REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0235 OF 2011

MAGEMESO MOHAMMED:::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(Appeal from the decision of the High Court at Kiboga before Mwondha, J (as she then was) dated the 10th of October 2011, in Criminal Session Case No. 082 of 2007).

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 Kiboga in High Court Criminal Session Case No. 082 of 2008, in which Faith Mwondha, J convicted the Appellant on two counts of murder contrary to Sections 188 and 189 of the Penal Code Act Cap 120 and sentenced him to 45 years' imprisonment on each count to run concurrently.

The facts as established by the prosecution before the trial court were that on 30th October 2007, at Sekamalya village in Kiboga district, the appellant and others still at large unlawfully caused the death of Badangada Akamada (the 1st deceased) being his step son and Nuru Tikabula (2nd deceased) being his step daughter in law by cutting them to death. At trial, the Appellant denied the charges levied against him. Accordingly, prosecution led evidence against him by calling five (5) witnesses in support of the prosecution case. The Appellant gave unsworn evidence. The learned trial Judge found that the prosecution had proved its case beyond reasonable doubt and sentenced the Appellant to 45 years' imprisonment on each count.

Being dissatisfied with the decision of the learned trial Judge, the appellant now appeals to this Court on the following grounds:

> **"1. THAT the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thereby convicting the Appellant based on unsatisfactory circumstantial evidence.**

2. **THAT without prejudice to the foregoing, the learned trial Judge erred in law and fact when she sentenced the Appellant to 45 years' imprisonment on each count, both sentences to run concurrently, which sentence was illegal, harsh and excessive thereby occasioning a miscarriage of justice"**

Representation

At the hearing of this appeal the Appellant was represented by *Mr. Kumbuga Richard,* learned Counsel on state brief while *Mr. Fred Muhumuza,* learned Chief State Attorney represented the Respondent. The Appellant was in attendance via video link to Luzira 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.

Appellant's submissions

Counsel for the Appellant submitted on ground one that the ingredient of participation of the Appellant in the commission of the alleged offences was not made out and it was wrong for the learned trial Judge to decide otherwise hence occasioning a miscarriage of justice.

Counsel further submitted that this case was based purely on circumstantial evidence of the alleged conduct of the Appellant since there was no direct evidence linking the Appellant to the commission of the double murder. He referred court to the evidence of PW1 Madinah Wankose Nabirye, PW2 Namujju Rehema, PW3 Kasule John Baptist and PW4 Swaliki Ssali and PW5 D/sgt Okidi Rokimean, all circumstantial and which evidence was relied upon by the learned trial Judge in finding the Appellant guilty.

Counsel submitted that PW1 testified that she was a wife to the Appellant, mother to the 1st deceased (step son to the Appellant) and mother in law to the 2nd deceased. Further that following the death of the Appellant's 2nd wife, the Appellant accused her and the deceased persons of bewitching and poisoning his deceased wife. He chased away the 1st deceased from the land he had given him, set the temporary hut on fire and further that on the day the deceased were discovered dead at their home, he appeared unbothered and continued to dig.

PW2, a daughter to the Appellant testified that after the death of her step mother, she came with condolences for the Appellant but he bitterly rejected her money worth 2000/=, stating that PW1 and the deceased persons were responsible for the death of his second wife. PW3, a neighbor to the deceased also testified about knowing about the grudge between the Appellant and 1st deceased as well as the threats which the Appellant had made against the deceased.

PW4, the Chairman LC1 testified as to how the deceased were found murdered and denied having any knowledge of a grudge between the Appellant and the deceased while PW5, the investigating officer testified about finding the bodies of the deceased persons and arresting the Appellant.

According to Counsel, the evidence of PW1, PW2, PW3 and PW5 was unsatisfactory and he faulted the learned trial Judge for relying on it. He submitted that the Appellant had a plausible defence to PW1's testimony on his conduct after the murder. The Appellant only came to the deceased's home after many people had gathered, having been in the garden digging and only responding after a drum was sounded.

Regarding the existence of a grudge as testified to by PW1, PW2 and PW3 which grudge was reported up to L.C.3 level, it was counsel's submission that no evidence was led to this effect save for utterances of the prosecution witnesses. Further that PW4, the Chairman LC1 himself testified that he was not aware of any grudge(s) between the Appellant and the deceased.

Counsel faulted the learned trial Judge for being on a frolic of her own when she denigrated into her own evidence and conjecture and incorporated facts that were not part of the record and arrived at a wrong conclusion. He referred court to the evidence of the Appellant who testified that he visited the scene of crime and he saw the 2nd deceased in the door with a deep wound on her head and his step son in the corner. This was corroborated by PW1 who stated that he came to the scene after many people had gathered.

Counsel referred court to the decision of the Supreme Court in **Bogere Moses v Uganda, SCCA No. 001 of 1997** for the proposition that before drawing an inference of the accused's guilt from circumstantial evidence, the

court must be sure that there are no other co-existing circumstances which would weaken the inference of guilt.

Counsel contended that the circumstantial evidence relied upon by the learned trial Judge fell short of exclusiveness and there were a number of co-existing circumstances which weakened the inference of the Appellant's guilt. He referred court to the case of **Mbabazi Rovence and Another v Uganda, Criminal Application No. 047 of 2012**, for the proposition that a judicial officer is prohibited from making judicial decisions based on fanciful theories, rumors, speculations and conjecture.

On ground 2, Counsel submitted 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. He referred court to **Aharikundira Yustina v Uganda (Supreme Court Criminal Appeal No. 027 of 2005,** for the proposition that consistency is a vital principle of the sentencing regime, deeply rooted in the law and prayed that this court be pleased to consider sentences for murder as meted out by the supreme court. **See Ndyomugenyi Patrick v Uganda, SCCA No. 057 of 2016**.

Counsel prayed that this appeal be allowed and court be pleased to set aside the sentence and/or substitute it with a lesser and more lenient term of 32 years imprisonment on each count, to run concurrently.

Respondent's reply

Mr. Muhumuza for the Respondent opposed the appeal in its entirety. He submitted that the case was purely based on circumstantial evidence and that the learned trial Judge was alive as to the law on handling circumstantial evidence, and she properly analyzed the evidence on record and applied the law to the facts at hand.

He referred court to the decision of **Mureeba Janet & 2 Others v Uganda, SCCA No. 13 of 2003**, for the proposition that in criminal cases, for circumstantial evidence to sustain a conviction, it must point irresistibly to the guilt of the accused. Further that under **sections 5 of the Evidence Act Cap 6,** facts which are so connected with a fact in issue as to form part of the same transaction are admissible.

He referred court to the evidence of PW1, PW2, PW3 and submitted that according to PW1, following the death of her co-wife, the Appellant concluded that PW1 and the deceased persons had connived to cause her death by witchcraft which led to the appellant harbouring a grudge against the deceased persons. The Appellant thereafter evicted the deceased persons from a plot of land which he had given to them, set their temporary hut on fire, and continued to threaten them even after they had left his land to the extent the 2nd deceased left following threats and fear and when she returned on 30th October 2007, the couple was murdered and their seven children injured.

PW2, a daughter to the Appellant testified that after the death of her step mother, she came to visit the Appellant who told her that the deceased persons were responsible for the death of his second wife and he emphasized that he would not leave them on earth when his wife was in the grave. The Appellant rejected the condolence money she had brought and asked her to take it to the deceased persons to celebrate and because he was speaking with so much anger she left to spend a night at PW1's house.

Counsel submitted that the evidence of PW3 implicated the Appellant in the murder of the deceased persons and ably corroborated the evidence of PW1 and PW2, when he testified that the 2nd deceased reported the threats to him and told him about the grudge but he doubted that the Appellant could kill them since they had already shifted from his land.

According to Counsel, the reports made to PW3 by the 2nd deceased are admissible evidence and they amount to a dying declaration under Section 30 (a) of the Evidence Act Cap 6. He referred court to **Mureeba Janet & 2 Others v Uganda (supra)** for the dicta that death reports made to the prosecution were envisaged under the Evidence Act and as such admissible.

Counsel contended that, the learned trial Judge properly evaluated the evidence of grudges and death threats having reviewed the evidence of PW1, PW2, PW3, and PW5 and she cannot be faulted for paraphrasing their testimonies. Counsel argued that the eviction of the deceased persons by the Appellant, burning of the house and death threats was sufficient

evidence that there was an existing grudge between the deceased persons and the Appellant.

Regarding the conduct of the Appellant, Counsel referred Court to **Section 7** of the **Evidence Act Cap 6** which stipulates that any fact is relevant which shows motive and conduct in criminal proceedings. He referred to the evidence of PW1 who testified that when she discovered that her son and daughter in law had died, she went to the scene but the Appellant was in the garden digging and yet the house of the deceased was near-about 500 metres from where he was digging.

According to Counsel, the Appellant should have been the first person to arrive at the scene since he was digging at a place only a short distance away, and this corroborates evidence of a grudge and he would have been the first to greet the couple in the morning before proceeding to the garden. He knew about the murder and was waiting for a third party to break it to him.

Counsel further submitted that the Appellant's defence that he refused mabugo from PW2 because she had never introduced her husband to him which was unbelievable. He contended that the only plausible reason for refusing the mabugo was because there was a grudge between the Appellant and the deceased persons.

Counsel argued that the learned trial Judge properly evaluated the defence case and she can not be faulted for applying reasoning to the defence case and the entire prosecution case. Moreover, the Appellant implicated himself when he mentioned the type of weapon used on the deceased persons which was not mentioned by any other witnesses and yet generally, it is impossible to ascertain the type of weapon used by merely looking at the injuries sustained by the victims, no matter how much time the Appellant takes to observe the injuries.

Counsel further argued that the Appellant's conduct before and after commission of the offence to wit; evicting the deceased persons from his land and subsequently burning the house and his subsequent conduct of coming late to the scene was influenced by a guilty mind having participated in the murder. All this is relevant evidence admissible under Section 7 of the

Evidence Act Cap 6. Further that the Appellant did not attempt to challenge the prosecution evidence in cross examination and as such, he conceded to the prosecution evidence and only fell short of pleading guilty.

Regarding the evidence of PW4, Counsel contended that the learned trial Judge having had the opportunity to assess the demeanor of the witnesses rightfully chose to ignore PW4's evidence on the grudge being reported to him, and it is trite that the learned trial Judge is at liberty to rely on part of the witnesses' evidence as truthful and disregard the falsehoods. According to Counsel, if there was a contradiction at all, it was minor and did not go to the root of the case.

Counsel further contended that the totality of the evidence of PW1, PW2, PW3 and PW5, leaves no doubt that the Appellant had the necessary motive created by the illusion that PW1 and the deceased persons had murdered his wife to plan and to kill the deceased persons. The exculpatory facts are incompatible with the innocence of the Appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. He prayed that the conviction and findings of the learned trial Judge be upheld.

Regarding the sentence, Counsel contended that the sentence of 45 years' imprisonment on each count of murder was lenient and not fitting of the nature of the offence, hence occasioning a miscarriage of justice. He prayed that court exercises its powers under **Section 11 of the Judicature Act Cap 13**, **Section 132 (1) (d) of the Trial on Indictments Act, Section 34(2)(b) of the Criminal Procedure Code Act Cap 116** and **Rules 32(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10** to vary the sentences passed by enhancing them to life imprisonment in respect of both counts of murder.

He relied on **Busiku Thomas v Uganda, SCCA No. 033 of 2011**, on the procedure and powers of this Court to vary a sentence where the Director of Public Prosecution is dissatisfied with the sentences awarded and submitted that he had followed the proper procedure when he notified Counsel for the Appellant and the Registrar of Court of Appeal by a Notice dated 2nd September 2021.

Counsel submitted that the Appellant murdered a husband and wife and further injured their seven children. The murders were gruesome and the surviving children watched their parents being killed in agony and survived with permanent physical injuries as a constant reminder of their parents' deaths.

Counsel referred court to **Guideline 9 of the Sentencing Guidelines** which provides that the sentencing range for murder cases is 30 years to death and the starting point is 35 years. He submitted that the aggravating factors in this case totally outweighed the mitigating factors and the sentence should be varied and life imprisonment imposed on each count of murder.

Counsel argued that two adults were killed, a husband and wife; the murder was gruesome where the deceased persons sustained multiple cut wounds and the 1st deceased had irregular edges and a crushed skull; the murder was committed by a gang; pre-meditated; use of dangerous weapons; deliberate cause of loss of life due to a grudge; murder of a step son whom he had parental responsibility over; murders committed in the presence of the children who are forever orphaned; and murders following allegations of witchcraft are rampant.

Counsel faulted the learned trial Judge for not considering that the murders were pre-meditated, committed in the presence of children and the degree of injuries sustained as well as previous death threats issued by the deceased and permanent trauma and injuries to the children.

He referred court to **Opolot Justine and Agamet Richard v Uganda SCCA No. 031 of 2014**, where the facts are similar to the present case and the court confirmed imprisonment for life on two counts of murder, stating that considering that the maximum sentence for murder is death and it was not given, it can not be said that the sentences passed were harsh and excessive.

Counsel relied on **Katureebe Boaz and Another v Uganda, SCCA No. 066 of 2011**, for the dicta that consistency in sentencing is neither a mitigating nor an aggravating factor to render a sentence passed illegal. He argued that the case of **Aharikundira (supra)** relied upon by the Appellant

was distinguishable from the present case since there was one murder and yet the latter involves a double murder of husband and wife and injuries to seven of their children.

Counsel concluded that the sentence of 45 years' imprisonment on both counts of murder was very lenient in the circumstances and as such, it was inappropriate. He prayed that the sentences be substituted with life imprisonment.

Resolution of the Appeal

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 unsatisfactory circumstantial evidence.

From the evidence on record, there was no eye witness to the killing of the deceased persons. The rest of the evidence adduced by the PW1, PW2, PW3 and PW5 in support of the prosecution case was all circumstantial. 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 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."**

Having set out the law on how to deal with circumstantial evidence, we shall now proceed to evaluate the evidence on record.

The incriminating circumstances believed by the learned trial Judge in this case arise from the evidence of a grudge between the deceased persons, PW1 and the Appellant; the Appellant's conduct and disinterest of showing up late at the scene yet he was digging only 500 metres away, evidence of threats uttered to the deceased and having specific knowledge as to the weapon which evidence, the learned trial Judge relied upon to impute motive and malice aforethought.

From the record, PW1 testified that following the death of her co-wife, the Appellant concluded that the deceased persons and herself had killed her by witchcraft and poison and he threatened to end their lives too. PW2 testified that when she came to give the Appellant mabugo following the death of his wife, he refused and angrily told her that the deceased persons had killed her, and he was angered that his wife was in the ground while they still lived. There was also PW3's testimony that shortly before the murders, the 2nd deceased reported to him that there was a grudge and the Appellant had threatened to kill her and her husband.

According to PW1's testimony, the 1st deceased had been friendly with the Appellant and even gave him a piece of land to live on with his wife, the 2nd deceased. However, later on his second wife fell sick and while she was being taken care of by the deceased persons, she died. The Appellant became bitter and concluded that PW1 had given witchcraft and poison to the deceased persons to cause her death and a grudge ensued.

Further that immediately thereafter, the Appellant evicted the deceased persons from the land which he had given to them and on that day set their temporary hut on fire. He thereafter continued to threaten them even after they had left his land and constructed another house elsewhere to the extent the 2nd deceased left following threats and fear. When she returned on 30th October 2007, she was found dead with their seven children injured.

PW2 told court that the Appellant while refusing her mabugo emphasized that he would not leave the deceased persons on earth when his wife was in the grave.

The learned trial Judge relied on the above pieces of evidence to show that the Appellant had a grudge against the deceased persons which he later acted upon and murdered the deceased persons with malice aforethought. While reviewing this evidence the learned trial Judge stated in her judgment at page 31 of the record:

> **"...On the 4th ingredient of participation, the evidence surrounding the case was circumstantial**
>
> **...**

The evidence adduced by the prosecution witnesses was so strong that it created no doubt in my mind.

PW1 told court in her testimony that much as the house of the accused was near the deceased's home, he never came there. PW3 testified to the same extent and even PW4 and PW5. This evidence was not challenged at all in cross examination

The accused gave the deceased an ultimatum of 3 days within which to move and on the 3rd day he burnt the grass thatched house where the deceased was staying. He was uttering words of hate and threatened directly to kill the deceased and even PW1 on suspicion that they were responsible for the death of this 2nd wife either by witchcraft or poison.

The evidence as summarized herein above is very clear. That when the accused burnt the grass thatched house, it was reported and went up to LC III. So, the issue of the grudge was very evidence between the deceased and the accused." (Emphasis, ours)

We have reviewed the evidence of PW1 on the existence of a grudge between the Appellant and the deceased persons following the death of the Appellant's second wife whom they had been taking care of before she died. This evidence was corroborated by the testimony of PW2 who at page 5 of the Record of Proceedings testified that:

"I came after one month. My father told me that its PW1, Hamada and his wife who are the ones who killed my wife. He said that he will not leave those people on earth when his wife was in the grave. He said that he could not allow me to enter the house. I gave him 2000/= as funeral expense and he refused. He said I should take it to Nnalongo, Hamada and his wife so that they can celebrate since they are the ones who killed his wife." (sic)

We have also reviewed the evidence of PW3 who testified that 2nd deceased had informed him that the Appellant had a grudge with them and further threatened to kill them but that he had strengthened her saying that that since they had vacated the land, he had earlier given them, he would not hurt them

We noted that the Appellant in his unsworn statement denied having a grudge with the deceased persons and stated that the only grudge he had was with PW2, his daughter who had failed to bring her husband home and yet they had a child.

Counsel for the Appellant faulted the learned trial Judge for finding that there was a grudge which had been reported to the LCs up to LCIII whereas not since PW4, the Chairman LC1 himself testified that he was not aware of any grudge. The Respondent disagreed and submitted that the learned trial Judge was at liberty to choose which witness to believe by assessing their demeanor and rightfully chose to disbelieve PW4. Moreover, that this was a minor contradiction that did not go to the root of the case.

It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored. **See Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989.**

Generally, the gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case and what constitutes a major contradiction will vary from case to case. In this case PW1 testified that there was a grudge and the deceased reported to the Chairman LC1 and the matters reached the LCIII chairman. PW4, the Chairman testified that he was never aware of this grudge. According to Counsel for the Appellant, this was a material contradiction. We have considered the character of the contradiction and inconsistency so highlighted and have not found it to be grave because PW5, the investigating officer in his testimony also stated that PW4 had told him about the existence of the grudge between the Appellant, the deceased and the deceased's mother. PW5 was an independent witness and had no reason to lie.

Accordingly, we find that despite the Appellant's denial, there is evidence on record by PW1, PW2, PW3 and PW5 proving that the Appellant held a grudge against PW1 and the deceased persons following the death of his second

wife. This is strengthened by the fact that he sent them away from his land and set their temporary hut on fire.

Regarding the Respondent's argument that PW3's evidence was sufficient to corroborate the evidence of PW1 and PW2 and that the 2nd deceased's utterances to PW3 about a grudge and death threats amounted to a dying declaration. We do not think so. A dying declaration is a statement by a deceased person about the cause of his/her death made while the deceased person was under a settled hopeless expectation of death. **(See: Nembhard v R [1982] 1 All ER 183).** Dying declarations were admissible under the common law, and are also admissible under **Section 30 (a) of the Evidence Act Cap 6**. The statements attributed to the 2nd deceased person as narrated by PW3 were not statements about the cause of her death, and neither were they made while she was under a "settled hopeless expectation of death". They were not a dying declaration, but rather threats that the appellant uttered against the deceased.

We have considered the report by the 2nd deceased to PW3 which we find was made within sufficient proximity between the threats and the occurrence of death. In the present case, PW2 testified that the deceased persons died five months after the Appellant's wife had died. The threats were continually made within that period as stated by PW1 and PW3.

The conduct of the Appellant after the murder was also relied upon in support of the evidence of a grudge. The Appellant testified that he delayed to come to the scene because he was in his garden digging and only left after hearing the drum. The Respondent disagreed and submitted that, the Appellant would have been the first person to arrive at the scene since he was digging within a short distance of 500 metres.

We have already found that indeed there was a grudge. Counsel's submissions on specificity of the distance are speculative. PW1 in her testimony, testified that the Accused was in the garden digging and yet the house where the deceased persons were murdered was nearby. It is only PW5, the investigating officer who testified that while looking for the Appellant who was not at the scene at around 12:00 noon, he was told that

he was at his house which was 500 metres from the scene. Reference was made to his house and not the garden.

Additionally, the submission by Counsel for the Respondent that the Appellant ought to have been the first to greet the couple in the morning before proceeding to the garden because he was only 500 metres away is a mere submission from the bar and not part of the evidence.

While reviewing the evidence on the conduct of the Appellant, the learned trial Judge at page 5 of her Judgment found that;

> *"PW1 told court in her testimony that much as the house of the accused was near the deceased's home, he never came there. PW3 testified to the same extent and even PW4 and PW5 and that their evidence was not challenged at all in cross examination."*

Respectfully, we disagree with the learned trial Judge in her finding in this regard since that was incorrect. From the record, PW1 at page 4 of the Record of Proceedings stated that the Appellant only came to the scene when the whole compound was filled with people. PW3 did not testify as to whether the Appellant was at the scene or not since he himself clearly stated that he could not go to the scene because he was busy. While PW4 went to the scene, he never mentioned whether the Appellant was there or not in his evidence. It is only PW5 that testified that the Appellant was not at the scene around 12:00 noon. This Appellant testified that he went over to the scene after the drum was sounded at around 10:00am. Accordingly, we find that the Appellant visited the scene at around 10:00am before he left to wash his legs.

Counsel for the Appellant also faulted the learned trial Judge for finding that the specifics on how the wounds were inflicted could not be a slip of the tongue when the Appellant stated that the wounds on the 2nd deceased had been caused by a Panga. We note that the learned trial Judge considered that by his evidence, the appellant had knowledge of specific injuries suffered by the deceased persons, and made an inference that the appellant had that knowledge because he was the assailant who murdered the deceased persons, hence why he was able to state their injuries.

We observe that PW1 testified that the 1st deceased's head was shattered. Similarly, Exp 1 also made referred to a shattered skull- on external injuries with wounds on (R) temporal region. PW4 stated that the man had wounds on the head. PW5 testified that the man had a big wound on the head which was oozing blood and brain matter. The Appellant on the other hand testified that the 1st deceased was hit on the head. Regarding the 2nd deceased, whereas the other witnesses testified that she had wounds and had been cut on the head and hands, the Appellant testified that she had been cut on the head and hands with a panga.

However, our view of the evidence is that the appellant's knowledge about the nature of the injuries sustained by the deceased persons can be explained by the fact that, as he stated in his evidence at page 17 of the record, he travelled on the vehicle carrying the deceased's dead bodies after the same were removed from the crime scene. The appellant's knowledge about location of the deceased's bodies, can be explained by the fact that the appellant had gone to the crime scene following the murder of the deceased persons. PW1 Madina Wankose confirmed in evidence that the appellant had gone to the scene of crime on the fateful day. Thus, in our view, the learned trial Judge erred in making the inference that the appellant's knowledge about the injuries and the location of the deceased's bodies was due to the fact that he was the perpetrator of the offences. We accept counsel for the appellant's submissions in that point.

We note that the learned trial Judge convicted the appellant basing on circumstantial evidence consisting of the following. Evidence that the appellant held a grudge against the deceased persons; evidence that the appellant had not so long before the deceased persons were killed, made death threats against them; and evidence that the appellant spoke about the precise nature of injuries sustained by the deceased persons, and the precise position in the deceased's house where their dead bodies were found.

On the circumstantial evidence, we have already found that the learned trial Judge erred in making the inference that the appellant was the deceased's killer based on knowledge about the injuries and the place of finding their bodies. In relation, to evidence of death threats against the deceased, we

wish to state that evidence of prior threats to kill cannot stand on its own. It can only be used for corroboration of other evidence. **(See: Baitwabusa Francis vs. Uganda, Supreme Court Criminal Appeal No. 0029 of 2015)**. In the present case, there was no other evidence linking the appellant with the murder of the deceased persons. The appellant merely remained a suspect. In the **Baitwabusa case (supra)**, it was stated that if the evidence on record leaves the accused person as a suspect, he should be acquitted. Suspicion, however strong it may be should not lead to conviction. **(See: Baitwabusa Francis case (supra) quoting with approval from R vs. Israel Epuku s/o Achietu (1934) 1 EACA 166)**. The killing of the deceased persons was saddening and the wicked person(s) who committed that reprehensible crime deserved to be brought to book. The disappointing fact however, is that the prosecution evidence did not identify the perpetrators, and identified the appellant merely as a suspect. In our view, the circumstantial evidence was insufficient to form the basis for convicting the appellant.

Ground 1 of the appeal must therefore succeed.

The manner of resolution of ground 1, renders it unnecessary to analyse ground 2 of the appeal.

Accordingly, we allow the appellant's appeal, quash the two murder convictions entered by the learned trial Judge and order that the appellant be immediately set free, unless he is held on other lawful charges.

We so order.

Dated at **Kampala** this.....24th.....day of .....May..... 2022.

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Richard Buteera

Deputy Chief Justice

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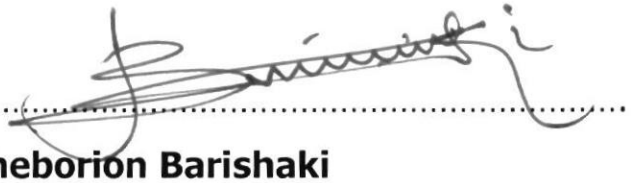
Elizabeth Musoke

Justice of Appeal



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Cheborion Barishaki

Justice of Appeal