THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 96 & 107 OF 2016

Coram: Egonda-Ntende, Bamugemereire, Madrama JJA

1. **NDARUGAYO JANUARIO**
2. **KOMUNDA EPHRAIM**
3. **SUNDAY STEVEN**
4. **BEINOMUGISHA SUNDAY**
5. **KATEBARIRWE ALFRED..... APPELLANTS**

VERSUS

UGANDA. ..... RESPONDENT

(Appeal from the Decision of Duncan Gaswaga J at the High Court of Uganda at Mbarara dated 9th May 2016)

JUDGMENT OF THE COURT

The Appellants were indicted for the offence of Murder contrary to **Sections 188** and **189 of the Penal Code Act**. The particulars are that on the 28th day of March 2011 at Kyeiremba Cell, in Mbarara district, the Appellants murdered Twinomugisha Geoffrey.

The Brief Facts

The facts as can be gleaned from the lower court are that the deceased was waylaid and killed on his way home and his body was found lying near his motorcycle a few metres from his house. Police commenced investigations and Appellant No. 1, Ndyarugayo Januario, a neighbour who had a grudge with the deceased over a land dispute confessed to the crime. He admitted that he hired Appellant No. 4, Sunday Steven, whom he found as a fellow inmate at Mbarara Central Police station. Appellant No. 4 accepted to eliminate the deceased for UGX 500,000/= (Uganda Shillings Five Hundred Thousand). The two met at the Chief Magistrates

Court of Mbarara, where Appellant No.1 handed the money to Sunday Stevens who then travelled to Ndyarugayo's home on 27th March 2011. He was transported to Ndyarugayo's home together with A4 Beinomugisha on a boda boda (motorcycle) belonging to Appellant No. 2, Tugume. A2 confessed that he picked up A4 and A5 from Nyeihanga stage and took them towards A1's home. He further confessed that on his way, A4 and A5 stopped at a shop of Keronze where they bought a torch, a machete (a.k.a 'panga') and a knife.

The appellants were tried, convicted and sentenced to 45 years' imprisonment. Dissatisfied, the Appellants who had several sets of lawyers eventually settled down for Mr. Ngaruye- Ruhindi for A2 and A5 and Mr. Andrew Byamukama for A1, A3, and A4. In their separate submissions the counsel referred to two different sets of grounds of appeal which we shall replicate here in the order of Appellants 1,3 and 4 and Appellants 2 and 5 respectively.

Grounds of Appeal for Appellant No. 1, No. 3 and No. 4

1. *That the Learned Trial Judge erred in law when he relied on the evidence of an alleged identification parade when there was no evidence adduced of carrying out an identification parade, which occasioned a miscarriage of justice.*
2. *That the learned Trial Judge erred in law when he admitted and relied on confessions of some of the accused persons to convict the Appellants without conducting a trial within a trial which occasioned a miscarriage of justice.*
3. *That the learned Trial Judge erred in law when he held that the Appellants participated in the murder when there was no sufficient evidence to prove beyond reasonable doubt that the Appellants participated which occasioned a miscarriage of justice.*
4. *That the learned Trial Judge erred in law when he sentenced the appellants to 45 years' imprisonment, a punishment which was manifestly harsh and excessive in the circumstances thereby occasioning a miscarriage of justice.*

5. *That the learned Trial Judge erred in law and fact when he sentenced the appellants to 45 years' imprisonment and failed to take into account the time the Appellants had spent on remand, hence the sentence being illegal.*

Grounds of Appeal for Appellant No. 2 and No. 5

1. *That the Learned Trial Judge erred in law when he relied on the evidence of an alleged identification parade when there was no evidence adduced of carrying out an identification parade, which occasioned a miscarriage of justice.*
2. *That the learned Trial Judge erred in law when he admitted and relied on confessions of some of the accused persons to convict the Appellants without conducting a trial within a trial which occasioned a miscarriage of justice.*
3. *That the learned Trial Judge erred when he relied on exhibits which had not been produced before court and which had not been admitted in evidence to convict the Appellants, which occasioned a miscarriage of justice.*
4. *That the learned Trial Judge erred in law when he held that the Appellants participated in the murder when there was no sufficient evidence to prove beyond reasonable doubt that the Appellants participated which occasioned a miscarriage of justice.*
5. *That the learned Trial Judge erred when he denied the appellants adequate representation in a very serious capital offence when on 5/4/2016 he asked counsel for the both sides to file written submissions by close of business of 6/04/2016 and when he did not direct as to who to begin and who to reply and to give counsel for the Appellants opportunity to study and reply to the submissions of counsel for the respondent which occasioned a miscarriage of justice.*
6. *The learned Trial Judge erred when he held that the Appellants were guilty on the basis of the doctrine of common intention, which had not been proved.*
7. *The learned Trial Judge erred when he denied assessors opportunity to participate in the entire proceedings of the trial, which occasioned a miscarriage of justice.*
8. *The learned Trial Judge erred in law when he did not properly sum up the case to the assessors, which occasioned a miscarriage of justice.*
9. *The learned Trial Judge erred when he relied on extraneous matters and not on the actual evidence before him to convict, which occasioned a miscarriage of justice.*

10. *The learned Trial Judge erred when he failed to follow the procedure prescribed by the law in conducting a criminal trial the effect of which was that there was a mistrial rendering the entire proceedings null and void.*
11. *That the learned Trial Judge erred in law when he imposed an excessive sentence of 45 (forty-five) years imprisonment, which occasioned a miscarriage of justice.*

Representation

At the hearing of the Appeal, **A2 & A5** were represented by Mr. Ngaruye Ruhindi on private brief, **A1, A3 & A4** were represented by Mr. Andrew Byamukama on state brief while the Respondent was represented by Mr. Moses Onencan, Asst. DPP from the Office of the Director of Public Prosecutions. The Appellants appeared online via a video link from Mbarara Government prison. The parties relied on written submissions, which have been adopted by this court.

Appellants No.1, No.3 & No.4's case

We note that Mr. Andrew Byamukama was counsel for appellants No.1, No. 3 and No. 4 and having filed a memorandum with five grounds of appeal, he based his submissions on those five grounds.

Ground No. 1, counsel contended that the Trial Judge erred when he relied on evidence of an identification parade as the sole method of proving that the appellants were recognised at the scene of the crime. Appellants No. 2 & 3 when the appellants in fact were never subjected to one and if any, it was carried out contrary to the law, which occasioned a miscarriage of justice. Counsel added that **PW5** who testified that the appellants were subjected to the identification parade stated that it was conducted by Detective IP Mugisha Jackson who by then was deceased. It was also counsel's contention that the persons who identified the

appellants were accomplices as opposed to witnesses as required by law, hence the said identification parade did not only flout the procedure of carrying out an identification parade but also occasioned a miscarriage of justice on the appellants.

Regarding Ground No. 2, Counsel submitted that the Trial Judge erred when he relied on the admissions/confessions of A1 without ascertaining their truthfulness from the accused himself, which was prejudicial to the appellants and hence caused a miscarriage of justice. It was counsel's argument that there was nowhere on record indicating that the Trial Judge asked the accused persons about the voluntariness of the said confession. He noted that A1 in his defence stated that he was forced and beaten to make a confession.

Counsel referred to **Omaria Chandia v Uganda SCCA No. 23 of 2001** where it was held that;

"It is not safe or proper to admit a confession statement in evidence on the ground that counsel for the accused person has not challenged or conceded to its admissibility. Unless the Trial court ascertains from the accused person that he/she admits having made the confession statement voluntarily, the court ought to hold a trial within a trial to determine its admissibility."

Counsel contended that since the trial court failed to ascertain from the accused person whether the said confession was made voluntarily, it was improper for it to be admitted as evidence and to be relied on by court to implicate appellants No. 2 and No.3.

With regard to Ground No. 3, it was counsel's submission that since the 2nd and 3rd appellants were never properly identified and that the confession relied upon to convict them was never subjected to a **trial**

within a trial, the Trial Judge erred when he held that the appellants had a common intention and participated in the killing of the deceased.

On Ground No. 4, counsel contended that the sentence of 45 years imposed on the appellants was manifestly excessive and harsh. He referred to **Turyahika Joseph v Uganda CACA No. 327 of 2014** where court held that; *"...sentences ranging from 20-30 years are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lesser sentence."*

Counsel submitted that there is a need to maintain uniformity and consistency in sentencing especially in murder cases thus he prayed that this court quashes the sentence imposed on the appellants.

Regarding Ground No. 5, counsel submitted that the Trial Judge while handing the sentence to the Appellants never considered nor complied with the provisions of **Article 23 (8) of the constitution** and the decision in **Rwabugande Moses v Uganda SCCA No. 25 of 2014** which require courts to deduct the period the appellants had spent on remand. Counsel prayed that the sentence of 45 years imposed on the appellants be set aside as the same was illegal.

Appellant No.2 & No.5's case

Counsel for the 2nd and 5th Appellants submitted on 11 grounds of appeal.

On Ground No. 1, Counsel for the 2nd and 5th Appellants submitted that the Trial Judge erred in relying on evidence of an identification parade, which had no documents on record to show that it was carried out. Counsel added that since the Trial Judge relied on such evidence to convict the appellants, such a conviction should be quashed.

Regarding Ground No. 2, Counsel submitted that the Trial Judge did not conduct a trial within a trial before admitting the extra judicial statements of A1 which was a fatal irregularity thus Ground No. 2 ought to succeed.

On Ground No. 3, counsel contended that Exhibit PE IV was an exhibit slip for various items but none of them were ever tendered in court yet the trial Judge heavily relied on them.

In respect of Ground No. 4, counsel argued that the participation of A2 and A5 was not proved beyond reasonable doubt and had it not been for conjecture and extraneous matters that the trial judge imported, the 2nd and 5th appellants would not have been found guilty.

Regarding Ground No. 5, counsel contended that the Trial Judge erred to deny the appellants adequate legal representation.

On Ground No. 6, counsel submitted that there was no evidence adduced by prosecution to prove common intention thus the Trial Judge erred to infer it on the appellants.

As regards Ground No. 7, counsel for the appellant submitted that the Trial Judge erred when he denied the assessors the opportunity to participate in the entire proceedings, which occasioned a miscarriage of justice.

With regard to Ground No. 8, counsel submitted that the record does not contain any sum up notes to the assessors thus the Trial Judge erred when he did not properly sum up the case to the assessors which occasioned a miscarriage of justice.

Regarding Ground No. 9, counsel contended that the Trial Judge erred when he relied on extraneous matters and not actual evidence before him to convict the appellants, which occasioned a miscarriage of justice.

On Ground No. 10, counsel submitted that the Trial Judge erred when he failed to follow the procedure prescribed by the law in conducting a criminal trial the effect of which was that there was a mistrial.

Finally regarding Ground No. 11, counsel for the appellant submitted that the learned Trial Judge erred when he imposed an excessive sentence of 45 years, which occasioned a miscarriage of justice.

The Respondent's Case

In reply to Ground No. 1, Counsel submitted that what transpired at police according to PW6 was an identification session where A1 and A3 were asked to pick out their accomplices among the people who had been arrested by police. Counsel contended that the testimony of PW6 was never subjected to cross-examination by counsel for the appellants thus such testimony should be taken as true. He referred to **Eldam Enterprises Ltd v SGS (U) Ltd SCCA No. 05 of 2005** where it was held that; *'evidence that is not challenged in cross-examination must be taken as true.'*

Counsel added that the use of the word identification parade by PW6 and the Trial Judge in describing the process should not be construed strictly to mean identification parade as set out in **Sentale v Uganda (1980) EA 365** and in any case, the said process of identification did not occasion any miscarriage of justice.

In reply to Ground No. 2, counsel submitted that the learned Trial Judge in his judgment was able to establish that the confession statements were made voluntarily. Counsel added that the Trial Judge rightly admitted the extra-judicial statement because it contained minute details of how the Appellants committed the offence. He also contended that the circumstances in **Omaria Chadia v Uganda (supra)** are different from this particular case and thus prayed that each case be handled on its own facts

and peculiarity. He relied on **Haji Makubo Nakulopa v Uganda SCCA No. 25 of 2001** where court found that the statement made by the appellant was made voluntarily and correctly admitted because the confession was so long and detailed that it could not have been imagined or invented. Counsel prayed that this ground of appeal fails.

Regarding Ground No. 3, counsel submitted that the Trial Judge was justified in admitting the exhibits in evidence because prosecution witnesses were confident, consistent and truthful and their evidence remained strong after being tested in cross examination. Counsel added that although the exhibits were not produced in court, they were properly described by the prosecution witnesses hence this ground should also fail.

In respect of Ground No. 4, counsel submitted that the learned Trial Judge was justified when he held that all the appellants had participated in the alleged murder since prosecution adduced evidence beyond reasonable doubt to prove their participation. Counsel averred that PW1, PW2 and PW5 testimonies were never shaken during cross-examination. He prayed that this court upholds the conviction of the appellants.

Regarding Ground No. 5, counsel submitted that this ground offends **Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions,** which is against framing general grounds of appeal.

It was counsel's argument that the above ground does not point out exactly the point of law or fact or mixed law and fact that the appellant contends were wrongly decided by the Trial Judge that Ground No. 5 should be struck off.

In reply to Ground No. 6, counsel submitted that the Trial Judge correctly and ably applied the doctrine of common intention and thereby came to

the correct decision that the appellants formed a common intention. Counsel referred to **S. 20 of the Penal Code Act,** which provides for the doctrine of common intention and **Simbwa Paul v Uganda CACA N0. 23 of 2012** in which court elaborated on the doctrine of common intention. Counsel contended that prosecution proved how the appellants met at the home of Baryomuntebe and hatched a plan to kill the deceased. He also prayed that this ground of appeal should fail.

Regarding Ground No. 7, counsel submitted that the assessors participated in the entire trial, were present when the witnesses were testifying and were able to give their joint opinion thus this ground of appeal lacks merit and should fail.

In respect of Ground No. 8, counsel submitted that the Trial Judge properly summed up the evidence on record and the law to the assessors. Counsel added that the summing up notes are very clear and relying on the authority of **Mawanda Patrick v Uganda CACA No. 210 of 2010** he argued that failure to sum up evidence properly to the assessors are procedural errors which do not occasion a miscarriage of justice and should be ignored.

With regard to Grounds No. 9 and No.10, counsel submitted that they offend **R. 66 (2)** of the rules of this court thus should be struck off.

Regarding Ground No. 11, counsel submitted that the Trial Judge in sentencing the Appellants considered the aggravating and mitigating factors and exercised leniency by not sentencing the appellants to the maximum penalty of death. He added that the sentence of 45 years was not harsh or excessive given the circumstances of the case.

In reply to Ground No. 12, it was counsel's argument that considering the period spent on remand, the instant case was decided in 2016 and the

decision in **Rwabugande (**Supra**)** was decided in 2017 thus such couldn't be applied retrospectively.

Consideration of the Court

This being a first appeal, this court is required to re-evaluate the evidence and make its own inferences on all issues of law and fact. In this regard Rule 30(1) (a) of the Rules of this court stipulates as follows;

(1) "On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-

(a) Reappraise the evidence and draw inferences of fact. (See; **Bogere Moses v Uganda SCCA No. 1 of 1997 and Henry Kifamunte v Uganda SCCA No. 10 of 1997)**

Section 11 of the Judicature Act, Cap 13 recognises the jurisdiction of the Court of Appeal. It states as follows:

"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."

The Trial on Indictments Act lays down both the law and the procedure of handling criminal appeals from the High Court to the Court of Appeal.

Section 132 (1) (a) and (b) of the T.I.A, Cap 23, states as follows:

(1) *Subject to this Section;*

(a) An accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact;

and the Court of Appeal may-

(d) Confirm, vary or reverse the sentence and conviction,

(e) In the case of an appeal against the sentence alone, confirm or vary the sentence;

The Court of Appeal can also lawfully alter, increase or decrease a sentence under **s. 34 (2) of the Criminal Procedure Code Act cap 116.** All these sections of the law are procedurally justified under **Rule 32 (1) of the Judicature (Court of Appeal) Rules,** which states, that;

'On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.'

We shall put the above principles into consideration while resolving the rounds of this appeal. Regarding Ground No. 1, both counsel for the appellants faulted the Trial Judge for relying on an identification parade without proof of the same being carried out. The guiding principles on how to conduct a proper identification parade were clearly set out in **R v Mwango s/o Manaa (1936) 3 EACA 29** and affirmed in **Ssentale v Uganda [1968] EA 365.**

In **Stephen Mugume v Uganda SCCA No. 20 of 1995** court noted that;

"It is, we think, common sense that a witness would normally not be required to identify a suspect at a parade if the witness knows the suspect whom he/she saw commit an offence. Identification parades are, as a practice, held in cases where the suspect is a stranger to the witness or possibly where the witness does not know the name of the suspect…" In the instant case, **PW6** testified that they subjected A1 and Tugume, A3 to an identification parade, which was

conducted by Det. IP Mugisha Jackson (deceased) whereby A1 and Tugume A3 ably identified 2 people that is; A4 and A5 as the ones they had hired to kill the deceased.

In **Mulindwa Samuel v Uganda SCCA No. 41 of 2000**; Court held as follows;

"Regarding identification parades we, with respect, are unable to agree that failure to hold one was fatal to the appellant's conviction. The objective of an identification parade is to test the ability of a witness to pick out from a group the person, if present, who the witness has said that he has seen previously on a specific occasion...however, where other evidence sufficiently connects the accused with the crime, as was the case in the present appeal, failure to hold an identification parade is not fatal to the conviction of the accused."

Court in the above case also found that identification of the appellants, as perpetrators did not require an identification parade since the appellants were properly identified at the scene of crime. In light of the above, we find that failure to carry out an identification parade properly did not cause any miscarriage of justice since the perpetrators were already known to the witnesses. Ground No. 1 therefore fails.

Considering Ground No. 2, the Trial Judge is faulted for not conducting a **trial within a trial** before admitting an extra-judicial statement. In re-evaluating evidence in the instant case, we would like to consider the issue of the charge and caution statement made by A1.

The Supreme Court in ***Amos Binuge & ors v Uganda, SCCA No. 23 of 1989***, held as follows:

"It is trite that when the admissibility of an extra-judicial statement is challenged, then the objecting accused must be given a chance to establish by evidence, his

grounds of objection. This is done through a trial within a trial…the purpose of a trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted."

Further, in ***Tuwamoi v Uganda [1967] EA 84, 91*** Court held that;

"…When an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true."

In the instant case, we reviewed the proceedings of the lower court and noted that **A1** testified that he was beaten and forced to make his statement but the two men he was taken before never asked him whether he was beaten before he could make a statement. In his Judgment, the Trial Judge noted that **A1** in his defence testified that he was beaten by police and forced to say what he admitted in his statement. The Trial Judge went ahead to state that he doesn't believe this assertion. There is however nowhere on court record where a ***trial within a trial*** was conducted by the Honorable judge to establish whether what **A1** stated was true or false.

We are of the view that when A1 disputed the charge and caution statement during trial, the learned Trial Judge was supposed to conduct a ***trial within a trial*** to find out the truthfulness and voluntariness of the statement, which he did not do but instead, chose to believe the prosecution's case and dismissed the Appellant's case as being untruthful.

It is therefore our considered view that the Trial Judge should have assessed the voluntariness of the statement vis-a-vis the Appellant's denial and thereafter give reasons for believing the prosecution case and

not the defence. He omitted to do this, which was fatal and caused a miscarriage of justice. Ground No. 2 thus succeeds.

In respect of Ground No. 3, counsel for the 2nd and 5th Appellants faulted the Trial judge for relying on exhibits, which were not produced in court. On this Ground, we observed that some items relied on by the trial court as exhibits were never tendered in court. However, the post-mortem report **Exhibit P1** gave a fair description of the cuts and injuries the deceased suffered. It also describes the weapons likely to have been used as machetes and knives.

In **Mutesasira Musoke v Uganda SCCA No. 17 of 2009**, court held that;

"In a case of aggravated robbery where the exhibits used in the commission of that offence, for some reasons, such as being hidden or destroyed or purposely being kept away cannot be exhibited in court, the prosecution is entitled to adduce evidence of the description of those items or weapons used in the commission of the offence as well as that of the injuries suffered by the victims of the offence, as sufficient and proper proof beyond reasonable doubt of the ingredients of the offence."

Further in **Mumbere Julius v Uganda SCCA No. 15 of 2014** the Supreme Court held that;

"For clarity, we wish to observe that exhibits in criminal trial fall into two broad categories. The first category is those exhibits, which are not recoverable because they are either hidden or destroyed. In this case what is required of the prosecution is to adduce evidence giving a description of the items…in both categories the overriding principle is whether the non-production of an exhibit was fatal to the prosecution case and in the instant case we think it was not."

In light of the above authorities, the post-mortem report coupled with testimonies on record are reliable evidence that a machete and knife

though not produced in court, were sufficient proof that objects described by the witnesses had been used. Ground No. 3 thus fails.

Regarding Ground No. 4, the Trial Judge is faulted for relying on insufficient evidence to find the appellants guilty of murder. During evaluation of evidence, the Trial Judge relied on different pieces of evidence that is, the testimony of **PW2** who testified that she went to the house of a one Baryomuntebe Stephen and heard voices of A1, A2, A3 and A6 plotting the death of the deceased and when she entered the house, she found them in the sitting room. The Trial Judge also relied on evidence of **PW1** who testified that a day before the deceased was killed, A2 and A5 purchased a panga, torch and metallic handle knife from his shop.

We therefore note that in absence of direct evidence connecting the appellants to the death of the deceased, the lower court relied on circumstantial evidence.

In **Byaruhanga Fodori v Uganda SCCA No. 18 of 2002**, the Supreme Court noted that;

"It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must, before deciding on 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."

The law on the evidence of a single identifying witness has long been settled by the decisions of **Abdulla Bin Wendo v R [1953] EACA 166** and **Abdalla Nabulere & Anor v Uganda CA No. 9 of 1978**. It was stated that;

"Where the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need to caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly the length of the time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger."

In **Sabwe Abdu v Uganda SCCA No. 19 of 2007 Court held that;**

"There is evidence on record that the two girls were familiar with the appellant because he lived about a quarter of a mile from their home, they always passed by his home as they went to school and they used to hear him speak to other people. The appellant also used to come to their home where they would hear him speak to their father. We agree with the trial judge's finding that given these circumstances the girls would be able to identify the appellant by voice even if they had never directly talked to him. To identify a person's voice, one does not necessary have to have talked with that person."

In the case now before us, the trial Judge relied on evidence of PW2 who testified that before the death of the deceased, she went to Baryomuntebe's home and heard voices of A1, A2, A3 and A6 plotting the death of the deceased. She added that she walked in and saw A1, A2, A3 and A6. From the court record, it is indicated that PW2 knew A1, A2, A3

and A6 well since they had interacted over time and lived in the same village for a long time. She added that he was able to identify A6 voice very well because it was different from other residents and has heard him speak several times.

The Trial Judge also relied on evidence of PW1 who testified that the day before the deceased was killed A2, A4 and another person purchased a machete, torch and metallic handle knife form his shop and he was able to recognise the machete and knife from the scene of crime.

Having studied the lower court record, we find that the Trial Judge properly evaluated the circumstantial evidence presented by prosecution *vis-a-viz* the defences raised by the appellants and found that the appellants were guilty. Ground 4 thus fails.

Regarding Ground No. 5, counsel for the 2nd and 5th appellants submitted that the trial Judge erred when he denied the appellants adequate representation in a very serious capital offence when on 5th April 2016 he asked counsel for the both sides to file written submissions by close of business of 6th April 2016 and when he did not direct as to who to begin and who to reply and to give counsel for the Appellants opportunity to study and reply to the submissions of counsel for the respondent which occasioned a miscarriage of justice.

We would first of all wish to point out that this ground is rather argumentative, which offends **r. 66 (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10**. However, we found that the Trial Judge did not err nor did he deny the appellants any chance of representation since they ably presented their evidence on court record. Counsel's contention that the Trial Judge did not give a schedule for who to file

submissions first and who to reply is a misguided concept. We find that Ground No. 5 lacks merit and is hereby dismissed.

On Ground No. 6, counsel for the 2nd and 5th appellants argued that the prosecution did not prove common intention thus the judge erred to infer it. **Section 20 of the Penal Code Act** provides that;

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

In **Kisegerwa & anor v Uganda CACA No. 6 of 1978**, court noted that;

"In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence…an unlawful intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and omissions of any of them to disassociate himself from the assault."

In **R v Okule & Others [1941] 8305 EACA 80,** it was held that;

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

In the instant case, the Trial Judge relied on the evidence that the appellants met at a one Baryomuntebe's home and planned to kill the deceased. We find also that the Trial Judge believed PW2 whose evidence was that she heard all the five appellants planning the murder of Geoffrey Twinomugisha. Before a trial court convicts joint-offendors it must be certain that this was a joint venture to which the five appellants were all party. We find it necessary to ensure that there is a common purpose, complicity, and that this was in the end a joint venture in which all the five were accomplices. In this case there was a tacit and reciprocal understanding between Appellants No. 1 and No.4 that the now deceased, Geoffrey should be eliminated and to accomplish this plan Appellant No. 1 procured appellant No. 4 to commit the murder. Appellant No. 4 was procured for UGX 500,000/= only. Appellant No. 2 aided and abated this crime when he accepted to transport Appellants No. 3, No. 4 and No. 5 and on the way he witnessed A3, A4 and A5 buy the implements such as a torch, a machete and a knife which he helped transport and were used in the murder. While up to this point A2 might have been considered uninterested in the venture, but as he gained knowledge of what venture the other appellants were up to, he became an accessory. Although their liability was of a secondary nature, the other three placed themselves squarely at the centre of this controversy and murder. In a proverbial manner, Appellants No.3 and No.5's 'feet were quick to rush them into trouble'. In this case Appellant No. 1 was the initiator. On his own he was not courageous enough to kill Geoffrey so he procured Appellant No. 4. It is not in controversy that Appellants No. 3 and No. 4 swiftly joined the criminal venture designed to end an innocent man's life while No. 2 transported the three to No. 1's home. The

mens rea was complete. The venture was fully formed. It matured to fruition the instruments for murder were purchased eventually when the target was executed.

We have painstakingly considered the criminal liability of the five joint-offenders. We find that the Trial Judge correctly applied the doctrine of common intention to the circumstances of the case. Ground No. 6 also fails.

Regarding Ground No.7, the 2nd and 5th appellants faulted the Trial Judge for denying the assessors a chance to participate in the proceedings.

From the Court record, we observed that the assessors were present and participated in the proceedings where after they gave their opinion on 5th May 2016. Counsels' arguments that the assessors were denied to participate in the proceedings because they did not hear the oral submissions of the lawyers is unfounded since assessors were present from the beginning of the trial to the end and were able to give their joint opinion. This ground thus lacks merit and should fail.

Regarding Ground No. 8, it was contended by counsel for the 2nd and 5th appellants that summing up was not done since the record lacks the summing up notes.

From the record, the Trial Judge noted that *"summing up done in open court."* And at the same page the assessors gave their opinion.

Summing up for the assessors is a requirement of the law. **Section 82 (1) of the Trial Indictment Act** states as follows;

"When the case on both sides is closed, the Judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state

his or her opinion orally and shall record each such opinion. The Judge shall take a note of his or her summing up to the assessors."

In **Simbwa Paul v Uganda CACA No. 23 of 2012** this court noted that;

"It is a good and desirable practice that the substance of the summing up notes to the assessors appears in the record of proceedings. It is the only way an appeal court can tell whether the summing up was properly done. We are however satisfied that this essential step was undertaken by the Trial Judge and that failure to file the notes on record was not fatal to the conviction."

Further, in **Mawanda Patrick v Uganda CACA No. 210 of 2010**, this court held that;

*"The Judge therefore erred when she failed to comply with the above provision of the law which is set out in mandatory terms. **(S. 81(2) of the T.I.A).** We however, find that no substantial miscarriage of justice was occasioned to the appellant as the assessor's opinion to convict him of a lesser offence of manslaughter, was rejected by the trial Judge who went on to convict him of a more serious offence of murder. Section 34(1) of Criminal Procedure Code Act permits this court to ignore procedural errors and omission if no substantial miscarriage of justice has been caused."*

It is therefore our finding that failure to include the summing up notes did not occasion any miscarriage of justice since the record indicates that summing up was conducted. Ground No. 8 also fails.

Regarding Ground No. 9, the 2nd and 5th appellants faulted the trial judge for relying on extraneous matters to convict them. We find that this ground has already been discussed under Ground No. 3 above under evaluation of evidence on record thus it is dismissed.

In respect of Ground No.10, the 2nd and 5th appellants fault the Trial judge for failing to follow the procedure prescribed by law in conducting a criminal trial.

We find this ground too general and not specific to exactly which procedure the Trial Judge failed to follow. Counsel should refrain from framing such general grounds of appeal, which offend **r. 66 (2) of the Judicature (Court of Appeal rules) Directions SI 13-10**. Ground 10 is thus struck out.

Considering Ground No.11 both counsel for the appellants contended that 45 years' imprisonment was manifestly harsh and excessive.

It should be noted that the Court of Appeal can lawfully alter, increase or decrease a sentence under **S. 34(2) of the Criminal Procedure Code Act cap 116.** Further, **rule 32 (1) of the Judicature (Court of Appeal) Rules,** states, that;

'On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.'

However, in the case of **Kamya Johnson Wavamuno v Uganda SCCA No. 16 of 2000** the Supreme Court noted that;

"...It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration, or an error in principle was made. It was not sufficient that the members of the court would have exercised their discretion differently."

This court must therefore test to see whether it can, in the circumstances vary, alter or confirm the sentence passed against the Appellants. While meting the sentence in the instant case, the learned Trial Judge had this to say;

"This court has taken note of the mitigation as put across by the convicts and their counsel. No doubt, murder is a serious offence. Deceased was killed in cold blood for no reason at all but simply because the land he … bought was later sold to another person and the money was never refunded. Such cases are very common in our jurisdiction, which calls for a different sentence. This will not only enable the convicts to reform but also a loud and clear message will be sent out to the public. The convicts have spent 5 years on remand. I shall therefore sentence each one of them to a period of 45 years' imprisonment starting from today."

While the Trial Judge mentioned the mitigating it is our considered opinion that the aggravating factors pre-occupied his mind and that is why, in our view, he meted out a sentence of 45 years' imprisonment against the appellants. We find that if the trial Judge had taken time to consider both the mitigating and aggravating circumstances he would have found that the sentence of 45 years' imprisonment was rather on the higher side. We also note that this sentence is not consistent with the sentences passed by this court in similar circumstances. In such circumstances, we consider parity of sentence in order to ensure that offences of a similar nature are handled in a similar manner across board. And we are not the only court to take this path. The Supreme Court in **Aharikundira v Uganda SCCA No.27 of 2015** noted that;

"It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital

principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."

The appellate courts have now considered the consissue of consistency in sentencing. Some of the cases involving murder are listed below;

In Anywar Patrick & Anor v Uganda, CACA No. 166 of 2009, this court set aside the sentence for life imprisonment imposed on the appellants for the offence of murder and substituted it with a sentence of 19 years and 3 months' imprisonment.

Similarly, in **Mbunya Godfrey v Uganda SCCA No. 4 of 2011**, the Supreme Court set aside the death sentence imposed on the appellant for the murder of his wife and substituted it with a sentence of 25 years imprisonment.

In **Tumwesigye Anthony v Uganda, CACA No. 46 of 2012**, the appellant was convicted of murder and sentenced to 32 years imprisonment. On appeal, this court set aside the sentence of 32 years and substituted it with 20 years' imprisonment.

In Turyahika Joseph v Uganda CACA No. 327 of 2014, this court held that; *"...sentences ranging from 20-30 years are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lesser sentence..."*

Further in Tumwesigye Rauben v Uganda CACA No. 181 of 2013, the appellant was sentenced to 40 years and on appeal, the sentence was reduced to 20 years' imprisonment.

In view of the above analysis of related trials and in the interest of consistency, we are of the view that the sentence of 45 years was manifestly excessive and harsh.

We now consider the other important leg in the sentencing; the amount of time spent on remand. In line with **Article 23 (8) of the Constitution,** which requires courts to take into account the period the convict spent on remand, and the decision of **Paul Kibolo Nashimolo v Uganda SCCA No. 46 of 2017,** the courts must now consciously off set the period spent on remand. The trial Judge did not comply with Article 23(8). Consequently, in view of the illegality and severity of sentence and considering the time spent on remand we find it proper to set aside the sentence of 45 years' imprisonment.

Ground No. 11 succeeds

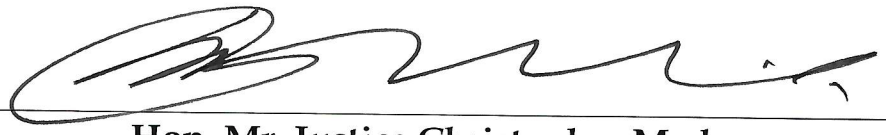
Having set aside the illegal sentence, we now proceed under **Section 11 of the Judicature Act**, to impose a new sentence of 35 years, which we find more appropriate in the circumstances. Considering the 5 years the appellants had spent on remand, we deduct the 5 years from the 35years.

The appellants are each sentenced to a period of 30 years' imprisonment w.e.f **09th May 2016** being the date of sentence.

Dated at Mbarara this ..30th..Day of ..May..... 2022.

Hon. Mr. Justice Fredrick Egonda-Ntende
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal



Hon. Mr. Justice Christopher Madrama
Justice of Appeal