

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA

[Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA]

CRIMINAL APPEAL NO. 182 OF 2018

(Arising from High Court Criminal Session Case No. 181 of 2016 at Iganga)

BETWEEN

Koire Bosco =====Appellant no.1
Naiga Sara =====Appellant no.2

AND

Uganda=====Respondent

(An appeal from the Judgement of the High Court of Uganda [Elubu, J] delivered on 20th September 2018)

JUDGMENT OF THE COURT

Introduction

- [1] The appellants and others still at large were indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that Koire Bosco, Naiga Sarah and others still at large on the 18th day of December 2014 at Mpande police post in Namutumba district murdered Mwaguye Fred alias “FEET”. The learned trial judge sentenced appellant no.1 to a term of imprisonment of 35 years whereas appellant no.2 was sentenced to a term of imprisonment of 20 years.
- [2] Being dissatisfied with the decision of the trial court, the appellants have appealed against the conviction and sentence on the following grounds:

‘1. THAT the learned trial Judge erred in law and fact when he found that the Appellants had been properly identified and placed at the scene of the crime.

2. THAT the learned trial Judge erred in law and fact when he found that the Appellants had aided and abetted the killing of the deceased whereas not.

3. THAT the learned trial Judge erred in law and fact when he disregarded the plausible defence of alibi raised by the Appellants.

4. THAT the learned trial judge erred in law and fact when he imposed harsh and manifestly excessive sentences against the Appellants.'

[3] The respondent opposed the appeal.

Submissions of Counsel

[4] At the hearing, the appellants were represented by Mr. Henry Kunya on state brief and the respondent by Ms. Anna Kabajungu, Chief State Attorney in the Office of the Director Public Prosecutions. Counsel filed and relied on their written submissions.

[5] With regard to ground 1 of appeal, counsel for the appellants submitted that it is an undisputed fact that the prosecution witnesses confirmed that the deceased was assaulted by a mob of local residents. Counsel for the appellants contended that there was a lot of noise, commotion, throwing of bricks and stones, gunshots at the scene of the crime hence hindering a proper identification by the witnesses. Counsel averred that PW1 stated that the police officers that were present at the scene of the crime did not disclose the perpetrators of the offence. Counsel further argued that appellant no.1 duly informed court in his testimony of how he found a mob at the sub-county headquarters that was furious and wanted to lynch the deceased, he tried to calm down the mob but in vain. He then decided to hand over the matter to police and he went to his home.

[6] Counsel for the appellants further submitted that DW3, the wife to the deceased testified that she met appellant no.1 about 150 meters away from the scene of the crime at the time the deceased was assaulted and also confirmed that she never saw appellant no.2 at the scene of the crime. It was counsel's submission that DW2, the mother to the deceased stated in her testimony that she did not see the appellants at the scene of crime and that PW3 had a grudge against appellant no.1. Counsel

also submitted that this court should take into consideration the fact that PW3's statement was taken 3 or 4 weeks after the murder of the deceased took place.

- [7] Counsel for the appellants further contended that PW2 who claimed to have seen the appellants at the scene of the crime stated during cross examination that efforts to trace the suspects took long because it took about six months to identify the suspects. Mr. Kunya argued that PW2 assumed that appellant no.1 organised the mob because he was the LC chairman. Counsel further argued that the appellants are innocent because they did not run away from the village, yet they were arrested six months after the incident. Counsel also argued that the fact the deceased's mother and wife testified for the appellants points to their innocence.
- [8] With regard to ground 2 of appeal, counsel reiterated the submissions on ground 1. On ground 3, counsel for the appellants submitted that the both appellants raised the defence of alibi. Appellant no.1 stated that he briefly went to the sub county headquarters where the deceased had been detained. He walked away from the place when his attempts to calm down the mob was rendered futile. It was counsel for the appellant's submission that DW2 and DW3 who testified that they met appellant no.1 walking in the opposite direction as they headed to sub county headquarters prior to the murder of the deceased corroborated the evidence of appellant no.1. Counsel for the appellants submitted that appellant no.2 stated in her testimony that she was at the burial of a relative at the time the deceased was murdered and that her evidence was corroborated by the evidence of DW4 and DW6.
- [9] Counsel for the appellants further submitted that it is settled law that the accused person does not owe a duty to prove his or her alibi, that the burden still lays on the prosecution to prove all ingredients of the offence. Counsel argued that the learned trial judge should have considered the substance of the evidence of DW2 and DW3 instead of erroneously relying on their demeanour. Counsel argued that the failure of the learned trial judge to evaluate evidence of the appellants with regard to their defence of alibi was a gross miscarriage of justice while citing Bogere Moses & Anor v Uganda [1996] HCB 5.
- [10] On ground 4, counsel for the appellants stated the principles upon which an appellate court can interfere with the sentence imposed by the trial court as stated in Kizito Senkula v Uganda [2002] UGSC 36. Counsel for the appellants submitted that section 11 of the Judicature Act grants this court the same powers as those of

the trial court to impose an appropriate sentence in consideration of the circumstances of the offence. Counsel cited Korobe Joseph v Uganda [2014] UGCA 41 where the trial court had sentenced the appellant to a term of 25 years of imprisonment for the offence of murder, but this court reduced the sentence to 14 years' imprisonment. The mitigating factors had been that the appellant was of advanced age and remorseful. Counsel for the appellants prayed that the sentences imposed against the appellants be reduced should this court maintain their convictions.

- [11] In conclusion, counsel for the appellants prayed that this court allows the appeal, quashes the appellants' convictions and sets aside the sentences against the appellants.
- [12] In reply, counsel for the respondent set out the duty of a first appellate court as laid down in Kifamunte Henry v Uganda [1998] UGSC 20. Counsel submitted on grounds 1 and 3 together. With regard to whether the appellants had been properly identified and placed at the scene of the crime, counsel for the appellant reviewed the evidence of PW2, PW3, PW4 and PW5 and the trial court's reasons for coming to the conclusion that the appellants participated in the murder of the deceased. Counsel relied on Abudalla Nabulere & 2 Others v Uganda [1978] UGSC 5 with regard to conditions for a proper identification.
- [13] Counsel for the respondent submitted that PW3 talked with appellant no.1 from the time the deceased was picked from his home, while appellant no.1 was inciting the mob to kill the deceased and that he was standing 15 meters from appellant no.1. Counsel further stated that PW3 and PW4 had more front row seat during the incident compared to PW4, DW2, DW3 and DW4 therefore the different perspectives in their testimonies of what happened and what the appellants did during the murder of the deceased. Counsel further submitted that the inconsistencies pointed out by counsel for the appellants were minor and do not go to the root of the case. Counsel for the respondent quoted Bogere Moses v Uganda [1998] UGSC 22 on his submission on what it means to place the accused at the scene of the crime. Counsel also relied on Turyahabwe and 12 Others v Uganda [2018] UGSC 15. Counsel was of the view that the trial judge gave reasons as to why he accepted the prosecution version over the defence version and concluded that the learned trial judge properly found that the appellants had been placed at the scene of the crime thus rejecting the appellants' defence of alibi.

- [14] In reply to counsel for the appellants' submissions on ground 2 of appeal, counsel for the respondent referred to the evidence of PW2, PW3, PW4 and PW5 and submitted that the appellants were principal offenders because they incited, instigated and encouraged the mob to break out the deceased from the police cell and kill him. Counsel further submitted that the appellants were not merely present in the mob but formed a common intention with the other members of the mob. Counsel referred to section 22 of the Penal Code Act and Ismail Kisegerwa & Anor v Uganda [1978] UGSC 36 on what amounts to common intention.
- [15] In reply to the appellants' submissions on ground 4, counsel for the respondent stated that the maximum sentence for the offence of murder is death and the appellants could have faced the death penalty given the wanton manner in which they killed the deceased. Counsel referred to Turyahabwe and 13 Others v Uganda [2014] UGCA 74 where this court confirmed a sentence of life imprisonment where the deceased had been murdered by a mob. Counsel for the respondent also cited Simbwa Paul v Uganda [2014] UGCA 57 where this court upheld a sentence of 14 years' imprisonment, the deceased had been murdered by a mob.
- [16] Counsel for the respondent further submitted that appellant no.1 being the LC1 chairperson in his village at the time should have participated in upholding the law instead of leading the mob into murdering the deceased. Counsel further stated that the appellants took the law into their own hands and did not give the deceased an opportunity to be heard and that the deceased was a young man of 24 years who was killed in a gruesome manner. Counsel for the respondent prayed that this court confirms the sentences of each of the appellants.
- [17] In conclusion, counsel for the respondent prayed that this court dismisses the appeal, upholds the convictions and sentences against the appellants.

Analysis

- [18] It is our duty as a first appellate court to subject the evidence adduced at the trial to a fresh re-appraisal and to determine whether or not the trial Judge reached the right conclusion, and to draw our own conclusions with regard to the law and facts of the case, bearing in mind, however, that we did not have opportunity to observe the witnesses testify and be able to determine their demeanour, in assessing their credibility. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I

13-10, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

- [19] The facts of the case according to the prosecution case is that on the 17th day of December 2012, a one Sajja Simon of Nakazinga in Ivukula sub county in Namutumba district was robbed. The matter was reported to the police. Appellant no.1, being the LC1 chairperson of the area suspected that the deceased was one of the robbers. Appellant no.1, in the company of OC Mpande Police Post arrested the deceased from the home of Batukyaye Lugaire Simon (PW3) on 18th December 2018. The deceased was detained at Mpande police post at the sub county headquarters. Appellant no.1 mobilised a group of people who broke down the cell in which the deceased was detained, dragged the deceased out of the cell and stoned him to death. Appellant no.2 sounded the drum used to mobilise the residents to gather at the police post and actively participated in the murder of the deceased. The medical examination of the deceased revealed that he had sustained multiple fragmented fractures of the skull and his scalp was torn. The cause of death was due to severe head injury. The appellants were arrested for the murder of the deceased after a period of six months.

Grounds 1, 2 & 3

- [20] Grounds 1, 2 and 3 shall be handled together since they are interrelated. The appellants contend that the learned trial Judge failed to properly evaluate the evidence on record thus reaching the wrong conclusion that the appellants were properly identified and placed at the scene of the crime. While dealing with evidence of identification, courts have to consider whether the conditions were favourable for a proper identification. In Abudalla Nabulere & 2 Others v Uganda [1978] UGSC 5, the Supreme Court stated:

‘Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defense 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.'

- [21] During the hearing, the prosecution presented five witnesses. PW1, D/AIP Olupot Peter was both the investigating officer and arresting officer. His evidence regarding the events leading to the murder of the deceased was hearsay which is inadmissible. What is significant though is that he was allocated the murder file on 13th January 2015. He arrested the appellants but does not disclose the date when this was done. When he got the file no suspects had been identified. The statements of the police officers that were present at the scene at the time of murder of the deceased did not identify any suspects. It was only after he took a statement from Batukyaye, PW3, 3 or 4 weeks after the murder of the deceased that he obtained the names of the suspect.
- [22] PW2, Isiko James Peter, stated that he arrested the deceased in the company of appellant no.1 and others at the home of PW3 on 18th December 2014 upon the suspicion of having robbed a one Sajja Simon the previous day. They took the suspect (deceased) into custody at Mpande Police post located at the sub county headquarters. He stated in his testimony that he received a phone call from PW3 after two hours from the deceased's detention that people were organising an attack at the sub county where the suspect was detained. PW2 informed Sergeant Nafendo of the matter and they proceeded to the scene of the crime where they found a mob armed with stones and bricks. He saw appellant no.2 beating a drum. They were forced to fire gunshots in the air to disperse the crowd after failing to talk the people out of their intended act of lynching the deceased. PW2 stated that appellant no.1 was standing at the Mvule tree. He stated that appellant no.1 stood aside as the mob picked up stones and became more charged.
- [23] PW3, Batukyaye Lugaire Simon, testified that the deceased was arrested on 18th December 2014 from his home where he was digging a borehole. PW2 together with other police officers came with appellant no.1 to arrest the deceased. PW3 followed them to the Mpande police post at the sub county headquarters where the deceased was taken for detention. He went to the police post to inquire about the arrest of the deceased. When he came out of the police office, he found a group of people gathered at a mvule tree near the sub county headquarters. Appellant no.1 was mobilising the people to kill the deceased. PW3 testified that he told appellant no.1 not to incite people to kill the deceased but the appellant refused to listen. He went back to the police office and informed police officer Atabok of what was happening. Police officer Atabok called PW2 and Namutumba Police headquarters

for support. When PW3 came out of the office again, he saw appellant no.2 beating a drum. He picked up PW2 and police officer, Nafendo, on his motorcycle from Ivukula police station. When he returned with the police officers, the mob was stoning the police that was trying to quell it. Police tried to fire in the air, but it was overwhelmed by the mob and was chased towards the back of the police post where their housing quarters are located. At that moment, PW3 still pleaded with the appellants not to kill the deceased, but they were adamant. PW3 stated that it was the appellants who broke down the door to the police post. Appellant no.1 ordered for the deceased to be taken where the police officers stay where he was murdered. PW3 stated that he was witnessing these events from a distance of about 15 meters.

- [24] Upon cross examination, PW3 stated that he went with appellant no.1 to the police post from his home on the same motorcycle. The appellants pulled the deceased out of the police cell together with others still at large. After the murder of the deceased, appellant no.1 came close to where he was standing and said, 'we have finished killing the deceased, let the law take its course'.
- [25] PW4, Dhikubye Simon stated that on 18th December 2014 between 11:00am and 12:10pm, while he was working, he heard the beating of a drum. He was forced to go to the place to find out the reason for the drumming. At the police post, he found a mob that was throwing stones towards the cells where the deceased was being detained. He saw Steven Kumbuga, Wakulyaka, Kakaire Christopher breaking down the door of the cell. Appellant no.2 was drumming while running towards the place where people were throwing stones at the deceased. He stated that appellant no.1 was in the field, he saw him throw a brick towards the suspect. Appellant no.1 was also instructing appellant no.2 to beat the drum.
- [26] Upon cross examination, PW4 stated that at the sub county headquarters, the police is located at the extreme end of a field. He was standing beside the road near the field besides an anthill. He was behind the mob. Appellant no.1 was standing in the middle of the field. Appellant no.2 was also in the middle of the field but moving all over the field while drumming. PW4 stated that at some point she would pause and throw stones and then continue drumming. He stated that he also saw Kumbuga, Wakulyaka and the appellants throwing stones at the deceased.
- [27] PW5, D/Cpl Atabok John, was the police officer who received the deceased for detention upon his arrest. He stated that after taking the deceased into custody, while PW3 was trying to tell him his side of the story, he saw a group of people collecting at the sub county under the umbrella tree. Amongst the people were the

appellants, Godi and Maka. The door where the deceased was detained was facing the mob and there was no way of saving him. He called the District CID officer and OC station Ivukula and informed them of the situation. OC station arrived with 3 other armed men. When Kumbuga, the mobiliser of the mob came to the station, they started shooting in the air and the mob advanced with stones and sticks. The mob threw stones at them as they continued shooting. When they were overwhelmed by the mob, he went to the back of the house. They broke into the deceased's cell and hit him. The deceased ran helplessly. He fell down as the mob continued hitting him.

[28] Upon cross examination, PW5 stated that many people had gathered at the police station. He knew a few of them. When he started shooting, he saw the appellants as part of the mob throwing stones at the deceased. Appellant no.2 was also drumming. PW5 stated that he did not see the person who knocked down the door of the cell where the deceased was detained. The mob was about 50 meters away from the police.

[29] The defence produced six witnesses. Appellant no.1(DW1) testified on oath in his own defence. He denied having committed the offence in question. He stated in his testimony that he did not know the deceased prior to his death. He denied having gone to PW3's home where the deceased was arrested. He stated that it was the residents that told him that the deceased had been found at PW3's home. He tried to call PW2 to inform him that the deceased had been found but his phone was not available. He got on a *boda* and proceeded to Ivukula police station to pass on the information about the deceased's whereabouts. He waited at the police station while PW2 went to PW3's home to arrest the deceased. They took long to return, and he proceeded to Ivukula sub county headquarters where he found a group of people who were furious and wanted to beat the deceased who was in the police custody at that time. He tried to calm down the people but in vain. He testified that he handed the matter to the police and left the scene of the crime. He later learnt of the death of the deceased through the residents. He denied speaking to PW3 on that fateful day when the deceased was murdered. He stated that he left the place before people started assaulting the deceased. On his way back home, he met the mother and wife to the deceased and told them that the deceased had been detained at the police cells at the sub county.

[30] Upon cross examination, appellant no.1 stated that he did not know the accused physically but knew of him. He went to the sub county headquarters to pay the

boda that had taken the OC to arrest the deceased. He denied having mobilised people to kill the deceased.

- [31] DW2, Eseza Namudope the mother to the deceased stated in her testimony that it was Maka, Clovis, Wakulyaka, Topher and Merab who broke into the cell where the deceased was detained. They dragged the deceased from the cell and started beating him. She ran away due to shock and that she feared being lynched too. She went to the police post with her daughter in law, the wife to the deceased (DW3). She testified that she did not see either of the appellants participate in the beating of the deceased. She left at the point when the assailants were breaking into the cell. She did not take a long time at the cell and that she did not see the deceased being beaten. DW2 stated that she met appellant no.1 going in the opposite direction at about 150 meters from the police post. She stated that it is appellant no.1 who informed her that her son had been arrested and detained at the sub county police post.
- [32] DW3, Naiwumbwe Lydia, the wife to the deceased corroborated the evidence of DW2 in her testimony. Upon cross examination she stated that appellant no.1 and the police came to her home at around 8:00am, they met appellant no.1 at around 9:00am and the deceased was killed at around midday. She testified that the assailants broke into the cell and dragged the deceased out when she was present at the scene of the crime but ran away before the mob started beating the deceased.
- [33] DW4, Mwesigwa Steven stated in his testimony that he was rang by the deceased's wife(DW4) who informed him that the deceased had been arrested and was about to be lynched by a mob. He arrived at the sub county when the deceased was being dragged out of the cell. He stated that he does not know the people who dragged the deceased out of the cell because he was in shock and was not able to recognise the people. He said they were about 200 people present at the scene of the crime. He was at the scene for about 3 minutes. He ran away for fear for his life and that he left when the deceased was still alive
- [34] DW5, Naiga Sarah (appellant no.2) also testified in her defence. She totally denied having participated in the events that led to the murder of the deceased. She stated that she did not know the deceased. She said that she was in Pallisa for a burial on the day the deceased was murdered. She went to Pallisa on 16th December 2014 and returned on 20th December 2014 after the deceased was murdered. DW5 also stated that she was forced by the police to make a statement. The trial court noted

that the witness appeared extremely frightened. She was speaking with a broken voice.

- [35] DW6, Kinyonyi Benjamin, the father to appellant no.2 corroborated the evidence of DW5. He stated in his testimony that that his brother passed away on 15th December 2014, he left for Pallisa with DW5 on 16th December 2014 and returned on 20th December 2014. He stated that he was with DW6 on the day the deceased was murdered.
- [36] It was PW2's evidence that he saw appellant no.1 standing by the mvule tree during the incident. In cross examination, the witness stated that he saw appellant no.1 standing aside while the mob was getting more charged and picking up stones. It should be noted that mere presence at the scene of the crime may not be enough to show that the accused participated in the crime. PW2 stated that he believed appellant no.1 incited the mob to murder the deceased because he was the chairman. This evidence is based on mere speculation. He did not see appellant no.1 incite the mob. PW5 stated that it was a one Kumbuga mobilizing the mob.
- [37] PW3, PW4 and PW5 stated that the appellant no. 1 was at the scene of the crime and actively participated in the murder of the deceased. In his defense, appellant no.1 stated that he left the sub county headquarters before the mob started assaulting the deceased. DW3 and DW4 corroborated his evidence. They stated that they met him about 150 meters away from the sub county going in the opposite direction at the time the mob was assaulting the deceased. It should be noted that DW2 is the mother to the deceased and DW3 was the wife to the deceased. It is unlikely that they would testify for the defense to thwart justice for their loved one that was murdered in such a gruesome manner. We find no reason to discredit their testimony. DW2 and DW3 testified that they saw Maka, Clovis, Wakulyaka, Topher and Merab breaking down the door of the cell where the deceased was detained. These were some of the people that PW4 stated that he saw breaking down the door of the cell. PW2 stated that he identified at the scene of the crime, Maka, Sajja and other riders. It is unclear as to why these people were not arrested and charged since they were identified as suspects.
- [38] It will be noted that according to PW1, the investigating officer, was allocated the file in question on 13th January 2015, a month or so after the murder of the deceased. He was not able to find any names of suspects on the police file. The police officers who were present at the scene at the time of the murder of the deceased did not mention the names of any suspects that they identified at the scene

of the murder and while the murder was taking place. It is particularly odd that PW2, who was present and had earlier on in the day been with the appellant, could not in his statement name the appellant as one of the suspects, if he had indeed seen him participating in the murder of the deceased. Neither could he cause his apprehension for the murder of the deceased when he had witnessed it in person. This witness who apparently made the first report of this crime did not mention the participants, 2 of whom, he knew in that report. For a police force that is generally known to arrest first and investigate later, this is significant. Unless satisfactorily explained the testimony of this witness and ultimately the prosecution case against the appellants may not be credible.

- [39] In cross examination, PW2 stated that the appellants were not arrested right away in order to be able to arrest a bigger number of suspects by taking a low profile and as his life was in danger. I will reproduce his exact words.

“We identified the suspect right on the day of the scene, but we took a low profile in order to arrest the rest. In my police statement I did not state that I saw them because at the time our life was in danger and I did not know what they could do next.”

- [40] PW3’s explanation for the delay of the arrest of the appellants cannot hold. No other persons were arrested for this offence. The appellants, according to the prosecution evidence, never disappeared from the village. They were present all along the period of the investigation of this case. The claim that those other persons ran away from the village when the appellants were arrested destroys the explanation that the delay in the arrest of the appellants was in order to arrest the other suspects.

- [41] There is no evidence at all that any person threatened PW2 with death. Definitely not the appellants. Why he perceived his life and that of others to be in danger and hence chose to record in his statement that he had not identified any suspects is perplexing in the absence of information in relation to this threat. Indeed, if his life was in danger did he make a report to any authority? There is no evidence that he did so. This appears to be a woeful attempt to explain his change of course or narrative as to what happened on the day of the murder and implicate the appellants.

- [42] It should also be noted that none of the appellants ran away from the village after the murder of the deceased unlike the other suspects who apparently run away on the arrest of the appellants. Without reading too much in this fact it is more consistent with the appellant's version of the case than the case for the prosecution.
- [43] PW1, the investigating officer stated that he was assigned the file on 13th January 2015 upon his transfer to Namutumba district. None of the appellants had been identified on the file as suspects. PW3's statement, which helped him in the tracing of the suspects was recorded about 3 to 4 weeks after the murder of the deceased. In reality 3 to 4 weeks after the murder of the deceased is when he was assigned the file on his own testimony. If we assume he recorded the statement of PW3, 3 or 4 weeks from that time or from the date he was assigned the file it would follow that he became aware of the suspects in this case in February 2015. There is no explanation why as the investigating officer he did not initiate the arrest of the appellants from February 2016 until June 2015 when they were arrested.
- [44] PW2, PW3, PW4 and PW5 stated that they saw appellant no2. at the scene of the crime beating a drum and that she was actively involved in assaulting the deceased. The testimony of PW2 and PW5 the police officers has been shown not to be credible in light of its inconsistency with their police statements. The only evidence that remains against the appellants is that of PW3 and PW4.
- [45] The appellants testified on oath in their evidence and called witnesses. Appellant no1 testified that he walked from the scene before the deceased was assaulted and on the way he met the mother of the deceased (DW2) and the wife of the deceased (DW3).
- [46] The learned trial judge did not believe the truthfulness of the testimony of DW2 on account of her demeanour. She was observed to be shaking in court and the court concluded that she must be telling lies. Of course as a first appellate court we defer to the trial court in matters of demeanour as that court would have had an opportunity to observe the witness in person. Nevertheless, in this case the witness gave an explanation as to why she was shaking. She stated that this was her first time in court. While it was up to the trial court to weigh this explanation and accept it or not, we find that the explanation is perfectly reasonable and credible. Even if one did not believe the explanation of her shaking, it is not fanciful and in our view capable of explaining her demeanour. Shaking of a person may be explained by

many other possibilities and not necessarily that a person is speaking falsehoods or is not credible. We are satisfied that her evidence was wrongly rejected.

- [47] In her testimony, appellant no.2 raised the defence of alibi and stated that she was in Pallisa burying a relative on that fateful day that the deceased was murdered. In Bogere Moses and Another Vs Uganda [1998] UGSC 22 the Supreme Court stated:

‘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.

To hold that such proof has been achieved the court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence 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 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 one version and the hold that because of that acceptance per se the other version is unsustainable.’

- [48] The evidence of appellant no.2 that she was away on the day the deceased was murdered was corroborated by the evidence of DW5. The prosecution did not call any evidence to demolish her alibi. That is calling evidence that would have shown she was not where she claimed to be.

- [49] All in all, we have the evidence of PW3 and PW4 on oath which is contradicted by the evidence of DW1, DW2, DW3, DW4 and DW5. It is a case of ‘oath against oath’. In the circumstances of this case, especially the unsatisfactory nature of the evidence for the prosecution, in disagreement with the learned trial judge, we are satisfied that the prosecution failed to discharge its burden of proving its case beyond reasonable doubt.

- [50] In light of the above, we would allow grounds 1, 2 and 3 of the appeal. We find it unnecessary to consider the remaining ground of appeal in relation to sentence.


Decision

- [51] This appeal is allowed.


[52] The conviction of appellant no.1 is quashed. The sentence imposed against him is set aside. We order the release of the appellant unless he is being held on some other lawful charge.

[53] The conviction of appellant no.2 is quashed. The sentence against her is set aside. We order the release of the appellant unless she is being held on some other lawful charge.

Dated, signed and delivered at Kampala this ^{17th} day of ^{September} 2021.


Fredrick Egonda-Ntende
Justice of Appeal


Catherine Bamugemereire
Justice of Appeal


Christopher Madrama
Justice of Appeal

