IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera, DCJ, Mulyagonja and Luswata, JJA

CRIMINAL APPEAL NO. 705 OF 2015

MUSANA ALEX:::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the judgment of Batema, N. D. A, J dated 25th February 2014 in Fort Portal HCT-01-CR-SC-No.0022 of 2012)

JUDGEMENT OF THE COURT

This appeal arose from the decision of the High Court sitting at Fort Portal in which the trial judge convicted the appellant of the murder of a woman in her prime and sentenced him to 25 years' imprisonment.

The facts that were accepted by the trial judge were that the deceased, Kyalisiima Beatrice, a married woman went out with relatives, in laws and friends on a market day at Kifunjo Trading Centre, in Kyenjojo District. She was last seen walking in the company of her brother in-law, Kateeba Vicent and an admirer, Musana Alex, both of whom showed amorous interests in her. It was in evidence that the deceased was related to Mujasi Joseph who said that on the fateful night the deceased took alcohol at his bar while in the company of Kateeba, Musana and one Gumisiriza. And that at around 9:00 pm Mujasi Joseph closed the bar and they all left, but on his way home he met the four of them taking more alcohol at one Kiiza's or Kaleija's place. That he talked to them for a while but they left him behind because his motor cycle had developed a problem. That the three all seemed to be heading

to their homes in the same direction, except for Musana who lived in Mbale Village in the opposite direction.

Mujasi later followed the three and caught up with them at Nyansimbi swamp. He asked the appellant, Musana, where he was going instead of going to his home which was in the opposite direction, but Musana did not give him an answer. That thereafter, he overtook them and asked Gumisiriza to hurry up and follow him since they were close neighbours. Gumisiriza, PW2, told court that he too left the deceased at Nyansimbi swamp walking with Kateeba who held her arm insisting that since she was his sister in law, he would escort her home. And that Alex Musana followed them at a short distance also insisting that he was following his girlfriend, Kyalisiima, who had taken beer on his account.

The following day Kyalisiima's dead body was discovered lying in the grass near a home at Bulingo Trading Centre in circumstances that suggested that she was raped before she was murdered. And that according to Gumisiriza, Bulingo the place where Kyalisiima's body was found was about 1km away from Nyansimbi swamp where he last saw her and left her in the company of Kateeba and the appellant. Mujasi then reported the matter to the Police who arrested the appellant and he was prosecuted for murder, convicted and sentenced to 25 years' imprisonment. He now brings this appeal on two grounds as follows:

1. The trial judge erred in law and fact when he held that the appellant is the rapist who strangled the deceased to death yet the prosecution did not adduce credible evidence as to the cause of death.
2. In the alternative, but without prejudice to the above, the trial judge erred in law and fact when he sentenced the appellant to 25

years of imprisonment, which sentence was manifestly harsh and excessive.

The appellant proposed that the appeal be allowed, his conviction be quashed and that his sentence be set aside. The respondent opposed the appeal.

At the hearing of the appeal, on 7th September 2022, the appellant was represented by Mr Richard Rwakakoko Mugisa on State Brief. Ms. Nakefeero Fatinah, Chief State Attorney and Mr Obbo Patrick Oneko, State Attorney, represented the respondent.

Counsel for both parties filed written submissions as directed by court. They each prayed that the same be adopted by court as their submissions in the appeal and their prayers were granted. The appellant's counsel had prior to the hearing filed written submissions on 19th August 2022, while counsel for the respondent filed a reply on 5th September 2022. This appeal was therefore disposed of on the basis of written submissions only.

Determination of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence from the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**)

In resolving this appeal, we considered the submissions of both counsel and the authorities cited and those not cited that are relevant to this

matter. We reviewed the submissions in respect of each of the grounds of appeal, immediately before we disposed of each of them.

Ground 1

In this regard, counsel for the appellant submitted that the trial judge based his findings that the appellant was the rapist who strangled the deceased on the DNA Expert Report, and that there was no other hypothesis for the murder of the deceased. Counsel further submitted that the trial judge based the conviction on circumstantial evidence, but he opined that circumstantial evidence must point to the guilt of the accused and lead to no other inference. He went on that PW2, Gumisiriza John, testified that at the Swamp Nyansimbi, Kateeba held the deceased's hand and said the deceased was his sister in law and he would lead her home. That at that moment the appellant stood a short distance away. He added that the testimony of this witness corroborated that of PW1 who testified that as he headed home, he left the deceased with Kateeba who continued along the way with her. He concluded that from the testimony of PW1 and PW2, the inference drawn was that Kateeba was the last person to be seen with the deceased on that fateful night. That the circumstantial evidence points to Kateeba as the murderer and not the appellant in this appeal.

Counsel for the appellant went on to submit that PW5, the Officer who conducted a post-mortem exam on the body of the deceased, testified that he was only a Senior Clinical Officer. Further that he did not study pathology. Counsel contended that he was not a competent person to work as a Medical Officer and he could not tell whether there was any other reason that could have caused the death of the deceased. He went on that without competent medical personnel or a pathologist, the testimony of the witness was inadequate for the trial judge to base his

findings on to prove the cause of death. He suggested that the deceased could have died of other causes, for instance by drinking too much alcohol, after which she could have been strangled by any other person.

He went on to impress it upon us that the DNA Report did not indicate the act which was the cause of death, neither did it indicate that the sexual act could have been performed before death and/or the cause of death of the deceased in the absence of the appellant. He added that the character, or the behaviour, of the appellant when the Local Council (LC) 1 Chairperson contacted him did not show any sign of guilt. And that therefore the evidence of the prosecution left a lot to be desired and could not prove the participation of the appellant, as well as the cause of death, beyond reasonable doubt.

The appellant's counsel concluded his submissions on this ground with the assertion that the trial judge based his decision on unclear circumstantial evidence which pointed to inferences other than the guilt of the appellant. He prayed that we find that this ground of appeal succeeds.

In reply counsel for the respondent raised a preliminary objection with regard to this ground of appeal. She said that it grossly offends rule 66 (2) of the Court of Appeal Rules, because it was argumentative and had narrative as opposed to being concise. Counsel prayed that for that reason this court strikes out this ground of appeal. The appellant's counsel did not file a rejoinder to this objection. However, we will briefly consider the objection since it is important that counsel coming to this court follow the rules while framing the grounds of appeal.

Ground 1 of the appeal was very short, and we will set it down again here below to aid our analysis:

"The trial judge erred in law and fact when he held that the appellant is the rapist who strangled the deceased yet the prosecution did notadduce credible evidence as to the cause of death."

Rule 66 (2) of the Court of Appeal Rules provides as follows:

> **(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided.**

Counsel's complaint is that the ground of appeal included narrative. However, we do not think that stating the facts upon which the trial judge based his decision to find that it was the appellant who caused the deceased's death was or could constitute the kind of narrative that is prohibited by the rule above. The information included in the ground of appeal was actually a point of fact; and it was followed by the statement that the trial judge erred because there was insufficient evidence to prove the fact, which is a point law.

We are thereof of the well-considered opinion that the impugned ground of appeal complied with rule 66 (2) of the Rules of this Court. It was concise stating the point of fact with which the appellant was aggrieved and a further point of law that there was inadequate evidence to support that finding. The preliminary objection is therefore overruled.

Counsel for the respondent further submitted that without prejudice to the preliminary objection, ground 1 raises two issues: the participation of the appellant, and the cause of death of the deceased. Counsel went on to address the two issues as follows:

With regard to the participation of the appellant, counsel submitted that the law on circumstantial evidence was laid down in the case of **Bukenya Muhamed & others v Uganda, Court of Appeal Criminal Appeal No. 903 of 2014**, where the court cited with approval the principles that were laid down in the case of **Kenneth Kaawe v Uganda, Court of Appeal Criminal Appeal No. 103 of 2011**, that the inculpatory facts must be incompatible with the innocence of the accused. That there must be no other explanation other than that of guilt; there should be no coexisting circumstances to weaken or destroy the inference of the accused's guilt. Counsel then concluded that the learned trial judge rightly appraised all the evidence before him, including the DNA evidence, before arriving at the finding that the appellant was responsible for the murder of the deceased.

Counsel went on that the DNA Report was never contested at the trial and was admitted in evidence without any objection, as it is shown on page 15 of the record of appeal. And that at page 14, paragraph 7 of the record, the trial judge analysed the DNA evidence and concluded that he found the appellant was the donor of the sperm found inside the vagina of the deceased. That the DNA matched 12/16 with the sperm found inside the vagina of the deceased, whereas Kateeba's blood marched the sample by only 2/16 parts. That therefore the DNA test excluded Kateeba as the murderer. Counsel for the respondent therefore supported the findings of the trial judge because they were based on the unshaken testimony of PW4, the expert from the Directorate of Government Analytical Laboratory.

The respondent's counsel further pointed out that at page 36, paragraph 2 the trial judge stated that this DNA test was good circumstantial evidence connecting the accused to the murder of the

deceased. That of the two (2) suspects she was last seen with in the night, the appellant is the one who raped her before she died. And that if it had been consensual sex there would have been no sign of a struggle at the scene of the crime. Counsel went on that from this analysis by the trial judge it was clear that the DNA test pointed at the appellant and it was good circumstantial evidence that placed the appellant at the scene of the crime.

In response to the contention that the DNA did not disclose the cause of death and that any sexual act could have been before the death of the deceased, counsel asserted that this argument was merely speculation. That the appellant had a chance to testify before court but he never told court that he had sexual intercourse with the deceased before her death. Instead his was a total denial. Further that the appellant's claim that he went home and left the deceased with Kateeba was a lie and therefore inconsistent with the innocence of the appellant. Counsel relied on a decision of the Supreme Court in **Kato John v Uganda, SCCA No 30 of 2014** to show that the appellant's *alibi* could not hold. He explained that in that case the court stated that being at another place, just after the occurrence of a murder was not believable as an *alibi* since there was nothing to prevent the appellant from moving from one place to another.

Counsel went on to explain that the appellant's defence of *alibi* was sufficiently rebutted and discredited by the evidence adduced by the prosecution; particularly the evidence of PW1 and PW2 as well as PW4, all of whom placed the appellant at the scene of the crime. She went on to state that at page 7 paragraphs 1 and 2 of the record of appeal, PW1 who was an eye witness gave sworn testimony confirming that the appellant, Kateeba and the deceased took the same direction together

in spite of the fact that the appellant's home was in a different direction. Further that at page 9 paragraphs 5 and 6 of the record of appeal, PW2 testified that though the appellant did not live in the same direction he said he was following his girlfriend who had taken his beer. And that when they reached the swamp, Kateeba held the deceased's hand and said she was his sister in law and would lead her home. That Alex stood a short distance away. That he left them standing there and went home, only to find out the following day that the deceased met her death.

Counsel then concluded on this point that the trial judge was right when he rejected the defence of the appellant as a lie. This was because Nyansimbi Swamp was past Bufunjo Kifuka, which was not near any junction to the appellant's home. And that this was the reason why both PW1 and PW2 were concerned about the direction that the appellant was headed to. That it was therefore not true that the appellant went to his home and left the deceased in the hands of Kateeba; instead, it was a deliberate lie which was incompatible with the appellant's innocence because he was seen far away from his home taking the direction of the deceased while clearly following her.

With regard to the contention that PW5, a Senior Clinical Officer, was not qualified and therefore was incompetent to determine the cause of death of the deceased, and that the deceased could have died of other causes such as overconsumption of alcohol, counsel referred to the analysis that the trial judge carried out on the evidence before him. She submitted that the trial judge did not place much reliance on the evidence of PW5, but he looked at the entire evidence on the record and even noted, at page 36 paragraphs 4 and 5 of the record, that even without the medical expert's view, it was easy to see that the deceased was strangled to death by the rapist. The trial judge pointed out that

her neck was twisted and she had bruises around it meaning that she tried to fight off the person strangling her and tried to free her neck. Counsel asserted that this finding of the trial judge was based on the evidence of PW1, PW2, PW5 and PW6, who all described the state of the body of the deceased at the scene of the crime and noted that she had bruises around the neck. Counsel concluded that the evidence of PW5 aside, all the circumstances put together would have led to the trial judge convicting the appellant, and rightly so.

With regard to the contention that the appellant's behaviour when contacted by the LC1 chairperson did not show any sign of guilt, counsel for the respondent asserted that this was not true. She submitted that the appellant was only subdued and arrested because he feared mob action. Secondly, that according to PW3, at page 11 paragraph 3 of the record of appeal, the appellant told him that he had heard about the death of the deceased who he knew well, and that he had been drinking together with her the previous day. That although, according to PW2, the appellant referred to the deceased as his girlfriend, he did not show any concern about her death when he reached the scene of the crime; instead he went about thatching his house. That all this put together with the lie referred to above meant that the appellant's conduct was incompatible with innocence.

The respondent's counsel then concluded that considering all the evidence before him, the trial judge arrived at the correct conclusion that the inculpatory facts in this case pointed at no one else but the appellant as the person who raped and murdered the deceased. That there was no other explanation for the conduct of the appellant other than that of guilt and there were no coexisting circumstances that weakened or destroyed the inference of the accused's guilt. She prayed

that this court confirms the findings of the trial judge and that this ground of appeal should fail.

Resolution of ground 1

It is clear that on the basis of the submissions of both counsel, 2 issues lie for the determination of this court under the first ground of appeal, as follows:

i. Whether there was sufficient evidence on the record to put the appellant at the scene of the crime;
ii. Whether the trial judge wrongly relied on circumstantial evidence to convict the appellant of murder.

The prosecution called several witnesses to prove the case against the appellant. We reviewed the evidence in detail before resolving the two issue because it is the same evidence that would be required to answer both issues, and it was as follows:

Mujasi Joseph (PW1) was the principal witness. He stated on oath that the deceased Kyalisiima Beatrice was his relative, because her mother was a sister to his grandmother. He explained that he was a businessman and that he had a bar at Kifunjo. That on the night of 27th June 2011, the appellant went to his bar with Kyalisiima and Kateeba. That Kateeba bought Waragi and Mkomboti which the three of them took, after which they all left at around 9.00 pm. He went on that while on his way home, his motorcycle ran out of fuel. That as he was looking for village mates to push the motorcycle, he went into Kiiza's bar, which was sometimes referred to in the various testimonies as Kaleija's bar. That he found the appellant, Kateeba and Kyalisiima in the bar with another called John Gumisiriza. That the four left the bar before him, but he asked them to wait for him at the next hill so that they could

help him push the motorcycle. That he later followed them and found them at Nyansimbi Swamp and it was apparent that they had taken alcohol. That he asked the appellant where he was going, but the appellant did not answer him so he passed the group and went on to his home. That later Gumisiriza returned home; they wished each other a good night and Gumisiriza went to bed.

PW1 went on to state that the following morning while he was going to the Trading Centre, when he reached a place called Bulingo, he found the body of Kyalisiima and she had been murdered. She lay on her back and had been raped and the body left by the side of a house. Her dress had been folded up to the chest and her knickers were torn. That it was early in the morning and he did not see any wounds because he stood at a distance from the body. That the Police were called in and when they interviewed him he told them that he last saw the deceased with Alex, the appellant. That he suspected that Alex committed the crime. The police then went looking for the appellant at his home.

PW1 was cross examined and he said he had known the appellant for about 15 years by the name Alex. That he had known the deceased for about 20 years and Alex was not related to her. That however Gumisiriza was a relative of the deceased, a brother by the clan but he was not related to Kateeba. Further that Kateeba was the brother-in-law of the deceased who was married to a soldier. That she resided in Kijenge, about 1 km away from Bulingo where the body was found. He clarified that he last saw the deceased the previous day at 9.00 pm. That they took Waragi in a small glass which they shared between the three of them. That they did not quarrel; they were happy and jolly and they left the bar together. He clarified further that he next met them in the company of each other at a bar, about 1 km away from his bar, where

he stayed for about 7 minutes. That the 3 were still drinking alcohol but they were not drunk. That he next found them near the Swamp, Nyansimbi.

He explained that he told people who had gathered in a crowd where the body was, by the roadside, that he had last seen the deceased with Alex. That he could not tell who killed the deceased but he had last seen her with him. That Alex was a key suspect; his clothes were recovered and they had dew and grass. There was no reason given for the death of the deceased.

The court examined PW1 about the whereabouts of the deceased's body when it was found. He said that the body was found near a house before the junction to her home. That she would have branched off a short distance ahead to get to her house.

John Gumisiriza was the second witness for the prosecution. He said he knew Kyalisiima who was a resident of his village. And that while he was in Mujasi's bar, the lady came to the bar and bought alcohol and was joined by Alex and Kateeba and they continued drinking alcohol. He confirmed that they retired from the bar, Kyalisiima, Kateeba and he. That Alex followed them and they walked to Kalaija's home where Kyalisiima bought more alcohol. That they left but Alex followed them although he did not stay in the same direction as they did. That he asked Alex why he was following them and Alex explained that he was following his girlfriend who had taken his beer. That they walked up to the Swamp Nyansimbi and Kateeba held Kyalisiima's land and said she was his sister in law; that he would therefore take her home. That Alex was a short distance away and he left them standing there and went home. That the following day he learnt that Kyalisiima was murdered.

The witness explained that he saw the body. That the deceased's clothes were pulled up and her knickers were torn. He further stated that he was taken to the police to make a statement and he made one telling them what he stated in court. Further that he last saw the deceased with Alex and Kateeba and he later saw Alex under arrest and that he was arrested by the LC Chairman and residents of Mbale village. In cross-examination PW2 clarified that the deceased was his relative. That he didn't know whether she had an intimate relationship with Alex or Kateeba. Further that her husband was called Sanyu. He further explained that the deceased, Kateeba and Alex each came to the bar alone. Further that he did not know who bought the alcohol but the three of them drunk from the same glass at about 7.00 pm. And that they left the bar at around 9.00 pm, the four of them in a group. That Alex followed them and at Kalaija's bar, he was still with them. That the deceased bought them a small glass of Waragi.

PW2 further stated that he saw the deceased and Alex in discussions while in Musana's bar but he did not know what they were discussing. He explained that there was no quarrel between them but that Alex claimed he had bought her drinks. But he knew of no love affair between Alex and the deceased. That he left them behind but the deceased was in the hands of Kateeba who held her hand and said he was leading her home as her brother-in-law. He added that Kateeba was the first person to be arrested. That between the two men, they knew who killed the deceased but Alex was the key suspect, though he left them together.

Kalulu Stephen was the Local Council (LC) I Chairperson of Mbale Village, Bufunjo sub-county, Kyenjojo District. He said that the deceased was his relative, a maternal aunt. That on 28th June, 2011 at around 8.00 am, he heard that someone had been found dead in their

Trading Centre, so he went to the scene where the body was found. That he recognised the body as that of Kyalisiima and the suspects were identified as Alex Musana and Kateeba. That he therefore decided to go and arrest Musana at his home where he found him thatching his house. That he asked Musana to surrender the clothes he was wearing the night before. And that in the company of one Kyomuheado and Mbaziira they recovered the clothes, a pair of trousers and a T-shirt. That the knee area of the trousers had dust, dew and grass and the fly was wet with semen and there were bits of grass around the knee area. That he took Musana to Kifunjo Police Post with the clothes that he recovered from his house, in the presence of his mother.

In cross-examination PW3 stated that the appellant was named by the crowd as the suspect. That he was told that the deceased was last seen in his company; in a group of three people: Kyalisiima, Alex and Baguma Vicent. That he arrested Alex because he was the one that he knew from his area, on allegations of murder. That the appellant did not confess to anything but he took his clothes as exhibits. He confirmed that the clothes had dust and were wet with dew around the knees and they also had pieces of grass. He also confirmed that the fly was wet with what he thought was semen. He clarified that there was another person arrested and he was Kateeba not Baguma.

The prosecution also called Geoffrey Onen (PW4) from the Directorate of Government Laboratories. He stated that he was a biochemist with a Master's Degree from Kharkov University in the Ukraine, of 1992. That he also had a post graduate qualification from Zhejiang University in China, 1998, in toxicology and pesticide toxicology. He said that he was the head of the DNA Laboratory and that he normally examined exhibits received from the Police. That his duties included carrying out DNA

analysis and writing reports of the results which were handed to the Police. The witness further stated that he produced a Laboratory Report which he signed, **Lab Ref No. F.B 235/2011** and dated 30 December, 2013. He detailed the contents of the report and explained the process through which the investigations were done on three samples: sample from the trousers of the accused suspected to be human semen; High Vaginal Swab (HVS) from the vagina of a deceased person; blood sample from the suspect Musana Alex; and control blood sample of another suspect, Kateeba.

The witness further explained the findings from the analysis. The summary was that Musana Alex the suspect could not be excluded as a potential donor or contributor to the Y profile recovered from the High Vaginal Swab; the Y profile generated from the suspect's sperm (Alex) was identical to that recovered from the biological material recovered from the trousers, and that a single female profile was recovered from a fraction of the High Vaginal Swab. The DNA report was tendered in evidence as **ExhPE1**, without any objection from counsel for the appellant.

Counsel for the appellant cross examined PW4 and challenged the evidence from the DNA results due to the length of time between the crime and the analysis. PW4 explained that it is possible to get DNA results after a long period of time and that the tests are carried out over a period of time. That the last tests are usually concluded about one week before writing the report.

The prosecution next called Gibutai Martin (PW5), a Senior Clinical Officer attached to Kyarusozi Health Centre IV, Kyenjojo. He stated that in 2011, he was in charge Bufunjo Health Centre III. That he held a Diploma in Clinical Medicine and Public Health, Mbale, of 1988 and had

practiced for 13 years. He identified **PF48C**, the Post Mortem Report in respect of Kyalisiima Beatrice of Kijangi. He read the findings in the Form and explained that though he was not a Medical Officer, he communicated with the District Medical Officer (DMO) who permitted him to carry out the post mortem examination on the deceased. The report was admitted in evidence as **ExhPE2.**

The witness was cross examined about his qualifications. He explained that he had a Diploma in Clinical Medicine and Community Health. He explained that the word written as *"sophication"* was most likely strangulation. That he could not tell whether there was any other reason for the death of the deceased. That something rough referred to in the report could have referred to rough fingers. In re-examination he stated that the possible cause of death was strangulation.

Corporal Were Sam (PW6) stated that he was a police officer attached to Bundibugyo Central Police Station (CPS), and that in 2011 he was attached to Kyenjojo Police Post. That he knew the appellant because he worked in the area on the case before court. He further stated that in the morning of 28th June 2011, while at Bufunjo Police Post, the LC Chairperson reported a case of a dead body of a woman lying near a house in Buhingo Trading Centre and it was identified to him as the body of Kyalisiima. He said it was he that registered the complaint and recorded their statements, including that of Mujasi. The witness stated that the body had scratches, blood oozed from the mouth and ears and there were signs of a struggle in the area, in a bush with grass that was about 2 feet tall. That there were no weapons at the scene. So he requested for a doctor to come and carry out an autopsy. That the doctor came and examined the body but because the witness had a feeling that the woman was raped before she was murdered, he requested the doctor

to take a swab from her vagina, which he did. He explained that his suspicions about the rape was from information that the deceased was seen moving around during the previous day with Musana and one Kateeba.

The witness further explained that he worked with LCs to find the suspect in the next village, Mbale. However, he was informed that the suspects had already been arrested by the Chairman LC and taken to the Police Post. That he was also informed that the Chairman brought them with some exhibits, a pair of trousers and a t-shirt recovered from the suspects. He identified them and they were admitted as Identification items, together with the Exhibit Slip, **CRR 49 of 2011**, which the witness signed. He stated that he sent the exhibits to the District Police Headquarters.

The witness confirmed his testimony on cross examination and did not waver. He said that the body of the deceased was in grass and there were signs of a struggle indicated by the grass lying flat on the ground and it had bruises on the neck. That because he suspected the victim was raped, he requested for a vaginal swab. That it was the Chairman who took the exhibits to the Police Post, and after he marked them he sent them to the Headquarters. He explained that he had not seen them again until that day, in court.

The appellant testified as DW1. He denied the offence. He made a plain statement in which he said that though he was at Mujasi's bar with Kyalisiima and Kateeba, Kyalisiima sat with Kateeba. And that when it was time to close the bar, Mujasi sent them all away and left with his wife. And that when he got to his home, he left Kyalisiima with Kateeba and the two walked on; they continued to their home. And that the next day, he was at work when the LC Chairman arrested them with the

Police and took him to Bufunjo Police Post, from where he was transferred to Kyenjojo. He complained that he had spent a long time on remand and prayed that court considers setting him free. He called no witnesses to testify on his behalf.

Issue 1

With regard to the issue whether there was sufficient evidence on the record to put the appellant at the scene of the crime, the trial judge found and held, at page 37-38 of the record of appeal, that:

> *"I have no doubt the rapist who strangled her to death was the accused. Kateeba is ruled out by the DNA expert's report. There is no other hypothesis for Kyalisiima's murder.*
>
> *The assailant wanted to have sexual intercourse with her by force and indeed he raped her. Between Kateeba and Musana who were last seen with her in a lustful mood all evidence points at the accused. Even if I was to rule that both Kateeba and Musana were possible rapists and murderers, the other evidence shows that Kateeba was last seen holding hands with her in a friendly manner. She accepted Kateeba. She rejected Musana Alex. But all the same Musana continued following her like a hungry hyena ready to pounce at her anytime it got the opportunity. I believe that opportunity came once Kateeba ceased protecting her that night. He either left her on her own or allowed the accused to divert her backward to the trading centre they had already by passed, Buhingo.*
>
> *In his defence the accused admits that they had drinks with the deceased. That PWl Mujaasi by-passed them on the way home. That he went home near Bufunjo-Kifuka and left the deceased continue ahead to her home in the company of Kateeba. I want to straight away reject this defence.*
>
> *It is a lie. PW1 and PW2 clearly stated that the accused was last seen in the company of the deceased at Nyansimbi swamp past Bufunjo Kifuka. It was not near any junction to the accused's home. That is why they all got concerned and asked him where he was heading to. In fact, Gumisiriza was reluctant to leave Kyalisiima in the hands of this accused. He only moved on when Kateeba assured him that he would lead her home as a sister -in-law. The accused was not a relative of the deceased while PW1 and PW2 were. Having their female relative whom*

they knew as a married woman gave them a sense of responsibility. They noted where they left her and with whom. They also noted who was following them."

We observed that in this portion of his judgement, the trial judge focused on two important pieces of evidence, and two principles: the doctrine of the *'last seen'* and the DNA test. We shall therefore interrogate the two, starting with the doctrine of the person last seen with the deceased.

In **Musyoka Maingi Nguli v Republic [2019] eKLR**, the Court of Appeal of Kenya quoted from the decision of the Nigerian Court of Appeal in **Stephen Haruna v The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009,** where it was opined as follows:

"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstances. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

In this case, both PW1 and PW2 stated that they left the deceased with the appellant and Kateeba. Kateeba did not testify because he was a co-accused and he died in prison before the trial took place. In the absence of Kateeba, it was upon the appellant to prove that he left the company of the deceased before she met her death. Instead, there is evidence that he diverted her from the right course to her home and took her back towards the Trading Centre. One then wonders why he did so, if not to force himself upon her. In any event, she was never seen alive again and the last person she was in the company of on that fateful night was the appellant.

The evidence of the appellant's intentions and attitude towards the deceased, before he was left alone with her, also speak volumes. John Gumisiriza (PW2) stated that the appellant was engaged in a quiet conversation with the deceased while they were still at Mujasi's bar. That he also claimed that he bought her alcohol. His intentions about the deceased were made even clearer when he stated before both Gumisiriza and Kateeba, though the latter did not testify, that the deceased was his *"girlfriend."* The said girlfriend, however, seemed to prefer the company of Kateeba who held her hand and said he would lead her home, meaning that he was taking her away from the company of the appellant. The inference can be drawn from this scenario that the appellant developed a rage against both Kateeba and the deceased, which most probably contributed to his committing this crime of passion.

It is also pertinent to note that the appellant gave no plausible explanation about his participation in the murder of the deceased. He, in the most unconvincing manner, simply stated that when they were at Mujasi's bar, Kyalisiima sat next to Kateeba and he sat by the side and had a drink. That on the way back home, when he got to his home, he left Kyalisiima with Kateba who continued ahead to their home. This testimony did not discredit the testimony of the two witnesses who stated that he followed Kyalisiima and Kateeba though he lived in a different direction from them. We therefore find that the appellant did not rebut the evidence adduced by the prosecution that he was one of the last two persons seen in the company of the deceased, while she was still alive.

The trial judge made the final determination that the appellant committed the crime, and not Kateeba, on the basis of DNA samples

that were taken from the vagina of the deceased compared to samples of biological material drawn from the appellant's trousers, retrieved from his house, and a sample of his blood. He found and held thus, at page 3 of his judgment:

> *"PW3 Kalulu Stephen, the chairperson of Mbale arrested Musana and recovered a pair of trousers with semen around the fry (sic). This exhibit was handed over to police and police sent it to Kampala for forensic DNA tests together with blood samples of the two suspects namely Musana and Kateeba. The DNA expert, PW4 Geofrey Onen, told court that upon subjecting the High vaginal swab to DNA tests with the blood samples of the suspects and semen found on the pair of trousers, he concluded that the DNA test excluded Kateeba. The semen picked from Musana's trousers matched 12/16 with the sperms picked from Kyalisiima's vagina. Musana was moderately the most likely donor of the sperms. Kateeba's blood matched by only 1/16. He did not rape the deceased.*
>
> *My considered opinion is that this DNA test is good circumstantial evidence connecting the accused to the deceased. Of the two suspects she was last seen with late in the night, Musana is the one who raped her before she died. If it had been consensual sex there would not have been signs of struggle at the scene of crime. Disturbed grass like there was a fight is for sure evidence of a struggle. The deceased's knicker(s) was also torn and her black dress had been pulled up to her chest. Her legs lay spread out. I believe the deceased was raped. I have no doubt she was raped by the person whose sperms were found in her private parts - the accused."*

The weight to be attached to evidence from Deoxyribonucleic Acid (DNA) tests was stated by the England and Wales Court of Appeal in **Regina v Alan James Doheny & Gary Adams [1996] EWCA 728.** Writing the lead judgment, Lord Phillips referred to a summary of the concept and the process of arriving at the results by Lord Taylor, CJ, in **R v Deen, [1994] Times, 10 January; [1993] Lexis Citation 3214,** where the CJ set it out as follows:

> *"Human cells in blood and in semen contain DNA. The process of DNA profiling starts with DNA being extracted from the crime stain and also*

from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electro-magnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto-radiograph which can be photographed. When the crime stain DNA and sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not.

Even if a number of bands correspond exactly, any discrepancy between the profiles, unless satisfactorily explained, will show a mis-match and will exclude the suspect from complicity. Thus the first stage in seeking to prove identity by DNA profiling is to achieve a match.

However, unlike finger-printing, a DNA profiling match is not unique. The second stage is therefore the statistical evaluation of the match. This depends upon the number of bands which match and the frequency in the relevant population of such band matching."

The probity of the evidence from DNA samples was also explained by Phillips LJ in **Alan James Doheny** (supra) thus:

"The significance of the DNA evidence will depend critically upon what else is known about the suspect. If he has a convincing alibi at the other end of England at the time of the crime, it will appear highly improbable that he can have been responsible for the crime, despite his matching DNA profile. If, however, he was near the scene of the crime when it was committed, or has been identified as a suspect because of other evidence which suggests that he may have been responsible for the crime, the DNA evidence becomes very significant. ...

The reality is that, provided there is no reason to doubt either the matching data or the statistical conclusion based upon it, the random occurrence ratio deduced from the DNA evidence, when combined with sufficient additional evidence to give it significance, is highly probative. As the art of analysis progresses, it is likely to become more so, and the

stage may be reached where a match will be so comprehensive that it will be possible to construct a DNA profile that is unique and which proves the guilt of the Defendant without any other evidence. So far as we are aware that stage has not yet been reached."

We are persuaded that this is a robust exposition of the process and the law and we shall follow it in making our decision in this case. Evidence from DNA tests, as the trial judge rightly pointed out is circumstantial evidence that strengthens other evidence on the record of the court. And in this case, Geoffrey Onen (PW4) testified that he received the samples that were drawn from the vagina of the deceased, the trousers of the appellant and the blood samples of the two suspects and carried out the DNA tests. He further testified that from the samples, he established the following:

"We proceeded to compare the profiles of the two suspects against the grey trouser and the HVS. Musana's profile matched with that from the grey trousers in all the 16 points. Therefore, there was a high probability that the trouser belonged to the suspect Musana, ... we matched Musana's profile with that of the profile received from HVS, the Y profile. They were able to match at 12 of the 16 tested lociles. The 4 lociles were not recovered so we could not match them. This means the machine never detected the four lociles. We also matched Kateeba Vicent's profile against the HVS and we were only able to recognize only 2 of the 16 lociles. Therefore, the trouser did not belong to Kateeba. It belonged to Musana. The HVS profile was of female origin. We tested using another kit."

PW4 concluded that Musana Alex could not be excluded as a potential contributor to the Y profile recovered from the High Vaginal Swab (HVS). Further that the Y profile generated from Musana Alex was identical to that which was recovered from the biological material recovered from the trousers. And that therefore, the suspect, Musana Alex, could not be excluded as a potential donor/contributor to the Y profile recovered from exhibit HVS AX. Further that the Y profile generated from the

suspect Musana Alex was identical to that recovered from the biological material recovered from the trouser (AB).

The trial judge concluded that since the semen recovered from the vaginal swab taken from the deceased matched the sample drawn from Musana, and not from Kateeba, there was no possibility that Kateeba raped the victim. He therefore could not be the person that killed her because the circumstances at the scene indicated that the deceased was raped and then murdered. The appellant's trousers recovered from his house, from which the semen sample was extracted had other tell-tale evidence. According to the LC Chariman, there was dust, grass and dew at the knee area consistent with the appellant having carried out an activity which involved him placing his knees in grass, dust and dew. And that, added to the presence of wet stains on the fly of the same trousers, put him at the scene of the crime which had flattened grass as a sign of a struggle in which the deceased met her death.

In view of this evidence which was not challenged in cross examination, we cannot fault the trial judge for the finding that it was indeed the appellant who raped and strangled the deceased.

Issue 2

The appellant's counsel advanced the argument that the trial judge wrongly relied on circumstantial evidence to convict the appellant of murder. We agree that all the evidence that we have reviewed above is circumstantial evidence. What then remains for us to consider is the question whether there is any principle that the trial judge did not follow while applying the circumstantial evidence, in order to reach the decision to convict the appellant.

Black's Law Dictionary, 9th Edition, West, at page 636, defines *"circumstantial evidence"* as *"Evidence based on inference and not on personal knowledge or observation"* and *"All evidence that is not given by eye witness testimony."* The same source states that it is also termed as *"indirect evidence"* and the latter is defined as follows:

> *"Indirect evidence (called by the civilians, oblique and more commonly known as circumstantial evidence) is that which is applied to the principle fact, indirectly, or through the medium of other facts, by establishing certain circumstances or minor facts, already described as evidentiary, from which the principle fact is extracted and gathered by inference ..."*

Halsbury's Laws of England, Commentary,[1] at paragraph 453, puts it aptly where the relevance of facts and circumstantial evidence is explained in the following terms:

> *"Since many crimes are committed in secrecy, it is inevitable that, in a criminal trial, direct proof of guilt is often lacking and a great deal of the evidence is indirect or circumstantial. 'Circumstantial evidence' is evidence of one or more facts (such as motive, opportunity, or fingerprints left at or near the scene of the crime) from which other facts (which may be the facts in issue, or secondary or collateral facts) may then be inferred or deduced.*
>
> *A single strand of circumstantial evidence may carry little weight, but when combined with other such evidence the cumulative effect may become very strong. In the absence of evidence directly proving the facts in issue, the defendant may even be convicted solely on circumstantial evidence: in a case of murder, for example, there may be a conviction notwithstanding that the body is never found, provided that there is sufficient circumstantial evidence to convince the jury that the facts cannot be accounted for on any rational hypothesis other than murder.*
>
> ***In seeking to connect the defendant with the offence, facts which tend to show motive for, means of, or opportunity of, committing the offence, or which show that the defendant had made preparations with the offence in view, or had threatened to do the***

[1] https://www.lexisnexis.com/uk/lega

act complained of, are also relevant. *Where the acts constituting the offence reveal any special knowledge, technique or attribute, the possession or non-possession of such special knowledge, skill or attribute is relevant and the non-possession of it may be decisive proof of innocence.*

The subsequent conduct of the defendant may furnish evidence of guilt, for example evidence of flight, or of the fabrication or suppression of evidence, or of the telling of lies. Possession of recently stolen property may, if unexplained, give rise to an inference that the person in possession is the thief or handler of the property."

{Emphasis supplied}

The appellant in this case formed the motive to get intimate with the deceased earlier than at the time and place at which he declared that the she was his *"girlfriend"* for whom he bought alcohol. PW2 testified that there was a conversation between him and the deceased while still at Mujasi's bar. He followed her towards her home which was in the opposite direction to his own home. He waited around even when Kateeba, her brother in law, expressed the intention of protecting her and escorting her home. It is not known when Kateeba left the deceased with the appellant, but other evidence shows that the deceased was raped and strangled to death. The evidence can also be used to prove that she was strangled in the process of being raped.

Nobody saw the appellant rape the deceased. However, after the fact of her rape and death, the appellant's clothes were discovered with stains indicating that he had sexual intercourse in the night when he kept company with the deceased, PW1 and PW2. Had it not been for the curiosity and good judgment of the LC Chairman who carried out a search and discovered the appellant's semen stained clothes, no one would have discovered the appellant's crime. Having discovered the clothes, they were subjected to DNA testing together with the HVS drawn from the deceased and the appellant's DNA drawn from his blood.

And as fate would have it, the semen on his cloths matched the semen collected from the deceased's vagina.

The often cited decision on circumstantial evidence in our courts in that in **Simeon Musoke v R [1958] EA 715**, which was cited with approval together with the decision in **Teper v R (1952) AC 489** followed by the Court, in **Kyeyune Joseph v Uganda, Supreme Court Criminal Appeal No. 48 of 2000**, as follows:

> *"In a case depending exclusively upon circumstantial evidence, the court must before deciding upon a conviction be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See* ***Simon Musoke v R (1958) EA 715.*** *In the English case of* ***Teper v R (1952) AC 489*** *which was followed in Simon Musoke (supra), the court stated that before drawing the inference of the accused's guilt from circumstantial evidence, court had to be sure that there are no co-existing circumstances that would weaken that inference."*

The case now before us falls in that category. The trial judge pieced the evidence together and came to the conclusion that he did and convicted the appellant, because the inculpatory facts were incompatible with the innocence of the appellant. They were incapable of explanation upon any other reasonable hypothesis than that of guilt of the appellant. We therefore find that the trial judge properly applied the principles that are applied upon a conviction based on circumstantial evidence only. He thus made no error whatsoever when he convicted the appellant of the murder of Kyalisiima Beatrice.

Ground 1 thus had no merit and it is dismissed.

Ground 2

In this ground the appellant complains that the trial judge erred in law and fact when he sentenced him to 25 years' imprisonment, a sentence

which he asserted was manifestly harsh and excessive in the circumstances of the case.

Submissions of counsel

With regard to ground 2, counsel for the appellant referred us to the principles upon which the appellate court may interfere with the sentence passed by the trial court, as they were re-stated in **Kyalimpa Edward v Uganda, Supreme Court Criminal Appeal No. 10 of 1995**. He further referred us to the decision in **R v Haviland (1983) 3 Cr.App. R(S) 109**, where it was held that an appropriate sentence is a matter for the discretion of the sentencing judge and that each case has its own facts. That it is therefore the practice that an appellate court will not interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice.

Counsel went on to submit that at the time of sentencing, the trial judge ought to have considered the fact that he based his findings on unclear circumstantial evidence which drew other inferences than the guilt of the appellant. He drew our attention to the testimony of John Gumisiriza who stated the while they were at the swamp, Kateeba held the hand of the deceased and said that since she was his sister in law he would lead her home while the appellant stood a short distance away from them. He further referred to evidence, which we have already evaluated above, and submitted that the inference is that it is Kateeba that killed the deceased, not the appellant.

Counsel went on and referred us to the testimony of the Clinical Officer who carried out the Post Mortem Examination, again, and asserted that he was incompetent to carry it out because he did not study pathology.

That this too led to an inconclusive finding which the trial judge relied upon to convict and sentence the appellant because the Clinical Officer was not a medical officer and so could not establish the cause of death. He went on to discredit the DNA evidence for not showing the cause of death. He then concluded that the appellant was a first time offender, still a young man and capable of reforming. That a sentence of 15 years ought to have been the appropriate sentence in this case. He prayed that the appeal succeeds and that the conviction is quashed and the sentence set aside.

For the respondent, counsel submitted that this ground of appeal was misconceived given that the maximum sentence for murder is death, as it is prescribed by section 189 of the Penal Code Act. She referred us to the principles upon which an appellate court may interfere with the sentence imposed by the trial court, as they were restated in **Jamiru v Uganda, SCCA No 74 of 2007** and **Johnson Wavamuno v U, CA No 16 of 2000,** agreeing with the principles as they were stated by counsel for the appellant.

Counsel went on to submit that in **Hon Akbar Godi v Uganda, Supreme Court Criminal Appeal No. 003 of 2013**, the court confirmed the sentence of 25 years for murder by the deceased of his wife, which was imposed by this court. She also referred us to the decision of the same court in **Karisa Moses v Uganda, SCCA No 23 or 2016**, where the appellant who was 22 years old was convicted for the murder of his grandfather. The Supreme Court confirmed a sentence of imprisonment of the appellant for the rest of his life.

Counsel for the respondent further pointed us to the principle in **Kyalimpa v Uganda** (supra), that was cited for the appellant that an appropriate sentence is a matter for the discretion of the trial court. She

added that on that basis, the Supreme Court in **Bashasha Sharif v. Uganda, SCCA No 82 of 2018** upheld the death sentence. She prayed that the court maintains the sentence of 25 years that was imposed by the trial court and that the appeal be dismissed.

We considered the sentencing proceedings at pages 38 and 39 of the record that was placed before us. We observed that during the proceedings, the prosecution informed court that the convict was a first time offender for he did not have a previous criminal record. Further that he had spent 3 years on remand. That the deceased placed her trust in the convict for she moved with him to various places where they both consumed alcohol. That the convict abused her by killing her and the offence carries a serious sentence between 35 years and death. He prayed that the convict be sentenced to more than 35 years' imprisonment.

For the convict, counsel stated that the he was remorseful. That he was 22 years old at the time he was convicted but he committed the offence when he was only 19 years old. Counsel impressed it upon the trial judge that at the time he committed the offence he was young and in transition from childhood; he was an adolescent. That because of this, he could reform and contribute to the development of his community. He asked court to consider the fact that he did not arrange to kill the deceased; that it was not a premeditated murder. That in addition, no one could tell exactly what led to the death of the deceased. He prayed that the court hands him a lenient sentence.

The convict was given an opportunity to make a statement in mitigation. He made a very brief statement in which he informed court that he had siblings to look after who were suffering because they required his help

and support for thier education. Further, that he had nothing to say about the family of the deceased.

We observed that in spite of the submissions and prayers of counsel for the convict, and the convict's own statement in mitigation, the trial judge handed down the sentence in one line thus:

"Court: Sentenced to 25 years' imprisonment."

Section 86 (4) of the Trial on Indictments Act provides as follows:

> **(4) The judgment in the case of a conviction shall be followed by a note of the steps taken by the court prior to sentence and by a note of the sentence passed together with the reasons for the sentence when there are special reasons for passing a particular sentence.**

While it is the position that the provision above does not make it mandatory for the trial judge to record the reasons for the sentence, if there are no *"special reasons for passing a particular sentence,"* it is our opinion that in a trial for a serious offence such as murder it is prudent to do so. The offence carries a maximum sentence of death. The prosecution stated so and prayed that the judge sentences the convict to a period of imprisonment of more than 35 years. The trial judge did not show that he considered these submissions. Neither did he show that he considered the statements in mitigation offered by and for the convict.

Much as the omission was not drawn to our attention by counsel for the appellant, our duty as the first appellate court is to reappraise the whole of the record of proceedings and come to our own findings, on both law and fact, and come to our decision. We cannot therefore fold our hands and not address this issue. It appears that the omission to set down reasons for the sentence led to an error in that the trial judge handed

down a sentence without taking into account the time that the convict spent on remand in contravention of Article 23 (8) of the Constitution.

This provision makes it mandatory for the trial court to take into account any period spent in lawful custody in respect of the offence before the completion of the trial. [See **Abelle Asuman v Ugandea, Supreme Court Criminal Appeal No. 66 of 2016; [2018] UGSC 10**]. Therefore, without prejudice to the fact that the trial judge may have handed down an appropriate sentence, given the grisly manner in which the deceased met her death at the hands of the appellant, the sentence of 25 years in prison became an illegal sentence.

It is also clear that the trial judge did not consider the principle of consistency in sentencing either. We therefore have no other option but to set aside the sentence that he imposed for those reasons and it is hereby set aside.

We shall now proceed to hand down a sentence of our own, in the form that is required by law, by invoking the powers of this court pursuant to section 11 of the Judicature Act.

Sentence

We have considered both the aggravating and mitigating factors that were stated by the prosecution and for the convict. The convict was still a young person whose age on arrest was given in the charge sheet, at page 4 of the record of proceedings, as 20 years on 8th June 2011, about 10 days after he committed the heinous offence. He was possibly also under the influence of alcohol, though he did not plead intoxication. He was in the company of two other young people; Kateeba Vicent, 22 years (deceased) and Gumisiriza John, 28 years old. The age of the deceased was not indicated anywhere in the documents that were prepared by

the Police; neither was an estimate given nor was it stated in the testimonies of any of the witnesses. We are of the view that this was an offence committed by the appellant while he was in the company of misguided youth. They all failed to respect the bodily integrity of an equally intoxicated woman in their company.

However, it was still a serious offence committed in the most horrendous manner. Beatrice Kyalisiima was raped and then strangled to death, or strangled to death in the process of being raped. There is no doubt, according to the DNA test results, that the appellant participated in this very violent rape though he was charged only for murder. According to the Post Mortem Report, the deceased's neck was twisted and extended to the left hand side of her body. She bled from the ears and mouth and had scratches in the neck. She died a painful and shameful death because there were testimonies that when they found the body, her dress was rolled up and her knickers torn to expose her nether region.

This court is duty bound to observe consistency in sentencing. It is therefore necessary for us to consider sentences for murder that have been handed down by this court and the Supreme Court in the not too distant past, and we shall do so in order to establish what is appropriate in this case.

In **Aharikundira Yusitina v Uganda, SCCA No 27 or 2015**, the Supreme Court set aside the sentence of death that had been imposed upon the appellant, for the murder of her husband by cutting his body into pieces, which had been confirmed by this court, by substituting it with a sentence of 30 years' imprisonment.

In **Rwalinda John v Uganda, SCCA No 03 of 2015**, the appellant who was 67 years old was sentenced to life imprisonment. The sentence was confirmed by this court. On appeal to the Supreme Court the sentence imposed by the trial court was upheld. The court found that the trial judge considered the aggravating and mitigating factors like having been a first offender and took into account the one year and three months he spent on remand, the age of 67 years and his prayer for leniency. Further, that the trial Judge considered the seriousness of the offence, the death of a toddler, the way the murder was carried out which culminated in the death, among others. He passed the sentence of life imprisonment. The court did not consider the sentence to be harsh and excessive in the circumstances and so upheld it.

In **Rwanyaga Charles v Uganda, Court of Appeal Criminal Appeal No. 352 of 2014,** where judgment was delivered by this court on 24th February 2022, the appellant had been sentenced to death for murder by multiple shooting and after killing the victim, he attempted to shoot the LC1 Chairman who had come to rescue him. He appealed to this court against the sentence only, his appeal against conviction having been dismissed earlier. The court substituted the sentence of death with imprisonment for 29 years and one month, from the date of his conviction.

In **Bayo Sunday v Uganda Court of Appeal Criminal Appeal No. 414 of 2019**, the appellant appealed against his sentence of 27 years, 2 months and 2 days for murder, where he caused the death of deceased by hacking at him with a *panga*. This court considered the sentence appropriate and upheld it.

In **Sambwa Issa v Uganda, Court of Appeal Criminal Appeal No. 145 of 2022**, the appellant who murdered his step brother by hacking him

to death with a *panga* was convicted to serve a sentence of 25 years. On appeal to this court, the sentence was upheld.

In the case now before us, the convict did not have to strangle the deceased. He did not have to use as much force as he did to subdue and rape her, or to rape her at all. Though he was and still is a young man, we think that a deterrent sentence is necessary.

We have therefore taken into consideration that the appellant was a young person at the time that he committed the offence. And as is required by Article 23 (8) of the Constitution, we have taken into account the period of 3 years that he spent in lawful custody in respect of the offence before his trial was completed [See **Abelle Asuman v Uganda** (supra)].

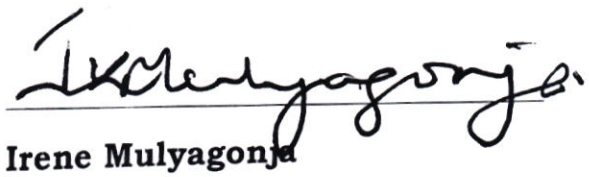
Having done so, we are of the view that a period of 23 years will meet the cause of justice in this case. We therefore sentence the appellant to imprisonment for a period of 23 years, commencing on the 27th February 2014, the date of his conviction.

It is so ordered.

Dated at Kampala this 7th day of October 2022.

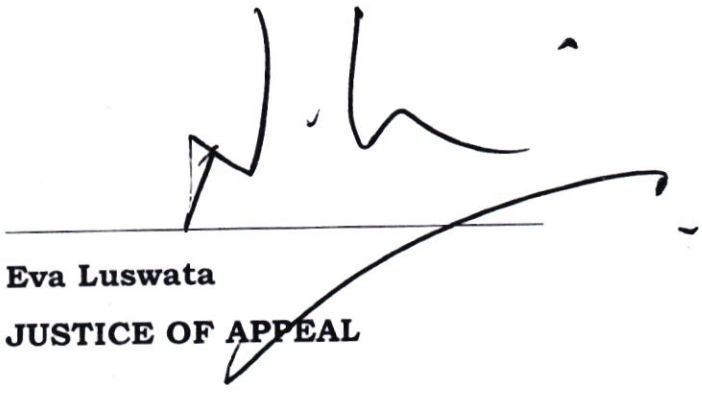
Richard Buteera

DEPUTY CHIEF JUSTICE



Irene Mulyagonja

JUSTICE OF APPEAL



Eva Luswata

JUSTICE OF APPEAL