THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 234 OF 2011

1. MULINDWA FRED

2. NTALE JOHN :: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of the High Court holden at Mubende before Mwondha, J. (as she then was) dated the 10th of October 2011, in Criminal Session Case *No. 442 of 2009)*

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

This appeal is from the decision of the High Court of Uganda sitting at Mubende in High Court Criminal Session Case No. 442 of 2009, in which Mwondha, J convicted the Appellants of the offence of murder contrary to **Section 188 and 189** of the **Penal Code Act Cap 120** and sentenced each to 45 years' imprisonment.

The facts as established by the prosecution before the trial court were that the 1st and 2nd Appellants (Mulindwa Fred & Ntale John), Bizibu Steven and a one Bogere James attacked the deceased, Nabatanzi Annet by forcefully entering into her house where they assaulted her, hauled her outside into the compound and hit her on the head with a blunt object suspected to be a hammer, instantly causing her death. At trial, A1 Bizibu Steven pleaded guilty, A3 Bogere James escaped while the Appellants denied the charges levied against them. Accordingly, prosecution led evidence against them by calling five (5) witnesses in support of the prosecution case. The 1st Appellant gave sworn evidence while the 2nd Appellant gave unsworn evidence. The

trial Judge found that the prosecution had proved its case beyond reasonable doubt and sentenced each of the Appellants to 45 years' imprisonment.

The appellants were dissatisfied with the decision of the learned trial Judge in relation to both conviction and sentence, and appealed to this Court on the following grounds:

> "1. **THAT the learned trial Judge did not evaluate properly all the evidence on record in regard to identification of the Appellants thereby reaching an unjust conclusion of convicting the Appellants and thus occasioning a miscarriage of justice upon them.**
>
> 2. **THAT the learned trial Judge erred in law and fact when she sentenced the Appellants to 45 years' imprisonment which was manifestly harsh and excessive thereby occasioning a miscarriage of justice."**

Representation

At the hearing of this appeal the Appellant was represented by *Ms. Janet Nakakande,* learned Counsel on State Brief while *Ms. Nabaasa caroline,* learned Senior Assistant Director of Public Prosecutions represented the Respondent. The Appellant was in attendance via video link to Nakasongola Prison by reason of the restrictions put in place due to COVID 19 pandemic. Both parties sought, and were granted, leave to proceed, by way of written submissions.

Appellants' case

Counsel for the Appellant submitted that the ingredient of participation of the Appellants in the commission of the alleged offence was not made out against the Appellants since this was a case of a single identifying witness with a high possibility of mistaken identity and the learned trial Judge erred when she decided against the Appellants hence occasioning a miscarriage of justice.

Counsel submitted that PW1, Bagala Serium Joseph was the only eye witness who testified that he was awoken by a loud bang and using light from *tadooba* and the assailants' torches, he managed to identify the Appellants

and another who assaulted his mother, dragged her outside and murdered her.

Counsel referred court to the evidence of PW2 Benoni Kikubi, PW3 Muwonde Samuel, PW4 Det. Col. Juko Livingstone and PW5 Sebugwawo Patrick which was used to corroborate the testimony of PW1 and submitted that their evidence was incapable of corroborating the evidence of PW1. According to counsel, PW2 testified that while driving on that fateful night he met the 1st Appellant with a hammer and another person who looked like the 2nd Appellant with a knife near the deceased's home, he was unable to properly identify the 2nd Appellant even though it was his further evidence that he knew both Appellants very well.

Counsel referred court to the evidence of PW3 who testified that on the night before the murder, he had seen A3 holding a stick with A4, while A1 came and inquired of them as whether it will work, to which they responded in the affirmative and submitted that if at all PW3 had heard them, they were merely conversing and this was not related to the murder. Further that PW4, Det. Cpl. Juuko Livingston and PW5, Sebugwawo Patrick also did not see the Appellants and their evidence had little or no probative value.

Counsel contended that the alleged identification of the Appellants was done by PW1 and it cannot be said to be without error since the incidence happened between midnight and 1:00am when it was too dark to enable correct identification.

Counsel further contended that PW1 was woken from a deep sleep and it was not possible for him to quickly recollect himself to be able to identify the assailants using the candle light and torch light directed at him and as such, it was not possible to rule out the possibility of mistaken identity because of blurred vision. According to Counsel torches ordinarily do not flash in the faces of the holders but the target and that its known that once a torch is flashed in one's face, it causes temporary loss of light. Moreover, when he reported to PW5 about the attack, PW1 intimated that there had been three

men and never referred to them by name where as he testified that they were known to him.

Counsel referred court to the decision of the Supreme Court in **Bogere Moses v Uganda, SCCA No. 001 of 1997** cited with approval in **Abdala Nabulele & Another v Uganda (1979) HCB 77** for the proposition that where the case depends solely on the evidence of a single identifying witness, court must warn itself of the special need for caution before convicting an accused because of a possibility of mistaken identity. Counsel contended that in this particular case, the prevailing conditions were not favorable for proper identification and PW1 could have been mistaken in his alleged identification of the assailants.

Additionally, Counsel argued that even though the learned trial Judge cautioned herself, she still relied on circumstantial evidence from PW2 and PW3 which did not arise and could not be said to have corroborative value. Counsel referred court to **Bogere Moses and Another v Uganda (supra)**, for the proposition that before drawing the inference of the accused's guilt from circumstantial evidence, court must be sure that there are no other existing circumstances that would weaken or destroy the inference.

According to Counsel, upon clear examination of the evidence of PW1 and PW2, there was no circumstantial evidence implicating the Appellants since PW2's testimony was that he met A1, A3, A4 and someone who looked like A2. He clearly did not place A2 and the scene having failed to recognise him. Moreover, he testified that he saw A4 with a shirt dripping of blood after the incident and yet he made no mention of the alarms that were allegedly made by PW1 and PW4 immediately following the attack even though he found them 60 metres from the scene. Neither did he bother to pass by the scene on his return journey and yet he could see that some people had collected. According to counsel, PW2 only saw A1, his son in law that fateful night and he did not properly identify A2.

Regarding the evidence of PW3, Counsel submitted that PW3 did not see A2 since he testified that he only saw A1, A3 and A4. Further that the stick he allegedly saw with A3 at the scene of crime was not exhibited in court.

Counsel further faulted the trial judge for relying on the evidence of conduct of the Appellants after the incident whereby they disappeared and A2 failed to attend the burial even though he testified that he was a friend to PW1. According to counsel the Appellants were not barred from going on with their lives and business despite the occurrence of murder in their village and there was no legal obligation or at all on them to stay in a place where murder had occurred inorder to prove their innocence.

Counsel further faulted the trial Judge for disbelieving A2 when he testified that he did not attend the burial because he had no money. The learned Judge's computation of A2's earnings at UGX. 17,000/= per day from a video hall business was erroneous since he was not the business owner and his evidence that he would be left with UGX. 3,000/= per day in cross examination was erroneously disregarded. Further, the learned trial Judge should not have made herself an accounting officer for A2's affairs and had she addressed her mind to all the facts of this case, she would have come to a conclusion that there was a great possibility of mistaken identity, and that the circumstantial evidence against the Appellants was destroyed and the inference of guilt weakened.

On ground 2, it was submitted for the Appellant that the learned trial Judge passed a harsh and excessive sentence when she failed to take into account the mitigating factors advanced on behalf of the Appellant and the period spent on remand. Counsel argued that the trial Judge failed to numerically compute the period of the four (4) years which the Appellants had spent on remand and deduct the same from the sentence of 45 years imprisonment which she imposed.

Counsel further submitted that the 1st Appellant was aged 35 years while the 2nd Appellant was aged 25 years at the time of commission of the offence and a such, they were of a relatively young age capable of reforming and

being re-integrated back into society. Accordingly, sentencing them to such a long term would not work in their favour but rather turn them into hardened criminals.

Counsel referred court to the decision of **Pte Kusemererwa and Another v Uganda, Court of Appeal Criminal Appeal No. 083 of 2010** where it was held that the period spent on remand ought to be credited to the Appellants in addition to the present mitigating factors.

Counsel prayed that this appeal be allowed and court be pleased to set aside the sentence and/or substitute it with a lesser term considering the time that the Appellants have spent in lawful custody.

Respondent's reply

Ms. Nabaasa for the Respondent opposed the appeal. She submitted that the learned trial Judge was alive as to the law on handling the evidence of a single identifying witness and the principles to be followed when determining such cases, and she properly analyzed the evidence on record and applied the law to the facts at hand.

Counsel submitted all the conditions that favour positive identification were in existence at the time the Appellants attacked the deceased. She referred court to the evidence of PW1 who testified that he knew the accused persons very well. Further that he was awoken by a loud bang at about mid night while his mother was still awake and the *tadooba* (kerosene) was still burning. When he woke up, he saw A1 enter with a stick and he got his mother, the 1st Appellant also entered and called to the 2nd Appellant to come quickly. They were using torches after the *tadooba* had been blown out by A1. They took his mother outside, assaulted her while she shouted out A1's name.

Counsel contended that PW1 properly identified the Appellants and there was no possibility of mistaken identity. He ably identified the assailants from close range, the Appellants were his close acquaintances for a long time and

he identified their voices and was also able to recognise them using light from both the *tadooba* and the torches.

Counsel further contended that contrary to the Appellants' submission, PW1 recollected himself and he was composed during the entire ordeal since he was not the target of the attack and the Appellants were unaware that someone was watching them. According the Counsel, a kerosene lamp produces light that is sufficient to support positive identification where the parties are at a close range and are known to each other.

Counsel argued that the deceased herself ably identified A1, Buzibu Steven with the *tadooba* when she shouted out his name and asked why he was murdering her. Further that, even when the *tadooba* was extinguished, the Appellants flashed a torch which enabled PW1 to observe them since its trite knowledge that a torch reflects light and the reflection enables a person within close range to identify another. Moreover, A1 was convicted on his own plea of guilty which confirms that the prevailing conditions were sufficient to support positive identification.

Regarding corroboration, it was submitted by the Respondent that PW1's evidence was corroborated by PW2, PW3, and PW4 as pointed out by the trial Judge. Counsel referred court to **Sections 5 and 7 of the Evidence Act Cap 6** on the doctrine of res gestae which states that facts which though not in issue are so connected as to form part of the same transaction are relevant and that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue and section 7(2) regarding the relevance of the conduct of an accused person.

Counsel further submitted that PW1's evidence was also corroborated by the evidence of PW2 who testified that he knew both the Appellants. He met the Appellants on that fateful night about 60 inches from the deceased's home and the 1st Appellant had fresh blood on his shirt. PW2 was also aware of the grudge between the deceased and A1, the Appellants' co-accused who had claimed that the deceased was bewitching his children.

Counsel argued that there was further corroboration from PW3 who testified that on 25.05.2007, whilst sitting on his veranda smoking a pipe, he saw A1, A3 and the 2nd Appellant. A1 had asked them if they were ready while he was holding a stick and if it would work and then he said that he was going to get his jacket while waiting for the drunkards to leave.

Counsel also referred to the testimony of PW4 who testified that while investigating at the scene, he was told by witnesses that they knew the deceased's murderers that is A1, A3 and the Appellants who were all at the scene and upon mentioning their names they run away. PW4 then run after them on his motorcycle but when they saw him parking near Kiwanguzi village, they disappeared into the bush to evade arrest for their crime.

According to Counsel, the learned trial Judge properly evaluated the evidence on corroboration when she found that the Appellants had been at the scene of crime and also by relying on the evidence of their conduct post the crime where the 1st Appellant disappeared and was arrested after one year from Mubende, while the 2nd Appellant was arrested after six months from Kasubi.

Counsel concluded that the evidence of PW1, PW2, PW3 and PW4, the existence a grudge between the deceased and A1 and the conduct of the Appellants by disappearing and refusing to attend burial all formed part of one transaction and as such the trial judge properly evaluated the evidence on corroboration and came to the correct conclusion that indeed there was common intention between the Appellants.

Counsel prayed that the conviction and findings of the learned trial judge be upheld.

Regarding the sentence, Counsel contended that the learned trial Judge considered all the mitigating factors and period spent on remand and arrived at a fair and appropriate sentence. She argued that the learned trial Judge had credited the period spent on remand during sentencing and that the 45 years' term of imprisonment was certain.

Counsel further contended that the sentence passed was legal since at the time of sentencing the Appellants, there was no requirement to arithmetically deduct the period spent on remand. Counsel argued the case of **Rwabugande Moses v Uganda (supra)** relied upon by the Appellants on arithmetic calculation of period spent on remand was decided in 2017 where as the Appellants were convicted in 2011 and as such, it has no retrospective effect.

Counsel referred court to the Supreme Court decisions of **Befeho Iddi v Uganda SCCA No. 015 of 2017** and **Byamukama Herbert v Uganda, SCCA No. 021 of 2017** for the proposition that, prior to the Rwabugande decision, it was enough for the sentencing court to state that it had taken into account the period spent on remand.

According to Counsel, the sentence of 45 years' imprisonment was appropriate considering that the murder was pre-meditated, the deceased was deprived of her sacred life brutally and her children were orphaned at a young age. She referred court to the decision of the supreme Court in **Ssekawoya Blasio v Uganda, SCCA No. 024 of 2014** where an Appellant was imprisoned for his natural life for a pre-meditated murder of his three (3) children and the sentence was upheld. Counsel further referred to **Turyahabwe Ezra and 14 Others v Uganda, SCCA No. 050 of 2015,** where a sentence of life imprisonment was upheld for some of the Appellants.

Counsel concluded that the sentence of 45 years' imprisonment was appropriate and prayed that the same be upheld by this court.

Resolution

This is a first appeal and as such this Court is required under **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions** to re-appraise the evidence and make its inferences on issues of law and fact while making allowance for the fact that we neither saw nor heard the witnesses. See: **Pandya v R [1957] E.A 336, Bogere Moses and another v Uganda,**

Supreme Court Criminal Appeal No. 1 of 1997 and Kifamunte v Uganda, Supreme Court Criminal Appeal No. 10 of 1997.

It is also trite law that an accused person is convicted on the strength of the prosecution case and not on the weakness of the defence. **See: Israel Epuku s/o Achouseu v R [1934] EACA 166** and **Akol Patrick & Others v Uganda, Court of Appeal Criminal Appeal No. 060 of 2002.**

Bearing in mind the above principles of law, we shall now proceed to consider the first ground of appeal on the alleged failure by the learned trial Judge to properly evaluate the evidence on record and thus convicting the Appellant basing on evidence of a single identifying witness which was not corroborated.

From the evidence on record, there was only one single eye witness to the incident that led to this fatal consequence. The rest of the evidence adduced by the prosecution witnesses in support of the testimony of the single identifying witness was all circumstantial.

We are well aware that where, as is the case here, the accused denies having killed the deceased, it is not incumbent on him/her to explain how the deceased died; the onus remains on the prosecution to prove its case against the accused. **See Kazibwe Kassim v Uganda, S.C. Crim. Appeal No. 1 of 2003 – [2005] 1 ULSR 1.**

The law on handling evidence of a single identification witness is settled and the principles for consideration were stated in the case of **Abdulla Nabulere & Anor vs Uganda Cr. Add. No.9 of 1978.,** 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 witness 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 distance, the light, the familiarity of the witness with the accused. All those 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

When the quality 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 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." (Emphasis, ours)

In the present case, it was argued by the Appellants that, the prevailing conditions on that fateful night were not favorable for proper identification and PW1 could have been mistaken in his alleged identification of the Appellants. The Respondent disagreed and submitted that all the conditions that favour positive identification were in existence at the time the Appellants attacked the deceased. For instance, PW1 knew the Appellants very well; he was awoken by a loud bang at about mid night while his mother was still awake and the *tadooba* (kerosene) was still burning; he saw the Appellants entering the house at different intervals while they flashed their torches around; he heard the 1st Appellant calling out to the 2nd Appellant to come quickly, and he heard his mother shout out A1's name while she was being assaulted in the compound.

While evaluating this evidence the learned trial judge at pages 3 -6 of her Judgment was alive as to the law on the evidence of a single identifying

witness and as a matter of procedure, she cautioned herself. She then clearly set out the facts considered to lead to proper and positive identification to wit; familiarity of the witness with the accused; distance from which the witness is observing the accused; length of time or duration the witness took observing the accused and the nature of the light available and applied the facts of the case thereto.

We agree with the learned trial Judge that while dealing with evidence of identification by single identifying witnesses in criminal matters, the starting point is usually, that the court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or were difficult, and to warn itself of the possibility of mistaken identity.

At pages 10-11 of the Record of Appeal, PW1 Bagala Serium Joseph, testified that:

> **"... I know the two accused persons. A2 is Ntale and A4 is Mulindwa... Before this case, we lived at Kiwaguzi with the deceased, my mother.**
>
> **A1 used to hate my mother that my mother was bewitching him. He was our neighbor, we left that place and went to Kigendo and opened up a bar with my mother...**
>
> **In 2007, around midnight we were sleeping. My mother was still awake... I heard something hit the door with a lot of force and the door opened. The tadooba was still burning.**
>
> **I saw Bizibu come in, he had a stick and he got my mother. A4 also entered, my mother attempted to get in front and A1 blew off the light. Then A4 said Ntale come quickly. They took her out, beat her while she shouted 'Bizibu (A1) onzitira ki'.**
>
> **She never talked again." [Sic]**

Upon our review of the trial record, it is clear that the Appellants were known to PW1. He testified that he knew them as neighbors and that even when they shifted to Kigendo, they used to come to his mother's bar. Further, the distance from which the witness was observing the Appellants was short

since he was in the same house with them and he could still hear his mother shout before her untimely demise after they had taken her outside.

The ordeal also took a while from midnight to 1:00am when the assailants forcefully entered to the point when the 1st Appellant invited the 2nd Appellant to hurry up so that they could take the deceased out and further with the scuffle that ensued outside. PW1 was able to identify the assailants using the *tadooba* and the torch they flashed around.

We disagree with the Appellants' contention that PW1 was unable to identify the Appellants because they flashed the torch in his face causing temporary blindness. To us, this was mere speculation and a submission from the bar. The Appellants were unaware that PW1 was watching them. We agree with the Respondent that, PW1 was composed during the scuffle since he was not the victim of their wrath. As such he remained in one position observing the actions of the Appellants and hearing their voices and because he was already known to them, he ably identified them with the help of the *tadooba*.

We are also cognisant of PW1's testimony at paragraph 2 of the Record of Proceedings where he stated that when he could no longer hear anyone outside, together with his younger siblings he run to PW5, Sebugwawo Patrick, the Chairman LC1 and told him that his mother had been beaten up and that he had identified the assailants but PW5 advised him to desist from mentioning their names for security reasons. This was confirmed by PW5 in his testimony at page 9 of the Record of Proceedings.

Accordingly, we find that all the conditions favouring correct identification were present as rightly found by the learned trial Judge.

Regarding the aspect of corroboration, it was the Appellants submission that the learned trial Judge erred when she relied on the evidence of PW2, PW3, and PW4 to corroborate the testimony of PW1.

Generally, there is no requirement for corroboration though it may be necessary where the conditions are not good enough. As such, it is not a mis- direction to convict on the evidence of a single identifying witness if the

conditions are right for such an identification. As stated **in Abdallah Bin Wendo and Another v R (1953), 20 EACA** and **Roria v R (1967) E.A 583**, subject to well known exceptions, it is lawful to convict on the identification of a single witness so long as the Judge adverts to the danger of basing a conviction on such an identification.

Bearing the above in mind, we shall nonetheless proceed to set out the law on how to deal with circumstantial evidence and further review the evidence on record.

The law on circumstantial evidence is well settled as stated by Ssekandi J (as he then was) in **Amisi Dhatemwa Alias Waibi v Uganda, Court of Appeal Criminal Appeal No. 023 of 1977** that:

> ***"It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial, See: R v Tailor, Wever and Donovan. 21 Cr, App. R. 20. However, it is trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See: Teper v P. (1952) A.C. 480 at p 489 See also: Simon Musoke v R (1958) E.A. 715, cited with approval in Yowana Serwadda v Uganda Cr. Appl. No. 11 of 1977 (U.C.A).***
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> ***The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of***

circumstantial evidence is only as strong as its weakest link.

In **Bogere Charles v Uganda, Supreme Court Criminal Appeal N0. 010 of 1998**, the Supreme Court referred to a passage in **Taylor on Evidence 11th Edition, Page 74** which states:

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

The incriminating circumstances in this case arise from the evidence of PW2, PW3, PW4, PW5, evidence of a pre-existing grudge between the deceased and A1 over land and allegations of witchcraft, and the Appellants' conduct of disappearing away from the village after the murder.

PW2, Benoni Kikubi testified that he knew the Appellants and that he had met A1, A3 and A4 and another person who looked the 2nd Appellant on 25.05.2007 at around midnight, 60 metres away from the scene of the crime. They requested for a lift which he declined to give them. He saw fresh blood on the 1st Appellant and he was told that they had come from Kigando for a drink and had had a fight with some youths at the bar. In cross examination, he confirmed seeing the 1st Appellant.

PW3, Muwonge Samuel testified that he knew the Appellants and that on 25.05.2007, whilst sitting on his veranda smoking a pipe, he saw A1, A3 and the 1st Appellant. He heard A1 asking them if they were ready while he was holding a stick and if it would work before informing them that he was going home to collect his jacket since the drunkards might still be there. In cross examination, he confirmed that the 2nd Appellant (A2) was not with them that day.

PW4, Det. Cpl Juuko Livingstone testified that while investigating at the scene, he was told by witnesses that they knew the deceased's murderers that is A1, A3 and the 1st Appellant (A4) who were all at the scene and upon mentioning their names they run away. PW4 then run after them on his motorcycle but when they saw him parking near Kiwanguzi village, they

disappeared into the bush to evade arrest for their crime. Upon counting the people present at the scene, it was established that PW2 had also run away.

While reviewing this evidence the learned trial Judge at page 8 of her Judgment stated that:

> **"...There was overwhelming circumstantial evidence as adduced by PW2 and PW3 who were independent witnesses. PW2 met them immediately after the act while PW3 immediately before the act. Their evidence could not be a coincidence or an accident. The circumstances in which these two witnesses saw the accused persons all of them point to their guilt and this court is satisfied beyond reasonable doubt that there was no other inference that would cast doubt on the prosecution case."**

The learned trial Judge went ahead to wholesomely consider the conduct of the Appellants following the murder where the 2nd Appellant was arrested one (1) month later in Kasubi while the 1st Appellant was arrested one (1) year later in Mubende as well as evidence of a land wrangle between the deceased and A1 who pleaded guilty and allegations of witchcraft between A1 and the deceased which were testified to by PW1 and PW2.

We agree with the Respondent's submission that indeed facts alluding to the motive of the murder and an existing grudge between A1 and the deceased over a land dispute as well as allegations of sorcery and witchcraft, coupled with the circumstantial evidence from PW3 who testified that he had heard the Appellants and others preparing to murder the deceased; PW2 who met them after commission of the offence and saw the 1st Appellant with fresh blood on his clothes; PW4 who run after them and saw them disappearing into a bush are all indeed so connected as to form part of the same transaction.

We find that the learned trial Judge properly evaluated the evidence on corroboration when she found that the Appellants had been at the scene of crime. The 1st Appellant was placed squarely at the scene by PW1, PW2, PW3 and PW4, while the 2nd Appellant was properly identified by PW1 and PW2. The evidence of PW1, PW2, PW3 and PW4 as well as the evidence

relating to a grudge all formed part of the same transaction and proved that there was common intention between the Appellants.

Accordingly, we find no reason to fault the learned trial Judge's findings and conclusion that the Appellants caused the death of the deceased with malice aforethought. In the result we hold that there was sufficient evidence to sustain a conviction against the 1st and 2nd Appellants. As such, the learned trial Judge correctly evaluated the evidence on record and came to the right conclusion.

In respect of the alternative ground on sentence, it is now settled that for the Court of Appeal, as a first appellate court, to interfere with the sentence imposed by the trial court which exercised its discretion, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law; or where the trial court failed to take into account an important matter or circumstance, or made an error in principle; or imposed a sentence which is harsh and manifestly excessive in the circumstances. **See: Kamya Johnson Wavamuno v Uganda, Supreme Court Criminal Appeal No. 016 of 2000 (unreported); Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Kalyango Achileo and Another v Uganda, Court of Appeal Criminal Appeal No. 637 of 2015.**

While sentencing the appellant, at page 34 of the Record of Proceedings, the trial Judge stated that:

> **"The convicts are first offenders and they have been in prison for 4 years without trial. They are capable of reforming. I take seriously the fact that the offence they committed carries a maximum sentence of death and its rampant. Taking all into account, they are sentences to 45 years imprisonment. There is need to protect society from people who deprive others of their sacred life."**

Regarding legality of the sentence, it was submitted for the Appellant that the learned trial Judge erred when she did not numerically subtract the amount of time which the Appellants had spent on remand when she

sentenced them to 45 years. The Respondent disagreed and argued that the requirement to numerically deduct the period spent on remand as provided for in **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported)** had no retrospective effect to the present case.

It is clear from the Judgment of the trial court that the learned Judge was aware of the provisions of Article 23(8) of the 1995 Constitution which provides that the sentencing Court must take into account the period spent on remand. It states:

> **"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."**

The application of the case of **Rwabugande Moses v Uganda (supra)** has been settled by the Supreme Court in **Abelle Asuma v Uganda, SCCA No. 066 of 2016** where court held that the said case was not binding for cases decided before 3rd of March 2017. Their Lordships had this to say:

> **" In its Judgment this Court made it clear that it was departing from its earlier decisions in Kizito Senkula vs. Uganda SCCA No.24/2001; Kabuye Senvawo vs. Uganda SCCA No.2 of 2002; Katende Ahamed vs. Uganda SCCA No.6 of 2004 and Bukenya Joseph vs. Uganda SCCA No.17 of 2010 which held that "taking into consideration of the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula."**
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> **This Court and the Courts below before the decision in Rwabugande (supra) were following the law as it was in the previous decisions above quoted since that was the law then. After the Court's decision in the Rwabugande case this Court and the Courts below have to follow the position of the law as stated in Rwabugande (supra)."**
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> **This is in accordance with the principle of precedent.**

Our understanding is that the learned trial Judge noted the period the Appellants had spent in lawful custody in her sentence which was passed on 10th October 2011 before the decision in **Rwabugande Moses case** (supra) which was passed on 3rd March 2017. As it was at that time, taking into consideration of the time spent on remand did not necessitate a sentencing Court to apply a mathematical formula. A precedent has to be in existence for it to be followed. The instant appeal is on a High Court decision of 10th October 2011, and the learned trial Judge could not have been bound to follow a decision of the Supreme Court of 3rd March 2017 coming about six (6) years after its decision.

Regarding severity, Counsel for the Appellant submitted that the sentence passed was harsh since the Appellants were first time offenders and relatively young and as such, a long custodial sentence would not help them to reform and return as useful members of society and as such, court the sentence imposes was severe and excessive.

We have noted that by the time of committing the offence, the 1st Appellant was 35 years while the 2nd Appellant was aged 25 years. Following the sentence of 45 years imprisonment, it appears that by the time of completion of service of their respective sentences, the 1st Appellant would be aged 80 years while the 2nd Appellant will be aged 70 years.

We understand that there is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. This is because sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation. **(See: Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 027 of 2015)**

In **Muhwezi Bayon v Uganda, Court of Appeal Criminal Appeal No. 198 of 2013**, this court after reviewing numerous decisions of the Supreme Court and the Court of Appeal stated thus:

> **"Although the circumstances of each case may certainly differ, this court has now established a range within which these sentences fall. The term of imprisonment for murder of a single person ranges between 20 to 35 years imprisonment. In exceptional circumstances the sentence may be higher or lower."**

See also: 3rd schedule Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013- Legal Notice No. 8 of 2013.

Guideline No. 6(c) of the Sentencing Guidelines provides that:

> **"Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances" In addition, this court is bound to follow the principle of "parity" and "consistency" while sentencing, while bearing in mind that the circumstances under which the offences are committed are not necessarily identical.**

In **Aharikundira Yustina v Uganda (supra)** where the Appellant brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the death sentence imposed by the trial Court and substituted it with a sentence of 30 years imprisonment.

In **Kisitu Majaidin alias Mpata v Uganda, Court of Appeal Criminal Appeal No. 028 0f 2007**, this Court upheld a sentence of 30 years imprisonment for murder. The Appellant had killed his mother.

In Bukenya v. Uganda C.A Crim. Appeal No. 51 of 2007, this court in its judgment of 22nd December 2014, upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight.

Similarly in **Sunday v. Uganda C.A Crim. Appeal No. 103 of 2006**, the Court of Appeal upheld a sentence of life imprisonment for a 35-year-old

convict who was part of a mob which, armed with pangas, spears and sticks, attacked a defenceless elderly woman until they killed her.

We have considered all the mitigating and aggravating factors and we further take all the above into account and accordingly set aside the sentence of 45 years imprisonment passed by the High Court. We now invoke **section 11 of the Judicature Act Cap 13** which gives this court power to impose a sentence of its own.

Considering all the above and the cases cited to us which we have reproduced and those we have not, we consider that a term of imprisonment of 35 years would be appropriate for each appellant. The period of 4 years which each appellant spent on remand is deducted from that sentence leaving each appellant to serve a sentence of 31 years imprisonment from the date of conviction.

Decision

1. The appeal against conviction is dismissed and the murder conviction for each appellant is upheld.
2. The appeal against sentence is allowed and accordingly the sentence of the High Court is set aside and in its place a sentence of 35 years imprisonment is substituted.
3. Considering the period of 4 years spent on remand, we sentence each of the 1st and 2nd Appellants to a term of 31 years imprisonment to be served from 10th October 2011, the date of conviction.

We so order.

Dated at Kampala this 28th day of March 2022.

.....Kavuchitra.....

Richard Buteera

Deputy Chief Justice

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Elizabeth Musoke

Justice of Appeal

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Cheborion Barishaki

Justice of Appeal