THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT KAMPALA

(Coram: Kenneth Kakuru, Muzamiru M. Kibeedi & Irene Mulyagonja, JJA)

CRIMINAL APPEAL NO. 312 OF 2015

1. KAVUMA GEORGE

2. MAYANJA JAMES

3. MUJUNI RICHARD :: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

[Appeal from the decision of the High court of Uganda at Kampala (Hon. Mr. Justice Lameck Nsubuga Mukasa] dated 16.10.2015 in Criminal Session Case No. 0216 of 2012]

JUDGMENT OF THE COURT

Introduction:

The appellants were indicted and tried for the offences of murder contrary to Sections 188 and 189 of the Penal Code Act and Aggravated Robbery contrary to Sections 285 and 286(2) of the Penal Code Act. The trial court convicted the appellants on both Counts of Murder and Aggravated Robbery, and they were sentenced to 41 years, 36 years and 31 years' imprisonment, respectively, in respect of each Count. The sentences were to run concurrently.

The facts as established before the trial court were that the appellants were part of a gang of robbers operating within and around Kampala, who used to hit and kill people, steal their vehicles, and sell the stolen vehicles at Mutukula on the Uganda – Tanzania boarder.

That on 30th June 2011, the appellants hired Motor Car Reg UAH370N Premio from a one Kigozi of Kawempe on self-drive. Their main aim of hiring the said vehicle was to drive around

Kampala and look for a new Fuso truck to rob and sell to a one Kasana of Tanzania who had requested for it, and to whom they normally sold the stolen vehicles. That while the appellants together with a one Fatuma and Katushabe Farida were driving themselves around Kampala, they sighted a Mitsubishi Fuso truck Registration No. UAP 366P parked at the gate of one of the houses in Old Kampala. They parked their car. A1 and Katushabe Farida came out of the car and headed to where the Fuso Truck was parked. When they approached the said truck, they found the driver, the deceased, seated in it and asked if he could transport their pieces of palm poles to Wakiso District. The deceased agreed to do the work and A1 promised to pay him after the work was done. A1 and Katushabe then got onto the truck and they left for Wakiso together with the deceased's two turn boys, Kakembo David and Aiku Peter respectively. A2 Mayanja James, A3 Mujuni Richard and Fatuma, all of whom had remained in the Premio car, also drove away, ahead of the Fuso truck.

That when the Fuso truck reached Kasubi, one of the turn boys namely, Kakembo David, got off. And during that time, the Premio vehicle which was being driven by A2 had reached Wakiso Trading Centre where they left A3. It then proceeded to the site where palm poles were to be dropped.

From Kasubi, the Fuso truck proceeded to Wakiso District. On their way, A1 and Katushabe Farida bought palm poles which were loaded onto the Fuso Truck by Ayiku Peter, the second turn boy. Thereafter, they proceeded to Wakiso Trading Centre where they found A3 (Mujuni Richard). While at Wakiso Trading Centre, A1 (Kavuma George) informed the deceased that they did not have enough money to pay for the work done. He requested the deceased's turn boy to go with A3 to Nansana to pick more money. The deceased accepted and the turn boy left together with Katushabe Faridah and Mujuni Richard (A3). After leaving, A1 (Kavuma George) proceeded with the deceased to Buyera- Temangalo village where the dumping site was located.

Upon reaching the site, they found A2 Mayanja James, Fatuma and the Premio vehicle parked. While there, A2 directed the deceased where to off load the palm poles which the deceased did. Thereafter A2 asked the deceased to come out of the vehicle to receive his money.

When the deceased got out of the vehicle to receive his money, A2 (Mayanja James) hit him on the head with a hammer. The deceased immediately fell down and died. A2 removed the deceased's Mobile Phone G-Tide with serial No.356688002450007 from his pocket. Immediately after, A1 Kavuma George and A2 Mayanja James entered the Fuso Truck and drove away. The Premio vehicle also followed them. They drove away to Mpigi where they

stopped and they were joined by A3 (Mujuni Richard) and Katushabe. They then proceeded to Mutukula, Tanzanian Boarder where they found Kasana.

At Mutukula they handed over the Fuso Truck to Kasana and he paid them money which they shared amongst themselves. However, before handing over the vehicle to Kasana, A3 Mujuni Richard removed its two red jacks, spanners and the tarpaulin. Thereafter the appellants came back to Uganda.

On the 1/07/2011 at 7:00am, a one Nasimbi Rose Mary of Buyera-Temangalo Village, while on her way to the garden of her boss, found the dead body of the deceased which was dressed in a blue shirt, navy blue trousers and brown shoes. She immediately called her neighbour, a one Nalongo Kyambadde, who then informed the LC1 Chairman of the area, a one Mukasa Edward. The Chairman then informed the Police of Bukasa who came to the scene and took photographs of the deceased's body and the palm poles. Later the body was transferred to Mulago Hospital in Kampala District for the post mortem investigations. The Post Mortem Report indicated that the deceased had died of neurogenic shock from blunt force trauma to the head.

In the course of the police investigations, the appellants were arrested and A2 Mayanja James found with the deceased's mobile phone and the hammer that he used for hitting the deceased. A3 Mujuni Richard was found with the deceased's jacks, 2 spanners and tarpaulin. They were interrogated and, in their Charge and Caution Statements, they admitted having committed the offences. They were convicted of the offences of murder and aggravated robbery and sentenced as already set out hereinbefore.

The appellants were dissatisfied and appealed to this court against both the conviction and sentences on the following grounds: -

1. ***The Learned Trial Judge erred in law and fact when he erroneously admitted the charge and caution statement of 1st appellant (A1) without considering the fact that the statement was procured by torture which occasioned a miscarriage of justice.***

2. ***The Learned Trial Judge erred in law and fact when he relied on unsatisfactory circumstantial evidence to convict the appellants of murder yet such evidence raised other probable and reasonable hypotheses that don't point to the guilt of the appellants.***

3. ***The Learned Trial Judge erred in law and fact when he convicted A2 and A3 without considering the defence of alibi raised by them.***

4. ***The Learned Trial Judge erred in law and fact when he convicted the appellants of Aggravated Robbery without proof of use of a deadly weapon which occasioned a miscarriage of justice.***

5. ***The Learned Trial Judge erred in law and fact when he relied on exhibits recovered from A1 and A2's premises without the same being identified by PW2 in court hence occasioned a miscarriage of justice.***

6. ***The learned trial Judge erred in law and fact when he relied on the evidence of PW9 which was hearsay evidence from a Police Officer who didn't record a statement from A1.***

7. ***The learned trial judge erred in law and fact when he convicted the appellants on the basis of prosecution evidence that was full of major contradictions, gaps and inconsistencies which occasioned a miscarriage of justice.***

8. ***<u>In the alternative but without prejudice to the above,</u> the Learned Trial Judge erred in law when he sentenced the appellants A1, A2 & A3 to different sentences i.e. 41 years' imprisonment, 36 years' imprisonment and 31 years' imprisonment respectively which sentences were illegal, based on wrong legal principles, harsh and manifestly excessive given the circumstances of the case.***

Appearances:

The three (3) appellants were represented by Mr. Andrew Ssebuggwawo of Ms. Nakagga & Co. Advocates, while the respondent was represented by Ms. Rose Tumuheise, an Assistant Director of Public Prosecutions. Due to the Covid- 19 Pandemic Restrictions, the appellants were not in court physically but followed the proceedings via video link to the prison. Both parties proceeded by way of Written Submissions which were already on the court record. They also briefly addressed the court orally.

The Appellants' Submissions:

On ground one, Counsel submitted that the Trial Judge erroneously admitted the Charge and Caution Statement of the 1st appellant without considering the fact that the statement was procured by torture and thus involuntary which occasioned a miscarriage of justice. That the

evidence of torture was contained in Exhibit PE2 - Police Form 24 on A1 (Kavuma George) which indicated that A1 had injuries and wounds all over his body at the time he was medically examined by PW5 Dr. Peter Kitayimbwa, a Forensic Specialist; the testimony of PW5 and the testimony of A1 himself.

Counsel submitted that the fact of torture put the Charge and Caution Statement in doubt, especially in relation to its voluntariness which the trial judge seems to have taken so casually and lightly thereby occasioning a miscarriage of justice. For this submission, Counsel relied on the cases of *Tuwamoi vs Uganda [1967] EA 84* and *Festo Androa Asenua & Anor vs Uganda, SCCA No.01/88).*

On ground two, Counsel submitted that the circumstantial evidence adduced in this case was not sufficient to justify a conviction of murder. That it did not resolve the issue of who and how the deceased had met his death since the diverse evidence on record is contradictory. To elaborate this point, Counsel submitted that on the one hand, the testimonies of PW2 and PW3 were to the effect that the deceased was given a lot of chloroform and then killed; while on the other hand, PW4 testified that the deceased died of scalp hematoma, fracture of skull arising from a shock from a blunt force trauma to the head. Even PW4's evidence contradicted that of PW1 who saw the body at the scene of crime but made no mention of having seen any injuries on the deceased's body. Even PW3 did not mention any injuries on the body.

Further, that even the evidence of PW8 relating to the charge and caution statement does not explain how the deceased met his death.

Counsel submitted that the contradictions and gaps in the prosecution's evidence seemed to produce more than one probable hypothesis that led to the death of the deceased namely: (i) That the deceased was given too much chloroform by unknown people that led to his death as stated by PW1, PW2 and PW3. (ii) That the deceased was hit by a blunt object on the head that led to his death by people unknown to A1. (iii) That the deceased was hit by A3 Mayanja which led to his death. (iv) That the appellants only committed the offence of theft of the vehicle but not the murder.

According to Counsel, since the circumstantial evidence in this case does not irresistibly point to the guilt of the appellants and is capable of explanation upon other hypotheses, the court ought to acquit the appellants. And for this submission, Counsel relied upon *IP Buko Difasi & Anor Vs. Uganda, Court of Appeal Criminal Appeal No.14 of 2010.*

On ground three, Counsel submitted that A2 and A3 were never placed at the scene of crime by prosecution witness. That the prosecution heavily relied on the evidence of PW2 who was not at the scene of crime. By the time the robbery and murder happened, PW2 had left the scene and could, therefore, not testify or allude to facts that transpired at the scene. That the evidence of PW8 in the Charge and Caution Statement was involuntary and inadmissible as it was procured through torture. And that the evidence of PW9 was hearsay.

On ground 4, Counsel submitted that the prosecution failed to prove the ingredients that there was use of violence or threat to use violence, or that the assailants used or threatened to use a deadly weapon or that there was use of a deadly weapon. That PW2 testified that they were convinced by the appellants to go and do work and no violence was involved. That PW1, PW2 and PW3 all testified that the deceased was given a lot of chloroform and that is what led to his death. That no deadly weapon was adduced by prosecution and tendered in court as having been used by the appellants in the robbery.

Counsel further submitted that exhibit P.E.13 (hammer) was never identified by PW2 as having been used at the scene of crime. That it was also not linked to the robbery by forensic examination or evidence. And that neither was it alluded to by A1 in his Charge and Caution Statement or by any other witness. Counsel concluded that in the premises there was no evidence led to prove the ingredients of aggravated robbery.

On ground 5, Counsel submitted that from the testimony of PW9 he recovered the items from the home of A2 and A3 illegally as there was no Search Warrant obtained to search the appellants' homes. That even after the search was done, there was no Search Certificate issued in respect of that search which, in Counsel's submission, was a violation of the appellant's rights as well as the prescribed procedure.

On ground 6, Counsel submitted that the evidence of PW9 was total hearsay because the witness told the court what he had been told by A1. That as a Police Officer, it was wrong for him not to record a plain statement from A1 and use it in evidence and tender it as opposed to coming to court to tell court verbally what A1 told him. That PW9's evidence was hearsay and inadmissible. That such evidence was susceptible to alterations, falsehoods, forgotten pieces and is generally unreliable.

On ground 7, Counsel submitted that the trial judge convicted the appellants on the basis of prosecution evidence that was full of major contradictions, gaps and inconsistencies namely:

- PW2, PW3 testified that the deceased was given a lot of chloroform which led to his death whereas the evidence of PW4 was to the effect that the deceased had died of trauma.
- The hammer allegedly used to kill the deceased was never connected to the scene of crime by forensic examination.
- The phone found at the scene was never adduced in evidence.

Counsel submitted that the said gaps, contradictions and inconsistencies in the prosecution's evidence occasioned a miscarriage of justice.

On ground 8, Counsel submitted that the sentences imposed on the appellants were illegal, based on wrong legal principles, harsh and manifestly excessive in that:

- To hand different sentences to different people who committed the same offence at the same time was illegal and without justifiable reason.
- The appellants A2 and A3 were 1st offenders and bread winners of their families.
- The trial judge ignored the fact that the appellants had reformed in prison by making arts and crafts and had undergone rehabilitation.
- The sentences were harsh and manifestly excessive given the circumstances of the case.

Counsel concluded his submissions by praying that the appeal against the convictions be allowed. And, in the alternative, that the sentences be set aside and substituted with others based on the law.

The Respondent's Submissions:

Counsel for the respondent opposed the appeal on ground that the prosecution proved its case beyond reasonable doubt and that the trial judge properly convicted the appellants.

Counsel for the respondent argued grounds 1, 2, 3, 4, 5, 6 and 7 together and argued ground 8 separately.

In her submissions on the first 7 grounds, Counsel reproduced extracts from the prosecution's evidence during the trial to confirm that indeed the prosecution proved the case beyond reasonable doubt. We shall therefore not reproduce the same at this stage as we shall be reevaluating the same evidence when resolving the above grounds.

Counsel concluded her submissions on grounds 1 – 7 by supporting the findings and decision of the Trial Judge to convict the appellants as charged.

On ground 8, Counsel prayed that court finds no problem with the different sentences to the appellants as the Trial Judge gave his reasons for the same. Counsel submitted that A1 was not a first offender as he was, and still is, serving another sentence in High Court Criminal Session Case No.26/2012 which is now on appeal in this Honourable court as Criminal Appeal No.900/2014. That the sentences were neither illegal nor harsh and manifestly excessive. That on the contrary, the sentences were lenient in light of the fact that the offences for which the appellants were convicted carry a maximum sentence of death.

Counsel concluded by praying that this Honorable Court upholds the conviction and confirms the sentences, if they cannot be enhanced.

Duty of the Court:

This being a first appeal, it is our duty to reappraise all evidence that was adduced before the trial court and come to our own conclusions of fact and law while making allowance for the fact that we neither saw nor heard the witnesses testify. See *Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions*, Baguma *Fred Vs Uganda SCCA No. 7 of 2004*, *Kifumante Henry Vs Uganda SCCA No. 10 of 1997*, *and D.R Pandya Vs R [1957] EA 336*.

We shall bear in mind the above principles when resolving the grounds of appeal. We shall resolve each of the complaints of the appellants in grounds 1, 2, 4 & 8 separately. As for grounds 3, 5, 6 & 7 they will be joined since they all relate to reappraisal of the evidence before the trial court in respect of the participation of the appellants in the commission of the offences indicted.

Resolution of Ground 1:

The appellants' complaint in ground 1 is that the learned trial judge erroneously admitted the Charge and Caution Statement of A1(Kavuma George) in so far as it was procured by torture.

The impugned Charge and Caution Statement of A1 appears in the Record of Appeal as Exhibit P. E7. It was recorded on 19.07.2011 before D/AIP Imalingat Samuel Peter (PW8).

From the Record of Appeal, the moment PW8 took the Witness Stand and was introduced to court by the Prosecuting Attorney as the Police Officer who had taken the Charge and Caution Statement of A1, both Counsel agreed to forthwith go for a trial within a trial since A1 was going

to retract the said Charge and Caution Statement. Court ordered that *"in the circumstances court would conduct a trial within a trial to determine the vulnerability(sic!) and admissibility of the Statement".*

During the trial, PW8 D/AIP Imalingat informed court the circumstances under which he came to be involved in the recording of the Charge and Caution Statement of A1 and how he went about it. He stated that while he was at the Headquarters of the Special Investigations Unit (SIU) at Ntinda, he and several other Police Officers were instructed by the Commandant of the SIU to proceed to Kireka to obtain Charge and Caution Statements from several people who had been arrested by the Police in respect of different offences and had admitted commission of the offences. That PW8 and the other Police Officers proceeded to Kireka. On reaching Kireka, PW8 was assigned A1 to interview from one of the offices. They were only the two of them in the office. PW8 was not dressed in the Police Uniform, and neither was he armed. There were no arms and ammunition in the office. PW8 introduced himself to A1, read out the charges against him, cautioned him and went through the usual procedure for recording such Statements. PW8 stated that there was no threat or intimidation of A1. That A1 freely agreed to record the Statement and told his story which was recorded by PW8. In his words PW8 stated:

> *"I cautioned him. I told him you must be free and tell me the truth and I told him I will not be here among those people who have been interrogating you or whatever but I am independent so you be free with me and I told him you don't need to say anything unless you wish but whatever you say may be given in evidence in your trial. I asked him if he understood the caution and he accepted and signed".*

As regards the claim of torture of A1 in order to admit the offences, PW8 stated that A1 never raised the said claim while appearing before PW8.

In the Statement, A1 stated how he was recruited into the field of motor vehicle robberies by a one Deo whom he had met in Police cells when he had earlier been detained and released on bond. That A1 in turn recruited Mayanja James (A.2), Richard Mujuni (A.3) and with time Farida Katushabe and Fatuma. That Deo connected them to a one Kasana from Tanzania to whom they would sell the robbed vehicles. A1 further stated that on the 30th June, 2011 while acting jointly with A2, A3, Faridah and Fatuma they lured the Late Lwanga into transporting palm poles on their behalf. He also stated how the deceased was hit on his head by A2 with a hammer when the deceased delivered the timber to Buyera - Temangalo Village in Wakiso District. That they then drove away the deceased's vehicle, a Fuso Tipper lorry, to Mutukula at the Uganda Tanzania Border and sold it to Kasana.

In his examination in chief during the trial within the trial, A1 denied having made any Statement before PW8 in which he admitted the commission of the offence. He stated that he had never seen PW8 before and was seeing him in court for the first time. He also denied being able to write at all.

A1 further stated that while in cells at the Rapid Response Unit (RRU), Kireka, he was tortured and beaten. That then he was given papers by some men and told that if he wanted to be taken to court, he had to sign the papers. Initially he refused to sign. Then he told them that he could only thumb print the papers as he did not know how to sign. That one gentleman got a pen and wrote A1's name for him and then told A1 to write his name in the space he showed him and he (A1) copied the written name onto the paper. A1 stated that he then signed the papers while in pain without knowing what they were all about or the consequences.

In cross examination, A1 stated that the day he was arrested is the day the police officers started torturing him and is the day he was tortured most. He explained the form of the torture to be that he was made to squat, his hands and legs were tied together, and he was beaten and slapped all over his body. That he reported the acts of torture to the Police Doctor who visited him subsequently when he was in police custody. He confirmed that PW8 was not among the persons who arrested him and tortured him.

Regarding the signing of the contested Statement, A1 repeated that he did not know how to sign; that he only knew how to thumb-print. But when the contested Statement was shown to A1, he admitted that the signatures on it were written by him. He, however, added that he was just copying the names which had already been written down for him.

When court requested A1's counsel to take a close look at the contested signatures, Counsel admitted that the signatures were for someone who had some idea of writing. That they were not signatures of someone who does not know how to write and was copying something which was written down for him.

In his Ruling on the trial within the trial, the learned trial judge stated:

> *"I have considered and evaluated the evidence on (sic!) both the State and Defence witnesses and find that PW1 followed the right procedure set down for recording a charge and caution statement. If the accused is to be believed that he was beaten and tortured on arrest and following his detention at PRU Kireka, PW1 was not among the arresting officers and was not stationed at Kireka but one who came from another department only for the purposes of recording a Statement. I*

believe PW1 that the accused knew how to write and that they communicated in English. The accused proved himself a liar when he said that he could not write even his name. That he copied what had just been written down for him. I carefully studied the way his name was written down, I find that the accused's name was written by a person who knew how to write.

Counsel for the defence was of the same view. To use his words, he observed "This signature is of someone who knows how to write, the signature is okay, it is of a person who has an idea of writing."

Considering all the above, I find that the right procedure was followed in recording the charge and caution statement from the accused, that he freely and voluntarily made the statement. It is in the circumstances admissible in evidence."

From the above, the learned trial judge cannot be faulted for finding that the Charge and Caution Statement was freely and voluntarily made and admissible in evidence. The trial judge observed both PW8 and A1 testify during the trial within the trial and concluded that A1 was a liar. An appellate court cannot overturn a decision of the trial court based on the demeanor of a witness which it has not observed. In the words of the Supreme Court of Uganda in *Baguma Fred Vs Uganda SCCA No. 7 of 2004*:

> *" ... when a question arises as to which witness is to be believed rather than another, and the question turns on the manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the judge who saw the witness."*

Moreover, the lie about the ability of A1 to write was admitted by his own advocate before the trial judge in the presence of A1.

Second, the graphic detail with which A1's contested Statement set out how the offences were committed which tallied with the testimonies of PW2 and PW7 cannot be the product of a Statement that was made involuntarily by A1.

In his submissions, Counsel for the appellants stated that the evidence of torture of A1 was contained in Exhibit PE2 (Police Form 24 on A1 - Kavuma George) which indicated that A1 had injuries and wounds all over his body at the time he was medically examined by PW5 Dr. Peter Kitayimbwa, a Forensic Specialist.

We have examined Exhibit PE2 (Medical Examination Form/Report on A1 dated 02.08.2011). It indicates that A1 was arrested on 04.07.2011 and examined on 02.08.2011 by Dr. Peter Kitayimbwa, a Police Surgeon/ Forensic Specialist. This was after A1's Charge and Caution statement had been taken on 19.07.2011. The Police Surgeon observed injuries on both knees, left wrist and right occiput. The description of the injuries was stated thus:

"Has 4 healed lacerations, some mildly tender".

When the above injuries are put in the context of A1's own testimony to the effect that the day he was arrested is the day the police officers started "torturing" him and is the day he was "tortured" most, the reasonable inference is that the injuries complained about were suffered by A1 on the day of his arrest of 04.07.2011. By the time of his examination by the Police Surgeon after a period of about 1 month, some of the injuries had healed.

This observation is further reinforced by the fact that Exhibit PE3 (Medical Examination Form/Report on A2 dated 02.08.2011) and Exhibit PE4 (Medical Examination Form/Report on A3 dated 02.08.2011) all indicated that even A2 & A3 had suffered injuries that were more or less similar to those suffered by A1. Further, that the said injuries of A2 & A3 had likewise healed by the time they were medically examined on 02.08.2011. Exhibits PE3 & PE4 indicate that A2 & A3 were arrested and medically examined on the same days with A1. If A1's injuries had been for purposes of forcing him admit commission of the offences as claimed, then A2 & A3 who, likewise had similar injuries as those of A1, would have also been made to make Charge and Caution Statements the way A1 was made. No such Statements were produced or even alluded to before the trial court.

In conclusion of this ground, we find that the trial judge properly admitted A1's Charge and Caution Statement in evidence. Upon its admission in evidence, the Charge and Caution Statement formed part of the Court record. Thereafter it became incumbent upon the trial judge to evaluate it as any other evidence to see whether it could shed light on the entire case *See Mumbere Julius Vs Uganda, Supreme Court Criminal Appeal No. 15 of 2014.*

Accordingly, ground 1 fails.

Resolution of ground 2:

The appellants' complaint in ground 2 was that the Learned Trial Judge erred in law and fact when he relied on unsatisfactory circumstantial evidence to convict the appellants of murder, yet

such evidence raised other probable and reasonable hypotheses that don't point to the guilt of the appellants.

In his submissions on ground 2, Counsel for the appellants faulted the trial judge for convicting the appellants of murder when the circumstantial evidence adduced in this case did not resolve the issue of how the deceased had met his death and who had caused it. That whereas the testimonies of PW2 and PW3 indicated that the deceased had been given a lot of chloroform and then killed, the testimony of PW4 indicated that the deceased had died of scalp hematoma, signature fracture of skull arising from a shock from a blunt force trauma to the head. That even PW4's evidence was contradicted by that of PW1 who had seen the body at the scene of crime but made no mention of having seen any injuries on the deceased's body.

In his judgment, the trial judge rightly set out the elements of the offence of murder that the prosecution had to prove namely: i) The person named (i.e. Lwanga Charles James) is dead; ii) The death was unlawfully caused; iii) The killing was done with malice aforethought; and iv) The accused persons are among those who participated in causing the death.

Thereafter the trial judge evaluated the evidence on the court record in respect of each element and was satisfied that each element had been proved to the prescribed standard.

When dealing with the issue of the cause of death of the deceased the trial judge stated thus:

> *"PW.1 testified that when the police officer arrived at the scene and turned the body, he saw a wound at the back of the head. PW.3 testified that they found the body in city mortuary. That she looked at the body and saw an injury on the head. That the part of the head injured went inside and she was informed he had been hit by a hammer. Dr. Onzivua found that the body had no obvious external injuries or trauma but internally there was a scalp hematoma, described as signature fracture of the skull(547cm)- Bilateral subarachnoid hematoma. He explained that the swelling was inwards and there was a circular mark referred to as a signature fracture caused by a round object like the round end of a hammer. The doctor's findings corroborate Pw.3's testimony that the injured part of the deceased's head went inside. The above prosecution evidence clearly shows that Lwanga's death was neither natural, accidental nor authorized by law".*

We have carefully reviewed the evidence on the record, the direct and admissible evidence of the prosecution witnesses about this issue consisted of the testimonies of PW1 Mukasa Edward (the LC1 Chairman), PW3 Nabbosa Prossy (the Widow) and PW4 Dr. Onzivua Sylverster (the

Consultant Pathologist). It proved that the death of the deceased was the result of the harmer that had been used to forcefully hit him on the head. PW1 saw the wound at the back of the deceased's head at the scene where the body was discovered while PW3 saw the same injury at the mortuary. PW4 who carried out the postmortem examination on the deceased's body confirmed that the death had been 'neurogenic shock from blunt force trauma to the head".

The other possibility of cause of death of the deceased which Counsel for the appellants raised in his submissions namely, having been given a lot of chloroform and then killed, arose from the testimony of PW2 Ayiku Peter. PW2 testified that he was one of the turn boys of the deceased. That he was with the deceased when the appellants hired their lorry to carry the palm poles from Wakiso to Temangalo. PW3 is the one who loaded the poles onto the deceased's truck from Wakiso. After loading, the appellants cunningly separated PW2 from the deceased by sending him to Nansana with some lady allegedly to pick the money for hiring the vehicle. That while at Nansana, the lady disappeared from PW2 without giving him the money as promised. And when he rung the deceased, the deceased's phone had been switched off. The time was around 7.30PM. Thereafter PW2 rung a one Na who was in their village, Kapekka, and informed him about his predicament. That on the following day PW2 and the deceased's relatives and widow gathered at the New Park Police Post in Kampala so as to start on the search for the deceased. PW2 further testified:

> *"As we were still standing outside [the Police Post] they called the widow that the Patrol of Wakiso got him (the deceased) and he was given too much chloroform and they had taken him to Kiwunya."*

Clearly the evidence of PW2 regarding chloroform was hearsay evidence and inadmissible under Section 59 of the Evidence Act which provides that oral evidence must be direct.

On her part, the widow PW3 Nabbosa Prossy while testifying about chloroform stated thus:

> *"We went to CPS. When we were going to enter like this around 8am I received a call that your husband has been found and he had a lot of 'califom'. He is at Mulago. The one who called me is Lubega a fellow businessman. We went to Mulago and we looked in the casualty and looked for him and he was not there... We found him in the City Council mortuary. The Doctors examined him and called us and told us to come and see what killed the deceased. They hit him in the head using a hammer...It was the only wound I saw. The next [sic] they gave us the body and we took him and buried him."*

From PW3's testimony, the evidence in respect of chloroform (which she called "califom") was hearsay and likewise inadmissible. However, PW3's testimony about the wound that she saw on the deceased's head was direct evidence in that she saw it with her own eyes. It was thus admissible evidence.

In the premises, there is no basis for Counsel for the appellant faulting the trial judge's findings as to the cause of the death. We are satisfied that the prosecution proved to the required standard that the death of the deceased was the result of the blunt instrument that was used to hit him on the head. The area that was hit indicates that the killers had the intention of causing his unlawful death. Ground 2 of the appeal therefore fails.

As regards the 2nd leg of ground 2 under which the trial judge is faulted for not finding that the circumstantial evidence adduced in this case did not resolve the issue of who had caused the death of the deceased, we have found it closely connected with ground 3. Accordingly, we opted to resolve it jointly with grounds 3,5,6 and 7.

Resolution of grounds 3, 5, 6 and 7:

Grounds 3, 5, 6 & 7 were couched as follows:

- ***Ground 3 - The Learned Trial Judge erred in law and fact when he convicted A2 and A3 without considering the defence of alibi raised by them.***
- ***Ground 5 - The Learned Trial Judge erred in law and fact when he relied on exhibits recovered from A1 and A2's premises without the same being identified by PW2 in court hence occasioned a miscarriage of justice.***
- ***Ground 6 - The learned trial Judge erred in law and fact when he relied on the evidence of PW9 which was hearsay evidence from a Police Officer who didn't record a statement from A1.***
- ***Ground 7 - The learned trial judge erred in law and fact when he convicted the appellants on the basis of prosecution evidence that was full of major contradictions, gaps and inconsistencies which occasioned a miscarriage of justice.***

From the appellants' submissions, it is crystal clear that the gist of the appellants' complaints in grounds 3, 5, 6 and 7 is that the trial judge erroneously concluded that each of the appellants had participated in the commission of the offences indicted basing on hearsay and unsatisfactory circumstantial evidence which was full of major contradictions, gaps and

inconsistencies. As such, we need to review all the evidence on the record in respect of the participation of the appellants in order to establish the bonafides of the appellants' complaint.

There is no doubt that none of the prosecution witnesses directly witnessed the killing of the deceased; the prosecution's evidence as to the participation of the appellants was therefore circumstantial.

From the record, the prosecution evidence in respect of the participation of the appellants was adduced by the following witnesses: PW2 Ayiku Peter, PW6 DIP Muzigiti Julius, PW7 AIP Okello Aggrey & PW9 DAIP Mwesigye Edward.

In his judgment, the trial judge reproduced in great detail the evidence of each one of the above prosecution witnesses before analyzing the same.

PW2 Ayiku Peter was the prosecution witness who last saw the deceased alive on 30th June 2011 in the company of A1. He testified that he was one of the turn boys on the deceased's tipper lorry Registration number UAP 366. The other turn boy was Kakembo. That on 30.06.2011 while he, the deceased and Kakembo were at Old Kampala, they were approached by A1 and a lady for purposes of hiring their lorry to collect poles from Wakiso. The deceased agreed and they set off to collect the poles at around 5.30PM. A1 and the lady sat with the deceased in the cabin while PW2 sat at the back of the lorry with Kakembo. Kakembo got off the vehicle before Wakiso leaving the rest to proceed to Wakiso where they arrived at around 6.30PM. At Wakiso they found A3. A1 paid for the poles and PW2 loaded them onto the vehicle after A3 had counted them. After paying for the poles, A1 and the lady claimed that they did not have sufficient funds on them to pay for the transport charges. They requested the deceased to permit PW2 go with A3 and the lady to pick the funds from Nansana and then find them at a place called Yesu Amala. The deceased agreed. PW2 and A3 sat on the same *boda boda* to Nansana while the lady sat on the 2nd *Boda boda*. The deceased stayed behind in the company of A1.

When PW2, A3 and the lady reached Nansana, they sent PW2 to go and buy paraffin for them. They told him that he would be paid on his return. PW2 left A3 and the lady to go and buy the paraffin as requested. But when he returned, the two had disappeared. He tried to ring his boss but the boss' phone was off. The time was around 7.30PM. He rung his village, Kapeeka, and told a one Na what had happened. He took a taxi and went to the Police Post near the New Park in Kampala City. On arrival at the Police Post, he informed the Police Officers, but they said that it was already late and could not do anything meaningful at that time. PW2 was picked

from the Police by a village mate, and he spent the rest of the night at the village mate's home. The following morning PW2 teamed up with the deceased's widow and relatives at the Central Police Station in Kampala to embark on searching for the deceased. While at the police, he learnt from the phone call that was made to the widow by a one Lubega at around 8AM that the deceased had been found but was dead.

PW2 told court that he was subsequently called to an identification parade that was held on 22.07.2011 at the Rapid Response Unit (RRU), Kireka, during which he identified A1 and A3 as the people he had seen when they came to hire their vehicle.

In evaluating the evidence of PW2, the trial judge said:

> *"...It is PW2's evidence that A1 and [A3] were strangers to him. That day was his first occasion to see them. However, he was with A1 from around 5.30PM and found [A3] at Wakiso at around 6.30PM. It was still during day time. He was with A1 at close range at Old Kampala as A1 and the woman discussed with the Late James Lwanga. Though he travelled at the back of the lorry, he moved with them from Old Kampala up to Wakiso. At Wakiso, as he loaded the poles, he was close to A.1 and [A3]. He rode with [A3] from Wakiso to Nansana on the same motor cycle and was close to them as he was given money to go buy paraffin. The conditions above would be good for a proper identification. However, it is always more difficult no matter the conditions to identify a stranger than it is to identify a person familiar to the witness. As already stated, A.1 and [A3] were strangers to the witness. Therefore, the possibility of error cannot be ruled out. However, PW.2 testified that sometime later he was summoned to Kireka to pick A1 as the one who had come with lady to hire their services. He also picked out another person as the one they had found at Wakiso, who counted the poles and with whom he rode on the same boda boda back to Nansana. At conclusion of the parade he learned that A.1 was Kavuma and the other man was Mujuni (A.3). It is clear that the witness had spent more time with A.3. The identification parade was shortly after the incident and he clarified that he could not identify Mujuni in court due to lapse of time."*

The trial judge cannot be faulted in his analysis of the evidence before him and the application of the guidelines as to positive identification as set out in the authority of **Abdallah Nabulere Vs Uganda [1979] HCB 76,** namely:

i) Period for which the accused has previously been known by the witness.

ii) Source of light of identification.

iii) Period for which the accused was under observation by the witness.

iv) Distance between witness and the accused.

PW2's evidence on the identification of A1 & A3 during the identification parade was further reinforced by PW6 DIP Muzigiti Julius. PW6 stated that he is the one who organized the identification parades in respect of A1 and A3. The first identification parade involved 8 other suspects who were lined up with A1. PW2 positively identified A1. The Police Form 69 (Identification Parade Report) which was tendered in court by PW6 as PE5 was signed by A1 acknowledging that he (A1) was identified by PW2 from the other suspects.

The 2nd identification parade involved another set of 8 suspects who were lined up with A3. PW2 likewise positively identified A3 who in turn signed the Police Form 69 (Identification Parade Report) which was tendered in court by PW6 as PE6.

The other crucial evidence of PW2 in respect of the participation of the appellants was his testimony that while still at Kireka, he was able to identify two hydraulic jacks and a wheel spanner that were on the deceased's vehicle at the time it was robbed. These items, together with others, had been recovered during the search of the A3's house at Bulange and A2's house at Kyengera. They were tendered in court by PW7 AIP Okello Aggrey.

The detailed testimony of PW7 as to how he had recovered the above items from A2 & A3 was captured in the judgment of the trial court thus:

> *"PW7 AIP Okello Aggrey, testified that in 2011, he was attached to the Rapid Response Unit at Kireka. In June 2011, he was assigned the task of tracing an iron bar group that was hitting, killing people and stealing vehicles along the corridor from Mukono Northern by Pass up to Kyengera. In the course of investigating a case of a motor cyclist who had been hit around Nansana, he re-arrested a one Mbaziira who had been earlier arrested and released on bond. Mbaziira led the witness to the arrest of Mujuni (A.3). Mujuni led the team to the arrest of Mayanja (A.2). That Mayanja named their group's boss to be Kavuma George (A1) who was also arrested. He further testified that on searching A.3's house at Bulange two hydraulic jacks, spanners and hammers were recovered. Also on searching A2's*

house at Kyengera, two mobile phones and hammers were recovered. The witness testified that he handed the recovered items of the case to the investigations officer A/AIP Mwesigye Edward (PW9). The witness tendered in court the big wheel spanner (exhibit P8), small wheel spanner (exhibit P9) big jack (exhibit P10), small jack (exhibit P11) and a hammer (exhibit P12). He also tendered in evidence of the exhibit record slips serial numbers 40349 and 40350 in respect of the items recovered from A3's house (exhibit P14) and exhibit record slip serial number 40348 in respect of the hammer recovered from A2's house at Kyengera (exhibit P15).

PW9 D/AIP Mwesigye Edward testified that he was the case investigations officer. He confirmed that he received the above exhibited items from PW7 AIP Okello Aggrey. The widow (PW3) and the turn boy (PW2) identified the said items recovered from A2's house as the ones which were in James Lwanga's Tipper Lorry at the time it was stolen."

Thereafter the trial judge applied the principle of "recent possession" to the evidence before him. While relying on the authority of Eraiza Kasaija Vs Uganda SCCA No. 21 of 1991 he stated that once the accused has been proved to have been found in recent possession of stolen property, it is for the accused to give a reasonable explanation on a balance of probabilities. If he is unable to give a reasonable explanation, the presumption arises that he is either the thief or receiver of the stolen goods according to the circumstances.

The trial judge then went ahead to analyse the testimony of A3 and found that he did not give any explanation as to how the late James Lwanga's wheel spanners and jacks had come into his house. That A3 had simply denied that anything had been recovered from his house. As for A2, he likewise denied that the items exhibited in court had been recovered from his home yet the exhibit record slip serial No. 40347 (exhibit P13) indicated that the phones were recovered from James Mayanja (A2). A2 stated that he first saw them in court.

In the premises, we are unable to fault the trial judge's analysis of the evidence and application of the principle of recent possession to the evidence before him.

In his submissions on ground 5, Counsel complained that the items exhibited were illegally recovered from the home of A2 and A3 as there was no Search Warrant obtained prior to the search being conducted. That even after the search was done, there was no Search Certificate issued in respect of that search.

We have reviewed the record of proceedings of the trial court in respect of the exhibits complained about. The legality of the search of the homes of A2 & A3 which led to the recovery of the exhibits complained about was never raised as an issue before the trial court. And neither is it one of the grounds of appeal as set out in the Memorandum of Appeal. Rule 74 (a) of the Rules of this Court bars a party from raising an issue outside the grounds specified in the Memorandum of Appeal without prior leave of Court. The Rule is couched as follows:

> *"At the hearing of an appeal, the appellant shall not, without the leave of the court, argue a ground of appeal not specified in the Memorandum of Appeal or in any supplementary Memorandum of Appeal lodged under rule 67 of these rules;"*

In the instant case, neither leave was sought by, nor granted to the appellants to argue the question of the legality of the search as required by the above Rule. Accordingly, the appellants' submissions on the matter are misplaced.

Needless to add, assessment of the legality of a search of a suspect's premises by a Police Officer is not restricted to possession or absence of a Search Warrant duly issued by court to the Police Officer pursuant to Sections 69 and 70 of the Magistrates Act, Cap. 16. Section 27(7) of the Police Act, Cap. 303 authorises a Police Officer to search a suspect's premises either after obtaining a Search Warrant from a Magistrate's Court or while carrying a Warrant Card. The above subsection is worded as follows:

> ***"S.27. Search by police officers***
>
> ...
>
> *(7) Notwithstanding the provisions of this section or the provisions of the Magistrates Courts Act relating to the search of premises, no police officer shall search any premises unless he or she is in possession of a search warrant issued under the provisions of the Magistrates Act or is carrying a warrant card in such a form as shall be prescribed by the Inspector General." [Emphasis added]*

The other prosecution evidence on the court record on the issue of participation of the appellants was the testimony of PW7 AIP Okello Aggrey regarding the Case Conference that he held with Mbazira, A1, A2 & A3 following their arrest at which it was planned to go to Mutukula on a mission to arrest a one Kasana, the individual from Tanzania to whom they used to sell the vehicles they had stolen. We have reviewed the Court record and found that the trial judge properly summarized it in his judgment. The trial judge stated:

"[PW7] testified that on that mission his team travelled to Mutukula with A.1 and A.2 on 7th July 2011. In the plan, the accused persons were delivering a premio vehicle to sell to Kasana, whom they were in contact with accompanied by their usual operational vehicle. The premio was being driven by Kawuma with Mayanja in the co-driver's seat both hand to hand. As they approached, having identified Kasana to the witnesses' team, the witness got out of the car and went into the bush nearby to effect the arrest. That as the witness was approaching the man to arrest him, A.1 who was on the steering wheel drove towards him nearly knocking him. That he jumped and fell into the ditch in the bush injuring himself. So Kasana torched off while A.1 and A.2 drove off and escaped. In the charge and caution statement A.1 talked about this mission and states that he aided Kasana's escape by driving the vehicle towards the officer who was going to arrest him. That they abandoned the vehicle and went to A.2's brother who cut the handcuffs from their hands.

In his evidence, A.1 makes no mention of the Mutukula mission. A.2 denies knowledge of Kasana, denied selling a vehicle to Kasana, denied going with Police Officer to Mutukula and denied any such escapade. He instead stated that Police Officers asked him to lead them to a person who was frequently ringing his phone number. That he took them to Kyotera where they arrested his brother a one Kayindo Henry Kigimba whom they alleged was stealing with him. That the officers included PW.7. A.2 thereby admits that he led PW.7's team to arrest a person suspected to be stealing with him."

Clearly the conduct of A1 & A2 at the crucial stage of the mission which led to failing it, and thereafter escaping was inconsistent with innocence on their part.

The last evidence on the issue of the participation of the appellants was the Charge and Caution Statement of A1 which was recorded on 19.07.2011 by PW8 DAIP Imalingat Samuel and tendered in court as exhibit PE7 after the trial court conducting a trial within a trial. The Statement was retracted by the A1 on account of NOT having been made by A1 voluntarily. However, this court while resolving ground 1 has upheld the trial judge's finding that the Statement was made voluntarily and accordingly, was admissible. As such, it is incumbent upon us to re -appraise it and satisfy ourselves whether in all the circumstances of the case the confession is true in respect of the issue of participation of the appellants.

We have reviewed the said Charge and Caution Statement. The trial judge rightly summarized the parts which are relevant to the issue of participation as follows:

> *"In the statement A1 states that he was recruited in the season of motor vehicle robberies by a one Deo whom he had met in the cells when he had earlier been detained and released on bond. That in turn, he recruited Mayanja James (A.2), Richard Mujuni (A.3) and with time Faridah Katushabe and Fatuma. That Deo connected them to one Kasana in Tanzania to whom they would sell the robbed vehicles. He further stated that on 30 June, 2011 as the five, that is himself, A.2, A.3, Faridah and Fatumah, were driving in a premio car, UAH 750N, they came across a Fuso Tipper Lorry between old Kampala and Nakulabye. He and Faridah approached the Lorry driver who was with his two turn boys and engaged them to ferry poles for them from Wakiso. That as they travelled to Wakiso, he together with Faridah sat with the driver in the cabin. That their colleagues drove ahead of them in the premio. At Kasubi, one of the turn boys got off the lorry. At Wakiso, they bought 150 poles. As per prior arrangement, A.3 and Farida moved back to Nansana with the turn boy on boda boda to pick money. Meanwhile he with the driver drove to the place arranged prior for dropping of the poles. There they found A.2, whom he refers to as 'the hitman' and Faridah. He stated:*
>
> *'The poles were put [at] the site…. Then Mayanja called the driver behind purporting to pay him. I didn't see what happened behind, he told me to drive that the mission is complete'*
>
> *He further [stated] that he drove the tipper lorry and all later converged at Mutukula where they sold the lorry [to Kasana] at 8,000,000/= which they shared among themselves".*

The graphic details contained in the Charge and Caution statement as to how the offences were committed, starting with how the appellants hired the deceased up to his gruesome murder, all of which tallied with the testimony of PW2, could not lead to any other inference than that the Statement was in fact true. It was also additional proof of the participation of the appellants in a mission that was very well-planned, with each party playing very definite but complementary roles, the total sum of which resulted in the commission of the offences as charged. The doctrine of Common intention renders each one of the appellants liable for each one of the two resultant offences namely, murder and aggravated robbery, irrespective of the specific role one actually played. In *Kamya Abdullah & 4 Ors Vs Uganda, Supreme Court Criminal Appeal No.24*

of 2015 the Supreme Court of Uganda while interpreting the scope of operation of the doctrine of "Common Intention" re-echoed the often-quoted dictum in R. v. Okule & Others [1941]8 EACA 80, where it was held thus:

> *"For the principle of common intention to operate it is not necessary to establish that the two first sat to agree on a special plan. Whether or not the accused was part of the common intention can be deduced from his or her presence at the scene of crime and his or her actions or failure to disassociate himself from the pursuit of the common intention. It is even irrelevant whether the accused person did physically participate in the actual commission of the offences or not. It is sufficient to show that he associated himself with the unlawful purposes" [Emphasis added]*

The doctrine of Common Intention is rooted in Section 20 of the Penal Code Act which is couched in the following terms:

> ***"20. Joint offenders in prosecution of common purpose***
>
> *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."*

In their respective defences, A2 and A3 raised an alibi. A2 stated on oath that on the 30th of June, 2011, he was at his home in Kyengera from 7:30pm till the next day at 6:30 when he woke up and went to meat packers. He was with his wife and children.

On the other hand, A3 in his sworn testimony denied knowing A1 and A2 and stated that on the 30th day of June 2011, he was at his workplace in Bulenga, Kikaaya from 7am in the morning till 9pm when he left work and went home where he stayed with his wife and children.

In his judgment, the trial judge correctly set out the law as to the defence of alibi as pronounced by Supreme Court in ***Natete Sam Versus Uganda SCCA No.053/2001*** *thus:*

> *"... Where an accused pleads an alibi as a defence, the prosecution must do more than merely placing him or her at the scene of crime. They must* disprove or otherwise discredit the defence of an *alibi. The mere putting the accused at the scene of crime is not enough."*

Thereafter the trial judge went ahead to evaluate in detail the evidence of both the prosecution and defence on the issue of participation, and in particular the charge and caution statement of A1 which the trial judge found to be truthful, the testimony of PW2, the recovery of the late Lwanga's properties from A3's house and PW7's testimony as to the conduct of A1 and A2 in escaping while at Mutukula and concluded that the prosecution had proved beyond reasonable doubt that each of the three accused persons participated in the commission of each of the two offences charged.

The appellants complain that the trial judge did not consider the alibi of A2 & A3. The Supreme Court of Uganda stated in *Lt. Jonas Ainomugisha Vs Uganda, SCCA No. 19 of 2015* that one of the ways by which the prosecution discharges its burden to disprove an alibi is by investigating its genuineness. But this is possible in cases where the appellant brings the alibi forward as soon as possible. The second way of disproving of an alibi is for the prosecution to adduce cogent evidence which puts the accused at the scene of crime.

In the instant case, evaluation of the 2nd and 3rd appellants' alibis by the trial court using the first option was not possible since there was no evidence before it as to when A2 & A3 first raised their respective alibis. This left the trial court with the 2nd option. The trial court was satisfied with the evidence adduced by the prosecution which put the appellants at the scene. As such, we find that the appellants have no basis for faulting the trial judge not to have considered the alibis of A2 & A3.

We are also unable to fault the trial judge on his findings about the participation of the appellants in the commission of the offences. The record shows that A1 and A2 were put at the scene of the crime from where the deceased was killed by A2 in the presence of A1 and the vehicle robbed by the two. Even if A3 was absent from the scene, he was proved to have been part and parcel of the planning. He also aided the commission of the crimes by separating the deceased from his turn boy (PW3) thereby making it easier for A1 and A2 to meet no resistance at the scene of the crime when killing the deceased and robbing the vehicle. He also shared in the proceeds of the sale of the robbed vehicle. Grounds 3,5,6 and 7 of the appeal, therefore, fail.

Resolution of ground 4:

Ground 4 as set out in the Memorandum of Appeal was to the effect that *"the Learned Trial Judge erred in law and fact when he convicted the appellants of Aggravated Robbery without proof of use of a deadly weapon which occasioned and miscarriage of justice"*. However, in their

written submissions the appellants stated that the prosecution failed to prove the ingredients that there was use of violence or threat to use violence, or that the assailants used or threatened to use a deadly weapon or that there was use of a deadly weapon. Further, that no deadly weapon was adduced by the prosecution and tendered in court as having been used by the appellants in the robbery.

In his judgment, the trial judge first correctly set out the elements of the offence of aggravated robbery which the prosecution had to prove namely: i) That there was theft of property; ii) There was use or threat of use of violence during the theft; iii) There was possession of a deadly weapon or cause of death or grievous harm of any person at the time of or immediately after the time of robbery; and iv) The participation of the accused persons or any of them.

When dealing with the issue of use of a "deadly weapon" and violence during the theft, the learned trial stated thus:

> *"PW.2 testified that the dead body had a wound on the back of the head. PW.3 testified that her husband's dead body had an injury on the head which went inside. Dr. Onzivua who conducted the postmortem examination found that the body had an internal fracture of the skull. There was a swelling in wards and a circular mark which he said was caused by a round object, like the round end of a harmer. He described the injury as severe fracture of the skull caused with a lot of force. The above prosecution evidence shows that actual violence was used in the execution of the theft of the motor vehicle. I accordingly find that the prosecution has proved the ingredient of violence beyond reasonable doubt.*
>
> *Further the evidence shows that the object used to hit the deceased's head and resulting into the extent of the injury testified to by the prosecution witnesses was capable of causing death or grievous harm. The injury caused actually resulted to (sic!) James' death. I accordingly find the ingredient of possession of deadly weapon as defined in Section 236 (sic) (3)(a) of the Penal Code Act and also the ingredient of death proved beyond reasonable doubt."*

We have reviewed the evidence on the court record in respect of ground 4, the analysis of the trial judge cannot be faulted.

With regard to the appellants' specific complaint to the effect that the trial judge convicted the appellants of Aggravated Robbery without proof of use of a deadly weapon, we find that there was no error on the part of the trial court. Section 286 (2) & (3) of the Penal Code Act simply

required that the prosecution adduces evidence to the effect that the appellants were, at the time of or immediately before or immediately after the time of the robbery either in possession of a deadly weapon or caused death to any person or caused grievous harm to any person. In the instant case, the prosecution satisfied the requirement of the law when its witnesses proved that the appellants had caused the death of Late Lwanga Charles James during the robbery of his truck.

In the result, ground 4 fails.

Resolution of ground 8:

Ground 8 of the appeal is to the effect that the Learned Trial Judge erred in law when he sentenced the appellants A1, A2 & A3 to different sentences i.e. 41 years' imprisonment, 36 years' imprisonment and 31 years' imprisonment respectively which sentences were illegal, based on wrong legal principles, harsh and manifestly excessive given the circumstances of the case. The appellants also faulted the trial judge for not considering the fact that the appellants A2 and A3 were 1st offenders, bread winners of their families, had reformed while in prison by making arts and crafts, and had undergone rehabilitation.

We have reviewed the court record. The mitigating factors which the appellants' counsel at the trial put before the trial court included A2 and A3 being 1st offenders, bread winners of their families, having reformed while in prison by making arts and crafts, and having undergone rehabilitation. The factors were considered by the trial judge while sentencing the appellants and he expressly stated so thus:

> *"I have considered the mitigating and aggravating factors put forward in respect of each of the convicts." [Emphasis added].*

With regard to the different sentences that were given to the appellants, the trial judge after considering the aggravating and mitigating factors stated the reasons for the different sentences in the following terms:

> *"With regard to Kavuma George A1, I find him the architect of the offences committed and a habitual offender. I find a sentence of 45 years imprisonment on each of the offences committed appropriate. I deduct therefrom nearly 4 years spent on remand and sentence [him] to 41 years' imprisonment for each of the offences charged to run from the date of completion of the sentence he is currently serving in respect of High Court Criminal Case Number. A24 of 2011.*

As regards Mayanja James A2, I find him a first offender. I consider 40 years appropriate in respect of each of the sentences charged. I deduct therefrom nearly four years spent on remand and sentence him to 36 years imprisonment on each of the offences charged, to run from the date of conviction, that is 16th October 2015.

As for Mujuni Richard A3, I find him a first offender and I find him a principal [offender] by virtue of his participation as an aider and abettor. I find a sentence of 35 years appropriate. I deduct therefrom the 4 years spent on remand and sentence him to 31 years' imprisonment on each of the offences charged effective from the date of conviction, that is 16th October 2015. These sentences for each of the convicts will run concurrently as the offences were committed in the same transaction and against the same victim."

The trial judge gave very clear reasons as to why he meted out the different sentences to the appellants even if the offences were committed in the same transaction and against the same victim. For this court, as a first appellate court, to interfere with the sentences imposed by the trial court which exercised its discretion, it must be shown that the sentences are 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 Vs Uganda, Supreme Court Criminal Appeal No.16 of 2000 (Unreported); Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported);

Counsel for the appellants has not brought any of the appellants' complaints about the sentences within the ambit of the grounds upon which this court may lawfully interfere. As we have already shown, all the complaints raised before this court about the sentence were put before the trial court and it considered them before exercising its discretion to impose the sentences complained about. The appellant has no basis for faulting the trial judge on that basis.

Further, the sentences appear to be within the range of decided cases of the Supreme Court and Court of Appeal for similar offences and facts and the sentencing range stipulated in the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 – Legal Notice No.8 of 2013.

According to Part 1 of the 3rd Schedule of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 – Legal Notice No.8 of 2013, the starting point for the sentence in cases of murder and robbery is 35 years and the maximum sentence is death.

In *Muhwezi Bayon Vs 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 in respect of sentences of first offenders in murder cases 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."*

In Ojangole Peter Vs Uganda, Supreme Court Criminal Appeal No.34 of 2017, the Supreme Court confirmed a sentence of 32 years imprisonment imposed by the Court of Appeal for the offence of aggravated robbery after deducting the period of 2 years and a half the appellant had spent on remand.

In *Guloba Rogers vs Uganda, Court of Appeal Criminal Appeal No.57 of 2013* where the cause of Death of the deceased was multiple organ failure due to damage to the brain and the cervical spinal cord, the Court of Appeal set aside the sentence of 47 years' imprisonment imposed on the appellant for the offences of murder and aggravated robbery and substituted it with a sentence of 33 years and 7 months' imprisonment after deducting the period of 1 year and 5 months that the appellant spent on remand.

In *Budebo Kasto vs Uganda, Court Appeal Criminal Appeal No.0094 of 2009* the Court of Appeal upheld the sentence of life imprisonment for the offences of aggravated robbery and murder that was given by the trial judge.

More recently, in *Senfuka George William Vs Uganda, Court of Appeal Criminal Appeal No. 420 of 2016* a sentence of 40 years' imprisonment was imposed by this Court in our judgment dated 18th May 2021. In that case, the appellant had killed the deceased, a 16-year-old, by cutting her neck using a panga. This was only three days after a report had been made to the Police that the appellant had defiled the deceased in the previous year.

In the premises, the sentences of A2 & A3 who are first offenders are within the range of the decided cases. The sentence for A1 was aggravated on account of being a repeat offender. Ground 8 accordingly fails.

865 **Conclusion**:

1. The appeal is dismissed.

2. The conviction and sentences of the trial court are hereby confirmed.

We so order.

Signed, dated and delivered this 27th day of Sept 20.....

KENNETH KAKURU

Justice of Appeal

MUZAMIRU MUTANGULA KIBEEDI

Justice of Appeal

IRENE MULYAGONJA

Justice of Appeal