he possessed sufficient knowledge to take an oath. That as a result he gave his testimony after an oath. It therefore did not require corroboration.

Counsel referred us to the decision in **Abudala Nabulere & 2 Others v Uganda, Criminal Appeal No. 9 of 1978,** and argued that on the basis of the dicta in that case, the the trial Judge made no error when he relied on the evidence of PW1 as a single identifying witness. This was because he observed that the appellant was known to PW1 prior to the incident which took place at midday, in broad day light. And that therefore PW1 could not have been mistaken about the identity of the appellant.

In reply to the appellant's argument that there was no eye witness that saw him commit the offence, counsel for the respondent referred us to the judgement where the trial judge stated that although PW1 did not see the appellant commit the crime, he placed him at the scene of crime. Further that he testified about the appellant and his friends' conduct of blocking him from entering the house, looking scared and acting like something was chasing them.

She then asserted that the learned trial Judge was correct when he convicted the appellant as a joint offender as is provided for under section 20 of the Trial on Indictments Act. She relied on the decision in **Hon. Akubar Hussein Godi v. Uganda, Court of Appeal Criminal Appeal No. 62 of 2011** for the submission that the trial Judge did not err when he relied on circumstantial evidence because such evidence has been found by the courts to be good evidence.

With regard to the complaint that the trial judge disregarded the appellant's defence of *alibi*, the respondent's counsel referred us to the decision in **Festo Androe Asenua & Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1999,** where it was held that the trial Court may disregard an *alibi* where the evidence on record places the accused at the scene of the crime. She prayed that this court dismissed grounds 1 and 2 of the appeal.

Resolution of Grounds 1 and 2

In resolving these two grounds of appeal, 4 important principles relating to the law of evidence need to be considered by this court in relation to the evidence on the record as follows: circumstantial evidence, the reliance on the evidence of a single identifying witness who was still a child, the doctrine of common intention and the defence of *alibi*. We shall now proceed to dispose of them as we reappraise the entire evidence on the record.

The trial judge defined circumstantial evidence as it was defined in **Hussein Akbar Godi v. Uganda** (supra) as sometimes being the best evidence of surrounding circumstances which by intensified examination is capable of providing a preposition with the accuracy of mathematics.

The circumstantial evidence that he relied upon was in the testimony of Kamoga Newton George William, PW1. At the time he testified, Kamoga stated that he was 13 years old, a pupil in Primary 6 at Zana Christian Primary School. This means that he was about 11 years old when the crime was committed. PW1 first of all stated that he knew the accused person in the dock as a friend to his brother whom he referred to as Alex Samwiri.

PW1 further testified that on the day that his grandfather Amon Matovu died, he was at home with his brother Alex. That Alex first told him that his brother had returned. But after that he told him that the same brother sent them some gifts which had arrived so they should go to Masajja to pick them up. That the 3 siblings, Kamoga, Iga and Matovu, then went to Massajja.

PW1 further stated that they did not get the gifts in Masajja; because their brother had not yet returned, the gifts were not there. He went on to state that on the way from Masajja, his brothers decided to take a detour to an Internet Café. But they told him that he was still young and could not go to the Café with him. So they asked him to go back home. He went on to state that when he got home, he found Alex and his friends, whose names he did not know, but who he could identify by their facial features. He said that the accused in the dock was one of those he found at home with Alex when he returned from the trip to Masajja.

Kamoga went on to testify that on arrival at home, Alex and his friends asked him to go and get them some water to drink but then, someone closed the door. He did not want him to enter the house and fetch the water. Because of this, Alex and his friends asked him

to go and buy them water to drink but he refused to do so. Instead he ran into the house.

The witness went on to testify that when he entered the house, he found his grandfather bound up with ropes by the hands and legs. He also had a piece of cloth stuffed into his mouth. That the grandfather was still alive but he could not breathe. He further testified that realising that he had seen what had been done to his grandfather, Alex asked him to escort him. He was running away towards Masajja and he asked him to run with him in the same direction. But when they reached a school called Little Star, Alex disappeared.

PW1 further testified that Alex's friends also ran away from the scene when he followed Alex who was running away. That when he first saw his brother Alex and his friends, their actions showed that they were *"somehow scared."* He explained that he suspected that they were doing something wrong inside the house. That when he saw what they had done to his grandfather, he suspected that they wanted money from him. That he suspected it was Alex and his friends who killed the old man. He explained his suspicions due to their conduct which he described in the following words:

> *"It was Alex and his friends because when I just entered the house and I found him down all of them were like something is chasing them they were on pressure. ... It was around midday."*

PW1 went on to testify that after he returned home, following Alex's efforts to confuse him by making him ran away with him, he unbound the hands and legs of his grandfather. After that he ran to his Auntie Cathy for help. She responded by going back to the house

with Kamoga. They found that the old man was still alive but had only a few minutes to live. In Kamoga's view, the cloth that they stuffed into his mouth was very long and he could not breathe. That after the aunt came to help him, the old man died within the next 20 minutes.

With regard to the contest that PW1, a single identifying witness could have made a mistake about the identity of the appellant at the scene of the crime, we are guided by the principles that were set out in **Abdula Nabulerere & 2 Others v. Uganda, Court of Appeal Criminal Appeal No. 9 of 1978,** where the court enunciated the core principles for identification by a single witness as follows:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. 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, 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.*
>
> *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. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."*

Kamoga explained how he was able to identify the appellant. His testimony showed that he had known these men as friends of Alex for a while. He also explained that he had no grudge against the appellant: *"... they just come at home they talk and then go away."* *(sic)*

He insisted that he saw Alex's friends when they came to their home and the appellant was one of them. Asked what happened to Alex's friend when he tricked him to run away in the guise of escorting him towards Masajja, he stated thus:

> *"His friends I never knew where they went because when Alex told me to come and escort him I went when I escorted then I came back when he was lost. Then when I reached back home I never found anyone." (sic)*

Kamoga further testified that he knew that the appellant was arrested because he was taken to the Police Station where he was told to look at some men and tell the Police if he knew any of them. That he looked at the men and identified one of them, the man in the dock at the time he testified.

During cross-examination, PW1 stated that when he returned from Masajja, Alex was inside the house. The appellant was outside standing at the door. The appellant told him not to enter the house. He insisted that it was the appellant who prevented him from entering the house and he remained outside the door. PW1 remained standing near the tap, then he broke away and forced his way into the house. But when he entered, he found when the assailants had already finished binding the deceased so he did not see them bind

him. That he did not ask them who bound the deceased because he *"just knew they were the ones."*

PW1 went on to explain, in cross examination, that though he was afraid he was not afraid for himself, because he knew they bound up his grandfather because they wanted money from him. He related an earlier incident in which Alex one day came home with fake currency notes of shs 50,000 denomination which he gave to his grandfather and asked him for change. That on looking at the notes, the old man just knew they were fake. He confirmed that when he came home and found his grandfather bound up with ropes, Alex and his friends were still at home. But when he found out that the old man was dead, they had all disappeared.

The assessors put some questions to PW1. He clarified that the accused person was at the door and it was he that prevented him from entering the house. The court also put questions to him. He again explained that it was the appellant who prevented his entry into the house. Further that when he made his forced entry, the old man could not talk because he was gagged and he could not make any signs because they had bound his hands and legs. He could not remove the cloth they used to gag him either because his hands were bound.

Court also inquired about the parade in which he identified the appellant. PW1 explained that at the police they lined up about 6 people for identification. He reiterated that he identified the appellant as one of the men. As for Alex, he run away. To the day that he testified in court, Alex had never come back home.

Because PW1 was a child of tender years, the trial judge took care of the requirement to conduct a *viore dire.* His investigation established that Kamoga, who was 13 years old at the time had sufficient knowledge to tell the truth. During the *viore dire* he stated that he knew that if he told lies to court, the court would punish him. He therefore gave his testimony on oath and so was cross-examined by counsel for the appellant.

We found that the testimony of PW1 was not shaken in cross-examination. He was consistent and firm about what he saw when he answered the questions put to him by counsel for the appellant, the assessors and the court.

His testimony established several important facts. The first was that the appellant and conspirators, including his brother Alex had an intention to commit the crime. They wanted to get money out of the old man. Secondly, his brother Alex tricked all three of the young boys to go away from home by enticing them to collect gifts that had allegedly been sent to them by another brother who was away from home. This gave Alex, the appellant and their conspirators the time they needed to carry out their dark deeds. But the witness surprised them when he returned before they concluded their mission.

The other important fact established was that though the appellant was not in the house, he aided the others, including Alex, who were inside the house to achieve their goal of trussing up the old man, gaging him and so overpowering him to achieve their goal, whatever it was. The testimony also established that the old man died and must have suffocated due to gagging because, according to PW1, *"the cloth that they used was very long and he could not breathe."*

PW1's testimony also established that he knew the appellant before the incident. He used to come to their home and spend time with Alex, talking, and then go away. It was day time and there was no chance of a mistaken identity on the part of this single identifying witness.

PW1's testimony further established the conduct of the appellant and his conspirators as suspicious, indicating that they were up to no good. They were pressured and wanted to run away. They tried to entice him away to go and buy them water, which they could not let him get from the house through another door. This time he did not succumb to the attempt to keep him away but instead bided his time till he entered the house by force and discovered the old man in the throes of his death.

Alex again tried to draw the witness away from the scene, probably to prevent him from properly identifying the rest of his conspirators. He succeeded in this in that the rest run away and by the time PW1 returned from the ruse that he created by asking him to escort him to Masajja, the rest of his friends had fled. However PW1 had been next to the appellant for long enough to properly identify him at the scene of the crime and later in an Identification Parade.

The conduct of Alex and his conspirators, before, during and after the offence was not that of innocent persons. As a result, in the words of their Lordships in **Simoni Musoke v R [1958] EA 715**, *"The inculpatory facts were incompatible with the innocence of the appellant. They were incapable of explanation upon any other reasonable hypothesis than that of the guilt"* of the appellant, Alex and the others that participated in this crime.

Regarding the complaint that **PF69,** the report about the Identification Parade conducted at Katwe Police Station was not produced in evidence, there was no witness called by the prosecution to testify about the Parade. PW3 was one of the investigating officers but he said nothing about it. It is also the rule that the officer investigating the case, though he may be present, should not carry out an Identification Parade. (See **Mwango s/o Manaa, (1936)3 EACA, 29** and **Ssentale v. Uganda [1968] EA 365**).

While it is true that the evidence of identification at a parade was not borne out with the testimony of the officer who conducted the Parade and the requisite **PF69**, we find that the evidence of the witnesses that testified in this case was sufficient for the court to make a decision about the identification of the appellant at the scene of the crime. This is amply clear from our re-appraisal of the evidence above. Evidence from the Identification Parade would have only served to strengthen the case for the prosecution. However, its absence did not detract from the cogency of other evidence on the record.

We shall next consider the doctrine of common intention, which explains the conduct of the appellant and the others still at large. Section 20 of the Penal Code Act provides for joint offenders in the prosecution of a common purpose as follows:

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

Counsel for the appellant strenuously argued that no one saw the appellant or any other person bind and gag the deceased. That there was no direct evidence or eye witness linking the appellant to the offence. His submission must have been based on the fact that the appellant was not inside the house when the deceased met his death.

Our finding on that point is that the single identifying witness, Kamoga, did see and observe the actions of the appellant for a while. He testified about them consistently, in our view. The appellant was a participant in an unlawful purpose in that he prevented PW1 from gaining access to the house in which the offence was in the process of being committed, albeit by other persons including Alex, his brother. By dint of section 20 of the PCA, he is deemed to be as guilty as the men who trussed up and gagged the deceased leading to his death.

As to whether the evidence of a child of tender years, as a single identifying witness requires corroboration, counsel for the respondent referred us to section 40 (3) of the TIA, which provides that:

> **"(3) Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her."**

In the case now before us, PW1 was examined by the court. The court established that he was possessed of sufficient *"knowledge"* to tell the truth. The court then proceeded to take his evidence on oath. PW1 was therefore cross-examined and his testimony, in our opinion, was not shaken. We find that there was legally no need for corroboration of his testimony.

Nonetheless, the prosecution called PW2, Bukenya Bonny, the son of the deceased. He testified that he went to the scene of the crime after a relative called him on telephone to inform him about the death of his father. That he drove to the scene of the crime and found his father's dead body there. That his legs and hand had been untied and a very big piece of cloth was inside his mouth and it was just being removed. He said he found the police at the scene doing their work.

PW2 also stated that prior to this, Alex Wamala used to cheat his grandfather. That on one occasion he told him that he was to have a surgical operation on his heart. This led the old man to part with Ushs 3 million.

PW2 also testified about the conduct of Alex Wamala after his grandfather was found dead. He said he did not attend the burial. That he disappeared and no one knew his whereabouts to the date he testified in court. He confirmed that at the time of his death, PW1 was one of the people who resided at the home of the deceased. He clarified in cross-examination that though his mother also resided with the deceased, every Monday she was in the habit of going to Nsambya Hospital to attend a clinic because she suffered from

diabetes. That Alex and his friends used this opportunity to *"finish their work."*

The facts relating to the manner in which the deceased met his death were reiterated by PW3, Odyek Bernard, the police officer who participated in investigating the crime. He stated that the deceased met his death after his hands and legs were bound with ropes and he had a piece of cloth stuffed into his mouth. PW3 also testified that the room in which the deceased's body was found looked disorganised because clothes were scattered everywhere. This points to the possibility that the assailants scattered the clothes in the process of looking for something in the room.

We therefore find that the testimony of PW2 and PW3 corroborated the material evidence that was adduced by the prosecution through PW1.

We must now consider the submission that there were inconsistencies in the testimony of PW1 about whether or not the appellant participated in killing the deceased. Counsel for the appellant pointed out that during his cross examination, the witness stated that it was Alex that killed the deceased. But when he was asked whether he saw Alex and his friends bind the deceased he said he did not see them. Counsel for the appellant concluded that these were *"grave contradictions and amounted to speculation that the appellant participated in the killing of the deceased."*

The principles relating to the resolution of inconsistencies and contradictions in evidence by the courts have been discussed in many cases including **Candiga Swadick v. Uganda, Court of Appeal**

Criminal Appeal No 23 of 2012, where this Court reviewed and restated them as follows:

> *"The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness. See* ***Alfred Tajar vs Uganda E.A.C.A Cr. Appeal No. 167 of 1969 (unreported); Sarapio Tinkamalirwe vs. Uganda, Cr. Appeal No. 27 of 1989 (SC)*** *and* ***Twinomugisha Alex & 2 others Vs. Uganda, Cr. Appeal No. 35 of 2002 (SC).*** *"*

A careful reappraisal of the evidence in this regard disclosed that the first time that counsel for the prosecution asked PW1 a direct question, *"So who killed your grandfather?"* his response was,

> *"It was Alex and his friends because when I just entered the house I found him down all of them were like something is chasing them they were on pressure." (sic)*

The prosecuting counsel asked the same question again at the end of his examination in chief. The witness' response again was, *"It was Alex and his friends."*

During cross-examination, counsel for the appellant asked whether he saw who killed the old man. PW1's response was, *"I saw. It was Alex."* In further cross examination, the witness admitted that he did not see them tying him up. Asked whether he asked them who had tied him up, he said, *"I did not ask because I just knew they were the ones."* But before all these questions were answered, the witness had been cross-examined about where each of the assailants was in this fashion:

"Mr Nshimye: Mr Newton when you came back home where was Alex was he in the house or was he outside?

PW1: He was inside the house.

Mr Nshimye: And where was this gentleman? (Referring to the appellant)

PW1: The gentleman was outside on the door. (sic)

Mr Nshimye: Did he refuse you to enter?

PW1: He told me that don't enter inside the house."

The 1st assessor put questions to PW1 about where the assailants were when he exited the house, after finding his grandfather on the floor dying. PW1 said that they were still around at the time. That the old man was not yet dead but Alex and his friends were still around. But when it was established that he was dead, they were no longer around, *"They had disappeared."*

We find no inconsistencies in the testimony of PW1 with regard to the assailants who participated in causing the death of his grandfather. In fact the witness was very consistent about the fact that the appellant was not inside the house with the assailants who actually caused the death. But all through it, he stood guard at the door and prevented him from entering the house until he broke through and forced his entry. The appellant clearly participated in committing the offence, and we have no doubt at all in our minds that he did so as a person with a common intention with those that actually trussed up and gagged the deceased leading to his death.

We shall next consider the complaint that the trial judge disregarded the appellant's defence of *alibi* and so wrongly convicted him.

Black's Law Dictionary (9th Edition, West) defines the word *"alibi"* to mean *"elsewhere"* in Latin. It goes on to define in it legal terms as,

"A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time."

So, what was the appellant's *alibi*?

We closely examined the record of appeal in order to establish what it was. In his unsworn statement before the trial court, the appellant denied knowledge of all the witnesses who testified against him. He also denied knowledge of the deceased. He said he did not know him personally and it was *"like take an example of me knowing the president."* He asserted that he was in court on charges about a case of murder of which he knew nothing. But at the beginning of his unsworn statement he stated thus:

"My Lord what I know is that they are accusing me of murder that I did not commit because even at the time the crime was committed I wasn't around."

The appellant did not go further to explain where he was at the time. Neither did he call any witnesses to testify about his assertion that he was elsewhere.

The principles relating to the manner in which the courts consider and deal with the defence of *alibi* were re-stated in the case of **Lt. Jonas Ainomugisha v. Uganda, Supreme Court Criminal Appeal No. 19 of 2015,** as follows:

"One of the ways of disproving an alibi is to investigate its genuineness as was stated in the case of ***Androa Asenua & Another Vs Uganda, Cr. Appeal No 1 of 1998) [1998] UG SC 23*** *where the Supreme Court of Uganda cited with approval the authority of* ***R Vs Sukha Singh s/o Wazir Singh and Others 1939 (6 EACA) 145,*** *where the Court of Appeal for East Africa observed that:-*

"If a person is accused of anything and his defence is an alibi, he should bring forward the alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

In **Ainomugisha's case** the Supreme Court went on to hold that:

> *"The other way of disposing of an alibi is for the prosecution to adduce cogent evidence which puts the accused at the scene of crime. The quality of the evidence (already analysed) which allegedly put the appellant at the scene of crime lacked the cogency that would disprove the accused's alibi and establish beyond reasonable doubt that he participated in the killing of the deceased."*

In the case now before us, we cannot tell from the evidence on record whether the appellant stated his *alibi* in the statement he made at the police station immediately after he was arrested. If he did so, it was the duty of his advocate to pursue the defence by making it concrete.

In the absence of concreteness and specificity of the whereabouts of the appellant at the time the offence was committed, it is our view that the statement that he made about being elsewhere does not fall within the description of a defence that he was elsewhere. The appellant left it to the court and the prosecution to surmise where he was.

Although it is the duty of the prosecution to disprove an *alibi*, in this case, the prosecution was not given ample evidence upon which investigations could have been done to establish that the appellant

was elsewhere. This did not help in disproving the evidence adduced by the prosecution, albeit by a single identifying witness who was a child, which placed him squarely and unequivocally at the scene of the crime.

We therefore find that the trial judge made the correct decision when he disregarded the appellant's attempt to raise an *alibi*. In effect the *alibi* was no *alibi* at all, and we find so.

Grounds 1 and 2 of the appeal therefore must fail and they are dismissed.

Ground 3

Ground 3 was the grievance that the trial judge erred in law and fact when he imposed a sentence upon the appellant that was manifestly harsh and excessive in the circumstances. It will be recalled that the sentence that was imposed upon the appellant by the trial court for murder was 30 years and 11 months.

With regard to this ground, counsel for the appellant referred us to the decision of the Supreme Court in **Kiwalabye Bernard v. Uganda, Criminal Appeal No.143 of 2001,** to guide us in making the decision about the sentence imposed by the trial court. The often cited passage from that decision, and others where the principles have been re-stated is that:

> *"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be*

considered while passing the sentence or where the sentence imposed is wrong in principle."

Counsel for the appellant took cognizance of the fact that under section 11 of the Judicature Act, this court has the power to impose an appropriate sentence in the circumstances, just as the trial court does. He referred us to paragraphs 6 (i) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, where it is provided that while sentencing an offender, every court shall take into account any circumstances that the court considers relevant. He went on to refer to paragraph 14 (v) of the same Guidelines where it is provided that when determining the sentence, the court shall take into account the role of the offender in the commission of the offence.

He drew it to our attention that in mitigation of the sentence to be imposed, the appellant's counsel pointed out the level of participation of the appellant in the offence as differing from the assailants that were inside the house who are believed to have committed the offence. He complained that while sentencing, the trial judge stated that the level of participation of each of the offenders did not matter. He again drew us to his earlier submission that the participation of the appellant was not proved beyond reasonable doubt because the circumstantial evidence that the trial judge relied upon to convict him was, in his opinion, weak.

He further submitted that while no two cases are the same, court must always have in mind the need to maintain consistency and uniformity in sentencing as it was held in **Kalibobo Jackson v Uganda, Court of Appeal Criminal Appeal No. 45 of 2021.** He then

drew our attention to some sentences that have been imposed by the courts for murder, such as the case of **Mbunya Godfrey v. Uganda,** whose citation he did not provide, where the appellant was convicted for the murder of his wife and sentenced to 25 years' imprisonment; and **Tuhumwire Mary v. Uganda, Court of Appeal Criminal Appeal No. 352 of 2015,** where the appellant was convicted of the murder of her husband using a *panga* and on appeal, she was sentenced to 10 years' imprisonment.

He further submitted that although it was brought to the attention of the trial judge that the appellant was a first time offender who was still young and deserved to be given a chance to reform in order to become a useful citizen to the nation, the trial judge did not consider this. That instead, while sentencing, the trial judge appeared to be biased and more emotional than judicially neutral. Counsel inferred this from the fact that before he went on to sentence the appellant, the trial judge asked him again whether he committed the offence or not.

Counsel went on to point out that the trial judge made negative comments about how the appellant wasted the court's time when he reneged on his earlier intentions to negotiate a plea bargain, when the matter first came up for hearing. That instead he opted for a full trial when he knew from the bottom of his heart that he participated in the murder of the deceased. He further pointed out that the trial judge stated that much as he knew that the appellant was a youthful person, he had no kind remedy for him. That it was for those reasons that the judge imposed a sentence of 30 years and 11 months, after he took into consideration the period spent by the appellant in lawful custody before his conviction.

The appellant's counsel further submitted that rule 8 (3) of the Judicature (Plea Bargain) Rules, 2016 provides that a judicial officer who has participated in a failed plea bargain negotiation should not preside over a trial in relation to the same case. That the spirit of the provision is to preserve the impartiality of the trial judge. He observed that this was defeated when the plea bargain agreement was placed or left on the file in the lower court which enabled the next trial judge to see it. He asserted that the tone and questions that were directed at the appellant by the trial judge displayed that he was biased against the appellant because he decided not to go on with negotiation for a plea bargain. He charged that this was in violation of the appellant's right to be presumed innocent until proved guilty.

Counsel concluded that his observations above proved that the trial judge did not consider the mitigating factors, because he had already made up his mind about the sentence. And that this was a result of the failed efforts to enter into a plea bargain agreement.

He prayed that the appeal be allowed, the conviction quashed and sentence set aside. In the alternative, he prayed that the sentence be reduced and determined judiciously.

In reply, counsel for the respondent submitted that the appellant and his friends killed a 93-year-old man who was a grandfather to one of them, who they owed honour and respect. That for this reason, the sentence meted out to the appellant by the trial judge was appropriate. She referred us to the decision in **Ssekitoleko Yudah & others v. Uganda, Supreme Court Criminal Appeal No. 33 of 2014** where it was held that an appropriate sentence is a matter for

the discretion of the sentencing judge, and each case presents its own facts upon which the judge must exercise his discretion.

In reply to the contention that the trial judge ought to have taken into account the provisions of paragraph 6 (i) of the Sentencing Guidelines, she submitted that paragraphs 6 (a) and (b) of the same Guidelines provide that every court shall take into account the gravity and nature of the offence. She added that in this case, the trial judge clearly stated that the appellant and others took away the life of the deceased and there is no spare part to life. That this showed that the offence committed was grave and serious so that when the trial judge went on to sentence the appellant to 30 years and 11 months in prison, he was well within the sentencing range provided for in the Sentencing Guidelines.

She prayed that the appeal be dismissed and that the conviction and sentence imposed by the trial court be upheld.

Resolution of Ground 3

We have taken cognizance of the principle that sentencing is within the discretion of the trial judge, and further principles that were re-stated in **Kiwalabye Bernard v Uganda** (supra). While passing sentence, the trial judge stated and held as follows:

> *"True the convict is a first offender, he is young as I can see and capable of reforming. Much as he participated his work was to watch out (for) people entering or watch out to stop people entering or to report or to alert the people inside. He has not even bothered telling court about Alex and the other people who participated in the killing.* ***He wasted court's time instead of going for plea bargaining and knowing from the bottom of his heart that he did it.*** *He denied everything. Section 20 of the Penal Code Act defines common*

intention as when two or more persons form an intention to pursue an unlawful purpose in conjunction with one another ... Each of them is deemed to have committed the offence equally it does not matter the level of participation but you decided to take away his life. (sic) His children still needed him, his grandchildren still needed him, the community still needed him. There is no spare part in life, you have no powers whatsoever to take away someone's life. What about if they took away your life what would you think about? Much as I agree that he is youthful I have no kind remedy for him. I therefore give him almost the same sentence I gave to the other one of 35 years less 4 years and one month leaving him with 30 years and 11 months to serve in prison. You have a right to appeal if you are not satisfied."

{Emphasis supplied}

We observed that the record of proceedings filed in this court also included the proceedings held on the 20th February 2015, before Justice Elizabeth Jane Alividza, J. The proceedings showed that though the appellant's case was first listed for hearing at a criminal session on the basis that he was ready to negotiate a plea bargain, he changed his mind. As a result, his case was taken off the list and adjourned to the next convenient session. The session took place two years later and the trial judge whose judgement he appealed against to this court had no kind words for the appellant for his change of mind.

Rule 4 of the Plea Bargain Rules defines a *"plea bargain"* as,

> **"the process between an accused person and the prosecution, in which the accused person agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offense, or recommend a particular sentence subject to approval by court; ..."**

Likewise, the agreement is defined as *"an agreement entered into between the prosecution and an accused person regarding a charge or sentence against an accused person."*

Rule 15 of the Judicature (Plea Bargain) Rules provides for the protection of the plea bargain process. Sub-rule 1 thereof provides that,

> **"Any statement made by an accused person or his or her advocate during plea bargain discussion is not admissible for any other purpose beyond the resolution of the case through a plea bargain."**

It is indeed unfortunate that the record of proceedings relating to the plea bargain process was left on file. This was in contravention of sub rule 1 of rule 15, Plea Bargain Rules. The omission to protect the proceedings from the plea bargain process seems to have had some effect on the mind of the trial judge while he was passing sentence.

Having said that, we cannot over emphasise the fact that the information obtained by the prosecution in the plea bargaining process must be confidential, and it should not be disclosed to the trial court if the process fails. It is for the same reason that a judge involved in plea bargaining should not sit in judgement of the offender, lest he/she be compromised by the information from the plea bargaining process, not to take sufficient care to observe the principles of natural justice and so fail to hold a fair trial. The principle that the accused person is innocent until he pleads or is proved to be guilty is a cardinal principle that should be observed and protected at all times.

It is therefore important that the proceedings or information relating to the plea bargaining process ought to be strictly kept separate from the proceedings that are placed before a judge for trial of an offender. The Judicature (Plea Bargain) Rules should be amended to ensure that this important principle is included.

The appellant complained that the trial judge did not consider the mitigating factors that were stated for the appellant, the level of his participation in the offence and the need for consistency and appropriate sentencing levels. And that this resulted in the trial judge handing down a harsh and excessive sentence in the circumstances of the case. We shall next consider these complaints raised by the appellant.

The general principles that have to be observed by the courts while sentencing offenders were succinctly set out in *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.* Direction 6 sets out the general principles of sentencing which are meant to guide the courts. They include the gravity and nature of the offence, the need for consistency with appropriate sentencing levels, and any information provided to court concerning the effects of the offence on the victim or the community, and the offender's personal family. Also included are the circumstances prevailing at the time the offence was committed up to the time of sentencing, any previous conviction of the offender or any other circumstances that the court considers relevant.

The statement in mitigation that was made for the appellant by his advocate was as follows:

"My Lord the factors to consider by this court while sentencing are that he is a first time offender because there is no known criminal record against him. Since he is a first time offender we are praying for lenience. He is a very young man who was by then aged 23 years who needs a second chance for reformation such that he becomes a useful citizen to this nation and to the people around him. He could have been misled by a group of people.

And my Lord now I go to the level of participation, my Lord according to the circumstances the level of participation cannot be compared to the people themselves inside who did the work and my lord there are many authorities to that effect though they are not available here. Thus court always considers giving somebody a lenient sentence though his friends are not in court.

My Lord the period of time spent on remand is 4 years and I month. I pray that while sentencing you consider that and deduct from the sentence this court is going to give. In the circumstances my Lord I pray for mercy while sentencing, so I pray."

In view of this statement, we accept the appellant's counsel's submission that the trial judge deliberately disregarded the age of the appellant during the sentencing process. He also disregarded the level of his participation in the offence, which in the Sentencing Guidelines is referred to as "the gravity of the offence." The trial judge also failed to consider appropriate sentencing levels, the principles of consistency when he stated that "*Much as I agree that he is youthful I have no kind remedy for him. I therefore give him almost the same sentence I gave to the other one of 35 years."* He did not state relevant cases in which sentences for similar offences had been imposed by the court, but relied on his own standards in sentencing during that very session he presided over.

We cannot tell who *"the other one"* was and what the gravity of his offence was. We therefore find that the trial judge ignored to consider important facts and circumstances which ought to have been

considered while passing sentence. As a result, the sentence imposed was based on wrong principles. We therefore set it aside and invoke the powers of this court under section 11 of the Judicature Act to impose a sentence of our own.

We have considered the aggravating factors stated by the prosecution, that several youthful offenders, including the appellant participated in causing the death of a defenceless old man. They strangled him without mercy, after trussing him up like a chicken. The others got away but the appellant was arrested and prosecuted, alone, for the offence.

As mitigating factors, we considered the fact that according to the charge sheet on record, the appellant was only about 21 years old in 2012 when he participated in committing the offence. He was still a young adult who may have been misled by a group of friend who escaped arrest and prosecution and probably had no intention of causing the death of the deceased, save that the law mandatorily provides that he was just as guilty as the rest who actually strangled the old man. The level of his participation was that he was used to prevent others from entering into the scene of the crime and did not directly participate in the acts that caused the death of the deceased.

As a young person, he needs more rehabilitation than punishment in order to transform him into a useful member of society and the nation. He ought to be given a chance to return to his community and participate in its development by imposing upon him a sentence that will enable him to reform. In order to establish an appropriate sentence for the appellant, we considered sentences that have been handed down for murder by this court and the Supreme Court.

In **Hon Akbar Hussein Godi v. Uganda, Supreme Court Criminal Appeal No 3 of 2013**, the appellant murdered his wife by shooting her with a gun. The Supreme Court confirmed a sentence of 25 years' imprisonment for the offence.

In **Atuku Margaret Opii v. Uganda, Court of Appeal Criminal Appeal No. 123 of 2008**, the appellant who was a single mother of 8 children caused an infant to drown and her body was never found. This court reduced the sentence of death that had been imposed upon her to 20 years in prison.

In **Koreta Joseph v. Uganda, Court of Appeal Criminal Appeal No 243 of 2013**, the trial court sentenced the appellant to 25 years' imprisonment. Taking into account that the appellant was of advanced age and that he was remorseful, this court reduced the sentence to 14 years' imprisonment.

In **Rwabugande Moses v. Uganda, Supreme Court Criminal Appeal No 25 of 2014**, the appellant caused the death of the deceased by hitting him on the head with a stick. This court upheld the sentence of 35 years imprisonment that had been imposed upon him by the trial court. The Supreme Court reviewed the sentence and held that,

> *"We agree that the offence committed was grave and that the sentence to be given must reflect the enormity of the accused's unlawful conduct. On the other hand, it was pleaded in mitigation that the appellant was a first time offender and was aged 24 years. Considering that the appellant committed the offence at a relatively young age we are convinced that it is necessary to give him a prison sentence which will enable him to reform and be re-integrated back into society."*

The Supreme Court then substituted the sentence of 35 years with 21 years' imprisonment after taking into consideration that the appellant had spent one year in prison at the time he was convicted and sentenced by the trial court.

In view of the mitigating factors presented to the trial court, and the sentences that have been imposed for similar offences that were more grave than the offence committed by the appellant, after taking into account that the appellant spent 4 years in lawful custody before sentence, we are of the view that a term of imprisonment of 17 years will be appropriate to meet the ends of justice.

We therefore hereby sentence the appellant to 17 years' imprisonment. The sentence shall begin to run on the 2nd February 2018, the date on which he was convicted.

It is so ordered. Dated at Kampala this 19th day of October, 2021

Kenneth Kakuru
JUSTICE OF APPEAL

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL