THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 618 OF 2014

CORAM: (Cheborion Barishaki, Stephen Musota, Muzamiru Kibeedi, JJA)

1. **NAKATO JOYCE**
2. **SENTEZA TWAIBU::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the sentence of the High Court of Uganda at Masaka before Hon. Lady Justice Margaret Oguli Oumo dated 24th April, 2013 in Criminal Session Case No.33 of 2010)

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence arising from the decision of *Hon. Lady Justice Margaret Oguli Oumo dated 24th April, 2013,* where by the appellants, Nyakato Joyce and Senteza Twaibu were convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 26 and 40 years imprisonment respectively.

The background to the appeal is that on the evening of 29th June 2009, the deceased Bukenya John Edward left Kihimba trading Centre where he operated a shop with his wife from home. He was riding a bicycle his way back home while his wife Rosette Bukenya followed him on foot. As Rosette

continued her journey home, she found her husband lying in a pool of blood on a road side. Before the deceased was murdered, the 1st appellant who is also the deceased`s daughter had on several occasions threatened to cut him with a panga if he did not give land to her son, Ssenteza Twaibu, 2nd appellant. That the chairman LC1 convened a meeting one time to settle the land problem between the 1st appellant, her children and the deceased but the 1st appellant and her children never showed up but continued to threatened to kill the deceased. That despite several attempts by the Local Council to settle the matter, the 1st and 2nd appellants continued to threatening the deceased that they would cut him with a panga. Three days before his death, the 2nd appellant found him watering cows with his son 7-year-old son Balinda Herbert and attempted to cut him but he fled for his safety.

After the murder the appellants were arrested and upon examination they were all found to be normal. They were tried, convicted of the offence of murder and sentenced to 26 years imprisonment for the 1st appellant and 40 years imprisonment for the 2nd appellant.

Being dissatisfied with the decision of the learned trial Judge, they appealed to this Court against both conviction and sentence on the following grounds;

1. ***That the learned trial judge erred in law and fact when she failed to properly evaluate the evidence and came to a wrong conclusion that the ingredient of participation by the appellants had been proved beyond reasonable doubt.***

2. ***That the learned trial judge erred in law and fact when she convicted the appellants solely on circumstantial evidence without due regard to the appellants defence of alibi which was not contested by the prosecution and hence came to a wrong conclusion.***

3. ***That the learned trial judge erred in law and fact when she failed to state the reasons for departing from the opinion of the 1st Assessor in her judgment.***

4. ***In the alternative, the learned trial judge erred in law when she sentenced the 1st appellant to imprisonment for a term for 26 years and the 2nd appellant to imprisonment for a term of 40 years which sentences are unjustifiable and very harsh.***

At the hearing of this appeal, Ms. Namawejje Sylvia appeared for the appellants on private brief and Ms. Amumpaire Jennifer, Assistant DPP holding brief for Angutoko Immaculate Chief State Attorney, appeared for the respondent.

Counsel for the appellant sought leave of court to validate the Notice of appeal and memorandum of appeal having them out of time and the same was granted.

It was submitted for the appellants that there were no eye witnesses to the gruesome murder and that the prosecution`s theory that the appellants murdered the deceased since they were known to have a land grudge with him was only relevant to prove the appellants` motive for the murder but was

not sufficient to prove the ingredient of participation. That the prosecution failed to adduce evidence of the appellants` acts and omissions either linking them to the murder or placing them at the scene of crime

Counsel contended that there were evidential gaps in the prosecution evidence which suggested other possible suspects but not the appellants. That it's the duty of the prosecution to proof the guilt of the accused beyond reasonable doubt. He cited the case of **Miller vs Minister of pensions (1947)2 ALL ER 372 at 373** and **Uganda v. Dick Ojok (1992-93)HCB 54** and contended that the prosecution failed to prove the participation of the standard.

On ground 2, it was submitted that the prosecution`s evidence was circumstantial and other than the evidence of existence of a grudge that only pointed to the motive, no direct evidence was adduced against the appellants linking them to the murder. That the circumstantial evidence did not conclusively point to the guilty of the appellants. He referred to **Budri Faustino vs Uganda CACA No. 0284 of 2014** and **Jephline Lubega & Others vs Uganda SC CR. APP NO. 05 of 1992** for the proposition that where the prosecution evidence does not point irresistibly to the guilty of the appellant, such evidence is not enough to secure a conviction.

Regarding the appellants` alibi, it was submitted for the 1st appellant that she was at home in Rugamba village which is a neighboring village to Rwamatengo were the murder was committed and that it's a one hour walk from there. That the 1st appellant could not go to her father`s home, the deceased on account that she had delivered twins and certain ceremonies were yet to be

done before she could visit her father and that it's only the deceased who occasionally visited her.

It was submitted for the 2nd appellant that at the time of the murder, he was at work and in company of a guard of his employer.

Counsel contended that both alibi were not investigated to either confirm or discredit the said assertions or contested by the prosecution. That in light of the above, court be pleased to squash the conviction and sentence against the appellants.

On ground 3, it was submitted for the appellants that while court is not bound to follow the opinion of assessors, it is required by the law to state the reasons for departure from the assessors' opinion. He cited section 82(3) of Trial on Indictment Act. That one assessor recommended an acquittal and the other a conviction. Counsel contended that it was necessary for the learned trial judge to give reasons of her departure from the 1st assessor`s opinion and for agreeing with the 2nd assessor. That the 1st assessor`s opinion raised pertinent evidential gaps regarding the appellants` participation and link to the murder demonstrating that the prosecution did not prove its case. That had the judge given reasons for the departure, it would have shown that the matters raised by the assessors had been considered by court when determining the matter. That this mandatory requirement was not complied with which was an error on record.

On ground 4, Counsel submitted that the appellants were convicted of the same offence and the 1st appellant was sentenced to 26 years imprisonment

well as the 2nd appellants to 40 years. That the trial judge did not give reasons why 2 convicts of the same offence were punished differently. He submitted that the evidence on record shows that it was only the 1st appellant who had a grudge with the deceased which fact was used as alleged motive for the murder. However, that the evidence on record does not specify individual acts and omissions of the appellants to have warranted court to meet out different sentences against the appellants

Counsel further submitted that the learned trial judge did not correctly consider all the mitigating factors i.e. that the both appellants were 1st time offenders. That the judge erroneously considered the age of then appellants as at sentencing as opposed to the time the offence was committed as stated in the sentencing guide lines. That at the time the offence was committed, the 1st appellant was aged 35 years old female, a primary care giver of infants while the 2nd appellant was an 18 years old and a first time offender.

Further, that whereas the trial judge recognized that the appellants had been on remand for 4 years at the time of sentencing, there was no indication that the remand period was deducted off their sentences as required by law.

Counsel cited **Obwalatum Francis v Uganda SCCA no 30 of 2015** where the appellant was tried convicted of murder and sentenced to 50 years having caused the loss of life of 2 people through torture. On appeal, the sentence was reduced to 20 years imprisonment. Counsel contended that in the instant case the sentences of 26 and 40 years were harsh and excessive and prayed for a lenient sentence of 10 years each.

In reply, the respondent adopted its submissions in the trial court on this matter and further submitted for the respondent that whereas no direct evidence was adduced by the prosecution to prove participation of the appellants, they relied on a strong chain of corroborated circumstantial evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8.

Regarding the 1st appellant`s participation, PW3, PW4, PW5 and PW6 clearly testified about her participation. That the deceased had been cut on the head and was lying in the middle of the road and this was synonymous with the threats and attempts that had been made by the appellants which the witnesses alluded to.

That PW1, Balinda Herbert stated that the 2nd appellant attempted to kill the deceased at the well but failed. That the threats and attempts to kill the deceased by 1st and 2nd appellants where made within the proximity and time within which the deceased was murdered. That the deceased`s utterances and the testimonies of the witnesses in support of participation of the 1st appellant made reference to the 2nd appellant. He relied on **Mureeba Janet and Anor v Uganda SCA 13 of 2003 and Waihi and Anor v Uganda (1968) EA 278** for the proposition that evidence of prior threat or an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and regard must be had to the manner in which the threat is uttered, whether it is spoken bitterly or impulsively in sudden anger of jokingly, and the reason for the threat, if given and the length of time between the threat and killing are material .

That the mode in which the murder was executed was consistent with that described in the appellants' threats, the deceased was severally cut with a sharp cutting object. That the circumstantial evidence irresistibly points to nothing but the guilt of the appellants and the inculpatory facts are incompatible with their innocence and only explain the guilt of the appellants. He cited **Simon Musoke v R (1958) E.A, Sharma and Kumar v Uganda SCCA No. 44 of 2000.**

On ground 2, it was submitted for the respondent that the trial judge considered the alibi of both appellants and rightly found that the prosecution had sufficiently destroyed the alibi. That the circumstantial evidence over whelming pointed to the participation of the appellants. He contended that the 1st appellant did not raise an alibi but only denied and stated that since she gave birth to twins she did not go home until a ceremony to welcome twins is performed. That the 2nd appellant raised an alibi that he was at work.

Counsel submitted that the deceased was not murdered at his home but by the road side about 150 meters away from his home and that basing from the prosecution evidence, the distance between the scene of crime and the residents of the appellants is walkable within I hour. That the respondent adduced cogent circumstantial evidence that placed the appellants at the scene of the crime and disapproved their alibi.

On ground 3, it was submitted for the appellant that the trial judge reasons for not agreeing with the 1st assessor were comprised in her elaborate analysis of the evidence. That there is no particular standard, style or structure required for the trial judge to state such reasons for departing from the

assessors' opinion. That be as it may, no miscarriage of justice was occasioned since the judge is not bound to conform to the opinion of assessors.

On ground 4, counsel submitted that, the maximum sentence of murder being death as stated in S. 189 of the Penal Code Act, the sentences of 26 and 40 years were within the one that is prescribe by law. He cited **Kiwalabye Bernard v Ug SCCA NO.143 of 2001** for the proposition that an appellate court will only interfere with the sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive if the circumstances of the case. Counsel contended that the sentences were justifiable considering the fact that the maximum sentence is death. The trial judge properly exercised her discretion within the precincts of the law and in doing so took into account the aggravating and mitigating factors, and the period the appellants had spent on remand.

In rejoinder, it was submitted for the appellants that the prosecution`s theory that the conflict that led to the deceased demise was relating to land which was the 1st appellant`s motive for killing. That both appellants testified that they had a good relationship with the deceased as a father and grandfather. That even though the deceased`s widow PW3 and her 3 sons, PW1, PW5, and PW6 gave a contrary account, the investigation did not confirm or discredit either version and that the evidence of motive did not satisfy the ingredient of participation.

Counsel submitted that the prosecution`s evidence that the 1st appellant had been seen within the village did not place her at the scene of crime and that

the evidence did not rebut the alibi. That the case of **Mubeere Janet and 2 others v Uganda** Supra is distinguishable from the instant case as the circumstantial evidence therein was able to show who was liable for the murder and by what means they murdered and who specifically executed the deed. That in the present case, the circumstantial evidence only shows the appellants as the mostly likely suspects without clarity on who specifically executed the deed and how it was done.

That the assessor`s opinion and the requirement in section 82(3) of the Trial on Indictment Act requiring the trial judge to give reasons for her departure from the assessor`s opinion cannot be satisfied within the evaluation of evidence as suggested by the respondent. That the provision makes it mandatory for the trial judge to state reasons for departure from the assessors' opinion.

She concluded by submitting that the ingredient of the appellants` participation was not proved beyond reasonable doubt and that the circumstantial evidence on record was not sufficient for a conviction.

The duty of this Court as a first appellate court is to re-evaluate all the evidence on record and come to its own conclusions as ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10*** was held in the case of ***Oryem Richard vs Uganda; Criminal Appeal No. 22 of 2014 (SC)***.

We have carefully studied the court record and considered the submissions of both counsel. We are also alive to the standard of proof in criminal cases

and the principle that an accused person should be convicted on the strength of the prosecution case, and not on the weakness of the defence. See: ***Akol Patrick & Others vs. Uganda; Court of Appeal Criminal Appeal No. 60 of 2002.***

The first ground of this appeal faults the learned trial Judge for not evaluating the evidence and came to a wrong conclusion that the ingredient of participation by the appellants had been proved.

From the submissions of counsel for the appellants, the only ingredient in contention is participation of the appellants. We are also alive to the fact that there were no eyewitnesses to the murder and all the evidence available on record is circumstantial evidence.

In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find 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 vs. R [1958] EA 775***.

Throughout the record, it was submitted for the appellants that the existence of a land grudge was only proof of motive but this did not prove the participation of the appellants in the murder. Suffice to note the presence of a motive can be relevant and strong circumstantial evidence tending to prove that an accused did or did not do a certain act for which he is charged. These facts are relevant facts as per sections 9, 10 and 13 of the Evidence Act.

While determining the appellant`s participation in the murder, the learned

trial judge stated as follows;

"Most of the threats by Nakato on the deceased`s life intensified in the month of June. Also A3 tried to carry out his mission on Sunday 28th june 2009 but failed because of PW1`s presence with his father the deceased at the well, it was on 24th June, 2009 that Nakato was seen near her father`s shop threatening to kill him.PW4 the deceased`s mother informed court that 2 weeks before the deceased was killed he had told her of the death threats made by A1.

Its court`s view that the threats and occurrences made by A1 and A3 were within the proximity and time within which the deceased was killed. The sequences follow each other until the mission was executed."

PW2, Twino Charles Mansio Detective inspector testified that the deceased body had cuts on the hand and multiple cuts on the neck, two fingers were cut off because we found them at the road side. That the body had cuts on the leg.

It was PW3, Rosette Mugenyi Muhume widow to the deceased testimony that the deceased and the 1st appellant the deceased`s daughter had grudges over land disputes. That the deceased came and told her at the shop that the 1st appellant had told him to add her more land and if not she would cut him into pieces. That on 28th June 2009 her and the deceased went to the land in question with the chairman and insisted that he will not add the 1st appellant and her sons more land since he also had other children and that if the 1st appellant and her sons wanted to kill him, they should do so.

PW4, Christine Nakisiba Nalongo the mother to the deceased testified that the deceased told her that if she heard that he was dead, it would be the 1st appellant who would have killed him. That the deceased told her that he had given the 1st appellant her land, but she wanted more for her son Kamuli since hers had been occupied by Twaibu the 2nd appellant. That the deceased refused to give her more land and that's why he was killed. That after 2 weeks after their meeting she heard that her son had been killed.

PW5, Patrick Magoza son to the deceased also testified that the 1st appellant came to the shop calling and quarrelling with the deceased to give her more land. That she quarreled and said that "we shall kill you." And that within a week, Bukenya died.

PW5 witnessed the quarrel that he heard the 1st appellant quarrelling and he saw her. And this was on 24th June 2010. That he was familiar with the 1st appellant`s voice since he knew her since she was born.

PW6, Senjobe Eria also son to the deceased testified that when he heard an alarm he responded and found his father had been cut on the head and was lying in the middle of the road. That the deceased didn`t have any grudge with anyone except his daughter the 1st appellant regarding the small land they had given her as she wanted a bigger one for her children. That the grudge had taken long and the 1st appellant had said that if the deceased does not give her kibanja, she would cut him. He further testified that while coming from one Sembuya`s funeral, the 1st appellant told them that its only 3 of them i.e. the deceased himself and another who were barring her from getting the kibanja and that if the deceased did not give it to her, she would kill him.

He further stated in evidence that he heard the 1st appellant say that she had procured a machete and they would cut him if he did not add her more land.

PW1, Balinda Herbert a son to the deceased testified that he was at the well with his father giving cows water and the 2nd appellant came with a panga, he wanted to hack the deceased and when he saw him, he started jeering him.

PW6, Senjoba Eria testified during his cross examination that the deceased told him that after the meeting the deceased had arranged with the chairman to show the 1st appellant her boundaries flopped on Sunday 28/6/09 as the 1st appellant and her sons refused to come, the deceased went to give cows water and the 2nd appellant wanted to cut him but since PW1, Balinda Herbert was there he couldn`t. That after that attempt, the deceased was killed the following day, on Monday.

PW7, Senkoto Patrick testified that when he was called by the vice chairman to go at the scene where the deceased had been murdered, they found that he had been cut with a panga on the head and neck. That on 26.6.2009 at about 8;30-9:30am, the 1st appellant had come to him complaining about not being given land by her father the deceased. He told her that he would convene a meeting with all of them to talk about it. That on 27.6.2009 at around 8:00am the deceased told him that the 1st appellant and her sons wanted a kibanja and if he didnot give it to them, they would harm him. That on 28.6.2020 when the LC Committee and the deceased went to talk to the 1st appellant and her sons, they found their home closed. That the following day, he heard that the deceased had been murdered. He further testified that the 1st

appellant and her children had a land grudge with the deceased who said that if he did not add them more kibanja they would do harm to him.

That the deceased had a grudge with the 2nd appellant because of the house. That the 2nd appellant cut sticks that he was going to build another house but Bukenya refused him. That the demand for kibanja by the 1st appellant was well known in the village.

PW8, Sagala James testified that on Sunday, he went to the deceased`s home and the deceased told him that the 1st appellant and her children want to kill him as they want more land. That the following day, on Monday, he was informed that the deceased had been killed.

The principle regarding past threats on the deceased was laid down in the case of **Mureeba Janet & Anor versus Uganda SCCA No.13 of 2003** wherein court stated that

"Past threatts on the deceased by his or her assailant can be good evidence leading to a conviction. However, there must be sufficient proximity between the threats and the occurrence of the death in order to a form a transaction, then it would not constitute circumstances of the transaction leading to the death of the deceased. The circumstances must be circumstances of a transaction. General expression indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of the death."

All the prosecution witnesses testified to the existence of a land grudge between the 1st appellant and the deceased and indeed the 1st appellant was

in cohort with her sons especially the 2nd appellant. Threats to kill the deceased were regularly made and attempt on his life by the 2nd appellant was made a day before the actual murder.

Even if most witnesses were told about the threats and attempts by the deceased which would be hearsay evidence, their testimonies are relevant and admissible under section 30 of the evidence Act.

Section 30 of the Evidence Act provides;

Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases—(a)when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question

It's clear from the evidence on record that these threats and the attempt to kill the deceased were made within the proximity and time within which the

deceased was killed. This is because the threats to cut, harm and kill intensified in the month of June. PW4, Nakisiba the mother to deceased testified that 2 weeks before his son`s murder, he had told him that should he be killed, it would have been the 1st appellant to have killed him due to land grudge. This evidence was further corroborate by the testimonies of other prosecution witnesses. On 24th June 2009 the 1st appellant was heard and seen by PW5, Patrick Magoza threatening to kill the deceased if he did not give her more land. PW6, Senjoba Eria heard the 1st appellant say to them that it's them barring her to bet more land from his father the deceased and that she would kill him if he refused. She further told them that she had produced that Machete and they would use to cut him. On 28th June 2009 at the well, the 2nd appellant attempted to cut the deceased with a panga but his plan failed due to the presence of PW1, Balinda Herbert. On 27th June 2009, the deceased told PW7 the chairman about the threats by the 1st appellant and his children to kill him if he didn`t add them land. The following day 28th June 2009 a Sunday, the deceased told PW6, Sagala James still about the 1st and 2nd appellant's threats to kill him.

PW3 Rosette Mugenyi, PW4 Nakisiba Nalongo, PW7 Sentoko Patrick and PW8, Sagala James testified that they were told by the deceased that the 1st appellant and her children had threatened to kill him if he didn't add them more land. It was after a few weeks, days and hours that the deceased was murdered in cold blood on 29th June 2009.

The deceased had told PW3, Rosette Mugenyi that the 1st appellant had threatened to kill him and cut him into pieces.PW6 Senjoba Eria testified that

he heard the 1st appellant saying that she would cut the deceased if he refused to give her more land and that she had produced a machete for that purpose. PW2, Twino Charles Mansio, when he saw the deceased with cuts on his hand, neck and his fingers had been cut off. PW7, Sentoko Patrick also testified that when he went to the scene he saw the deceased had been cut with a panga on his neck. The day before, the 2nd appellant had attempted to cut the deceased at the panga at the well.

The nature of the appellant`s threats and attempt to kill him with a panga were corroborated by the Postmortem Report Exh P.E.1 where in it was stated that he had deep cut wounds on parietal region involving the skull, on the left and right side of the neck, the left posterior palm had deep cut wounds and fingers cut off and the Doctor concluded that a sharp cutting object was used.

In **Katende Semakula versus Uganda, SCCA No. 11 of 1994;** the court stated that another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference

In light of the above evidence, it's clear that the appellant`s threat to kill the deceased and the attempt on his life were squarely made within the proximity and the time he was murdered and the only reasonable inference to be made is that it's the appellants who executed their earlier threats and attempt and killed the deceased. The use of the panga and cutting of the deceased on the

hand, neck and chopping of his fingers speaks to no other inference than that that the appellants` executed their threats of cutting into pieces and killing him with the panga which the 1st appellant had procured and there are no co existing circumstances which would weaken or destroy this inference.

On ground 2, the appellants fault the learned trial judge for convicting the appellants solely on circumstantial evidence without due regard to the appellants defence of alibi which was not contested by the prosecution.

It is trite that when an accused person raises a defence of alibi, it is not his duty to prove it. It is up to the prosecution to destroy it by putting the accused person squarely at the scene of crime and thereby proving that he is the one who committed the crime. See: ***Sekitoleko vs. Uganda [1968] EA 531.***

While determining this matter the trial judge stated as follows;

"A1 raised the defence of alibi and total denial. She said since she had given birth to twins she could not go where her father was staying because a ceremony for the twins had not been carried out and that actually it was Senjobe PW6 who had grudges with the deceased. The defence was quashed by five witnesses who saw A1 at the place where her father was residing thus destroying her alibi, she did not call witnesses to support her position that it actually could have been Senjobe who killed the deceased.....A3 Ssenteza Twaibu also raised the defence of Alibi and total denial, but was seen with a panga at the well on28th June, 2009.His mission failed as PW1 was present at the scene."

DW1, the 1st appellant stated that on 29th June 2009 she was at her home and he was called and told her father had been killed. That she had given birth to twins in 2008 and could not go at her father`s home not until the ceremony to welcome twins was conducted. That since then it was the deceased who used to visit her.

DW3, the 2nd appellant stated that on June 29th 2009 he was at work.

The scene of crime was at a village called Rwandengo 150 meters away from his home and 1 hour and half from the deceased`s home. PW5 Patrick Magoza testified that he saw and heard the 1st appellant at the deceased`s shop. We must note that this was not the scene of crime as stated by the learned trial judge therein above in her decision.

In **Kazarwa Henry versus Uganda, SCCA No. 17 of 2015**; the appellate court stated that:

> *"We have to point out that the issue is about "scene of crime. Scene of crime cannot be enlarged to mean an area. This was a statement by the Court not supported by evidence on record. If a murder is committed in Kampala District, it would be too farfetched to say that a suspect has been put at the scene of crime because he or she too was in Kampala District or area of that time. The material and relevant issue was the scene of crime whether there was evidence placing him at the scene of crime, i.e. the particular place where the attack was done."*

In **Bogere Moses and Another versus Uganda, SCCA No. 1 of 1997;** it was held that what then amounts to putting an accused at the scene of crime? We

think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time.

Be that as it may the circumstantial evidence adduced by the prosecution as already discussed in ground 1 placed the appellants at the scene of crime and disapproves both alibi. Prosecution witnesses alluded to the 1st appellant and 2nd appellant and her other children`s threats to kill the deceased by cutting him using a panga. Indeed the day before the murder, the 2nd appellant attempted to execute their earlier threats against the deceased at the well with the panga but was hindered by the presence of PW1 Balinda Herbert. The nature of the threats and the attempt was vividly in line with the way the deceased was murdered. This circumstantial evidence was corroborated by PW6 Senjoba Eria who heard the 1st appellant say she would kill the deceased and that she had produced a machete to that effect. Also the Post Mortem report Exh PE1 speaks to deep cut wounds on the deceased body caused by a sharp object.

From the evidence in the case before us, the appellant put up an alibi which the prosecution disproved by the evidence of 8 prosecution witnesses who placed the appellants at the scene of crime. In the context of alluding to the circumstantial evidence lead by the prosecution, the learned trial Judge rightly disbelieved the appellants and we find no reason to fault her finding that both alibi were destroyed and contested by the prosecution when they placed the appellants at the scene of crime.

On ground 3, the learned trial judge if faulted for not stating the reasons for departing from the 1st assessor`s opinion in her judgment.

It was submitted for the appellants that section 82(3) of the TIA enjoins the trial judge to give reason for departure from the 1st assessor`s opinion and agreeing with the 2nd one. That the 1st assessor`s opinion raised pertinent evidential gaps that demonstrated that the prosecution had not proved the case against the appellants beyond reasonable doubt.

It was submitted for the respondent that the reasons for not agreeing with the 1st assessor where comprised in her analysis of evidence. That in any case, be that as it may, no miscarriage of justice was occasioned as the trial judge is not bound to follow the opinion of assessors under S. 82(2) of the TIA.

The 1st assessor in her own stated as follows;

"As per participation of the accused persons, prosecution relied on the evidence on the circumstantial evidence, which evidence in my view is not substantial to suggest conviction in respect of the 3 accused persons.

According to the evidence on record, I am of the opinion that someone else could have taken advantage of the situation of Nakato`s threats to her father and killed the deceased."

The 2nd assessor stated as follows;

"..... prosecution evidence destroys Alibi of the accused. The accused persons A1 and A3 had motive to kill because of the refusal to give them more land in additional to the kibanja, the deceased had given A1.Therefore, the prosecution has proved that A1,A3 had from several threats in the village a motive to kill Bukenya Edward, while A1, A3 fulfilled on 29th June, 2009.

In my opinion, I advise court to acquit A2, Kamuli Peter and find A1, A3 guilty as charged."

Section 82 of the Trial on Indictment Act provides that;

"Where the judge does not conform to the opinions of the majority of the assessors, he or she shall state his or her reasons for departing from their opinions in his or her judgment."

In the instant case there were two assessors, the 1st assessor recommended an acquittal while the 2nd assessor recommended a conviction.

It`s clear from the record that the judge convicted the appellants of murder. However, no reason where advanced for departing from the 1st assessors opinion. Be that as it may, it's our considered opinion that there was no miscarriage of justice occasioned to the appellants in the circumstances.

On ground 4, the learned trial judge is faulted for sentencing the 1st appellant to 26 years imprisonment and the 2nd appellant to 40 years imprisonment which sentences are unjustifiable and very harsh.

The appellants` submission on this ground was hinged on the variance in sentence of the appellants of 20 years and 40 years imprisonment which was not justified and the failure by the learned trial judge to correctly consider all the mitigating factors i.e. That the appellants were first time offenders, court considered the appellants` age at the time of sentencing instead of at the time of commission of the offence and the judge`s non consideration of the period the appellants had spent on remand.

This Court has the power to reduce a sentence imposed by the lower court when that is found to be the appropriate thing to do. This happens in circumstances where the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. See ***Kiwalabye Bernard vs Uganda; Criminal Appeal No.143 of 2001 (unreported)***

In sentencing the appellants` the learned trial judge stated as follows;

"Murder carries a maximum death sentence. Court has even the following into considerations in passing the sentence. The accused parsons are first time offenders. The accused persons killed their father/grandfather violently even after having given them land, but they didn't think it is enough. He even went to the extent of marrying a wife for A3 and building him a house.

The deceased after receiving the threats from them was in the process of adding them more land, but they refused to attend the meeting he convened. But instead planned to kill him violently. Court also cause listed the following facts in mitigation. The accused persons are 39 and 22 years old respectively. Both of them have young dependants to look after. That have been on remand for 4 years. In view of the above circumstances. I sentence A1 to 26 years imprisonment and A3 t 40 years."

Applying the above principles to the instant case, we have perused the record and studied the sentencing proceedings. The trial Judge did consider the

mitigating factor that the appellants were first time offenders in her sentencing proceedings. While considering the age of the appellants, she stated the 1st appellant was aged 39 and the 2nd appellant 22 years. This fact was also stated by counsel for the appellants in mitigation. While testifying the 1st appellant testified that she was 48 years and the 2nd appellant stated that he was 22 years

The medical examination report Exh PE2 and PE3 state the age of the 1st appellant as 35 years and 18 years for the 2nd appellant respectively.

In our view the reliance on the age of 39 years and 22 years did not occasion a miscarriage of justice since the learned trial judge ably considered other mitigating factors.

Regarding the issue of non-consideration of the remand period, in **Abelle Asuman versus Uganda, Supreme Court Criminal Appeal No.66 of 2016** the Supreme Court appears to have revisited the decision in Rwabugande Moses (supra) when it held that;

"Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution".

We note that the trial Judge stated that he had considered what had been submitted for the appellant in mitigation and also the aggravating factors. The Appellant's Counsel had clearly stated in mitigation that the appellant had been on remand since April, 2012. This meant that the trial Judge had, in our view, considered the remand period although he did not expressly state it. We find that the requirements of Article 23(8) of the Constitution were met.

While determining that issue the learned trial judge stated as follows;

"They have been on remand for 4 years. In view of the above circumstance, I sentence A1 to 26 years imprisonment and A3 to 40 years imprisonment."

It's clear from the record that the learned trial judge was alive to and ably took into consideration the period of four years the appellants had spent on remand. However, no reasons were given for sentencing the 1st appellant to 26 years and the 2nd appellant 40 years. The variance in the sentences was not explained yet both appellants were convicted of the same offence. No individual acts or omissions in commission of the offence were advanced to warrant the variance.

Section 189 of the Penal Code Act, Cap.120 provides that;

"Any person convicted of murder may be sentenced to death."

Guideline 19 (2) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that;

"In a case where a sentence of death is prescribed as the maximum sentence for an offence, the court shall, consider the aggravating and

mitigating factors to determine the sentence in accordance with the sentencing range."

Upon consideration of all the aggravating and mitigating factors on record and the period the 1st appellant had spent on remand, and the fact that the appellant spearheaded the issuing of the threats to kill her own father and having regard to the circumstances of this case, we find that the sentence of 26 years meted out against the 1st appellant was justified and we hereby maintain it.

Regarding the 2nd appellant`s sentence, having regard to the circumstances of the case and the fact that no reasons were advanced for sentencing him to 40 years imprisonment yet the 1st appellant was sentenced to 26 years imprisonment, and being alive to the fact that he was a young adult at the time of commission of the offence, a first time offender, had spent 4 years on remand. We exercise our power under Section 11 of the Judicature Act to resentence the 2nd appellant afresh.

We find that the sentence of 20 years will meet the ends of justice.

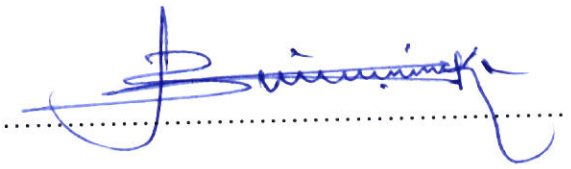
It is hereby ordered;

The sentence of 26 years imprisonment for the 1st appellant is maintained.

The 2nd appellant is sentenced to serve 20 years imprisonment to be served from the time he was convicted.

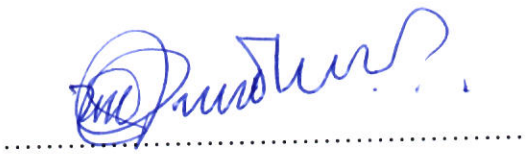
We so order,

Dated at Masaka this.....11th.....day of.....February.....2022.



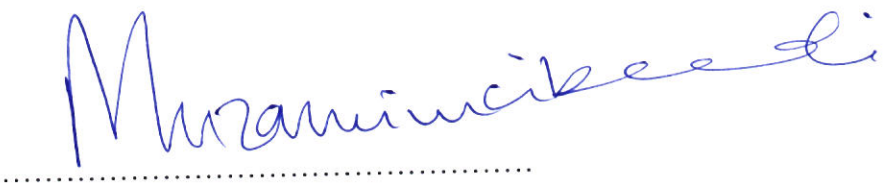
Cheborion Barishaki

Justice of Appeal



Stephen Musota

Justice of Appeal



Muzamiru Mutangula Kibeedi

Justice of Appeal