THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CONSOLIDATED CRIMINAL APPEALS NOs. 037 & 43 OF 2018

(Coram: Elizabeth Musoke, Cheborion Barishaki and Hellen Obura, JJA.)

1. MUKISA HAKIM

2. MAGANDA EDIRISA ::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Jinja before Elubu, J. delivered on the 8th day of May, 2018 in Criminal Session Case No. 0182 of 2012.)

JUDGMENT OF THE COURT

Introduction

The appellants were indicted, tried and convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act by the High Court (Elubu, J.) on 8th May, 2018. They were sentenced to 25 years' and 20 years' imprisonment respectively.

Background to the Appeal

The facts of this case as ascertained from the court record are that on the 16th day of October 2011 at Kitondha Trading Center, Bulesa Sub County in Bugiri District, Barasa Peter summoned the residents of Kitodha for a meeting to resolve the allegations of poisoning and witchcraft against Byansi Abudu (the deceased). The meeting was held opposite Kitodha police station and had over 100 people in attendance including the appellants. During the meeting, the gathering turned rowdy and started stoning Byansi Abdu. Byansi managed to escape and locked himself in a nearby resident's house. The mob under the leadership of Barasa Peter and Mukuve Sadam broke into the house and pulled Byansi out. Byansi was kicked and hit with various objects to wit a hoe, an iron bar and sticks. The police at Kitondha intervened and manage to disperse the mob. Byansi

sustained life-threatening injuries and was rushed to Bugiri hospital for medical attention where he succumbed to his injuries the next day. The appellants ran away from the village but were arrested a couple of weeks later. They were indicted, tried and convicted of the offense of Murder and sentenced as aforementioned.

Being dissatisfied with the decision of the trial Court, the appellants appealed to this Court on the following grounds;

1. ***That the learned trial Judge failed to properly evaluate the evidence as a whole thereby arriving at the wrong decision and occasioning a miscarriage of justice.***
2. ***That the learned trial Judge erred in law when he denied the appellant the opportunity to call their witnesses in the defence of the case thereby denying them a fair trial thereby occasioning them a miscarriage of justice to them.***
3. ***That the sentence against the appellants was harsh and excessive in the circumstances***
4. ***That the learned trial Judge erred in law when he did not consider other mitigating factors of the appellants.***

Supplementary grounds of appeal.

5. ***That the learned trial Judge erred in law and fact when he convicted the appellants basing on evidence of the prosecution witnesses that was marred with major contradictions.***
6. ***That the learned trial Judge erred in law and fact when he dismissed the appellants' defence of alibi yet the prosecution did not destroy it in any way of evidence of investigation.***
7. ***That the learned trial Judge erred in law and fact when he held that there was correct identification of the appellants basing on the evidence of the prosecution witnesses which was very inconsistent and majorly contradictory.***
8. ***That the learned trial Judge erred in law and fact when he reached a conclusion that the appellants had common intention in committing murder with the prosecution having failed to disprove the appellants'defence of alibi.***

The appellants prayed that this Court allows the appeal, sets aside the order of conviction and quashes the sentence and the appellants be accordingly acquitted. In the alternative, the appellants prayed that their sentence be varied to 5 years or Court

sentences them to pay a fine. The respondent opposed the appeal.

Representation

At the hearing, Ms. Kevin Amujong, counsel represented the appellants on State Brief whereas Ms. Nakafeero Fatina, Chief State Attorney represented the respondent. The appellants could not physically be in court due to the restrictions on movement of inmates following the Standard Operating Procedures put in place to avert the spread of corona virus. However, they were facilitated to participate in the court proceedings from Jinja Main Prison via zoom technology. Counsel for both sides, with the leave of Court, filed written submissions which have been considered in this judgment.

Appellants' submissions

In her written submissions, counsel abandoned ground 2 and submitted on grounds 1, 5, & 7 concurrently, grounds 3 & 4 and grounds 6 & 8 together respectively. On grounds 1, 5, & 7 she submitted that the prosecution did not prove beyond reasonable doubt that the appellants were guilty because they failed miserably to prove ingredient 4 of the offence which is participation of the appellants and common intention and that, if the learned trial Judge had properly evaluated the evidence, he would have found so.

Counsel contended that the learned trial Judge, in reaching the conclusion that the appellants were placed at the scene of crime and thus participated in murdering the deceased, relied on the evidence of PW1, PW2 and PW3 which was contradictory.

Counsel submitted that PW1 No.18668 D/Sgt Otete Moses did not know the appellants, PW2 and PW3 as he did not inform court how he came to know them. He argued that since PW1 was a Police Officer, it is unimaginable that he knew everyone in the village. Counsel for the appellants added that the 1st appellant denied knowing PW1 and PW4 while the 2nd appellant denied knowing any of the prosecution witnesses. Counsel for the appellants further concluded that from the foregoing the learned trial Judge erred when he stated that the appellants were known to all the prosecution witnesses. Counsel

submitted that even if PW1 had known the appellants, he could not have seen them stoning the deceased since PW1 had admitted that the stones were being hurled stealthily and that after sometime he had moved away from the scene to go and pick a gun to help him disperse the crowd.

Counsel also contended that during the trial PW1 alluded to recovering an attendance list, a small hoe and an iron bar but the same were not exhibited in court as evidence. He further added that the prosecution did not present a key witness, a one Mutesi who reported to PW1 that, the deceased had been beaten up from her homestead.

On contradictions, counsel submitted that PW1, PW2 and PW3 contradicted each other. He contended that PW1 told court that he attended the meeting at 2.00pm and there were 102 people in attendance while PW2 told court that he had attended the meeting at 4.00pm and there were 65 people in attendance. PW3 stated that the meeting had begun at 2.00pm and ended at 3.00pm.

Additionally counsel contended that PW2 and PW3 had told court that the meeting had turned rowdy after the 2nd appellant had hit the deceased with a bench yet PW4 stated that a one Peter Barasa was the first to kick the deceased in the ribs giving lee way for others including the appellants to join him. He questioned why PW1 did not testify to the same.

Counsel further submitted that PW2 informed court that he is the one who called PW1 to save the father yet PW1 stated that it was a one Mutesi. She also stated that PW2 told court that he had helped his father escape the mob yet PW1 never stated anything of the sort. Counsel submitted that PW2 had testified that Peter Barasa had followed the mob when the deceased managed to escape from the meeting yet PW1 did not testify to the same. Counsel stated that PW3 told court that the mob had beaten the deceased yet PW1 and PW2 had told court that the mob had stoned him instead. According to counsel, these contradictions are major and ought not to have been ignored by the learned trial Judge. She added that the learned trial Judge had failed to acquit the appellants basing

on these contradictions yet it was on the basis of the same contradicting evidence as given by PW1 and PW2 that he found Peter Barasa not to have been part of the mob that followed the deceased after he had escaped from the meeting and thereby acquitted him.

Counsel also submitted that the learned trial Judge erred when he ignored the evidence of DW1 who stated that PW2 and PW3 were in Namayingo and Kampala respectively and did not witness the incident. She drew the attention of this Court to the falsehood that PW2 had stated at the trial, namely that; PW2 noticed who hit the deceased yet at the time he was helping him to safety; PW2 was not hit by any stone when he was helping his father to safety; PW2 stated that he had locked his father in the house and stepped away but later changed to state that a one Yazidi Mukuve is the one who pulled him away from the door. Counsel added that the learned trial Judge should have considered the evidence that DW1 had called PW2 from Namayingo to come and take the deceased to hospital.

Counsel contended that PW3's conduct of running to hide in the forest and only coming out in the cover of darkness at 9.00pm to go see his father in hospital is contrary to the conduct of a reasonable man who has just witnessed his father being attacked. She added that PW3 only arrived to see his father in hospital at 9:00pm because he was coming from Kampala.

Counsel also submitted that PW1, PW2 and PW3 did not specifically tell court the role that each of the appellants played during the incident and therefore they did not clearly identify the appellants.

Further, that though PW1 told court that the appellants had run away to evade arrest, this was not true since the 1st appellant was arrested immediately after the incident and the 2nd appellant was never summoned to police during investigations.

Counsel also submitted that the learned trial Judge ignored the alibi raised by the appellants. He stated that DW3 told court he was attending to mourners and DW4 told

court he had taken his wife and child to see a herbalist. She argued that the appellants' defence of Alibi was never discredited by the prosecution. He referred to the decision in ***Bogere Moses and Anor vs Uganda; Supreme Court Criminal Appeal No.1 of 1997.***

In conclusion, counsel submitted that the learned trial Judge failed to evaluate the evidence on the record and thus erred when he found that the appellants had been properly identified by the prosecution witness at the scene of crime. She invited this Court to fault the learned trial Judge and acquit the appellants.

On Grounds 6 and 8, counsel submitted that the learned trial Judge misdirected himself on the principle of common intention yet the same had not been alluded to by the prosecution. Counsel also stated that the learned trial Judge could not use the principle of common intention against the appellants since the prosecution failed to discredit the appellants' alibi. She added that the prosecution evidence was marred with major contradictions and inconsistencies that even led to the acquittal of a one Peter Barasa.

On Grounds 3 and 4 counsel submitted that the learned trial Judge did not take into consideration the circumstances under which the offence occurred when he ignored the fact that the deceased had told DW1 that Walyoba had hit him most. Counsel contended that the learned trial Judge did not accord the mitigating factors the weight they deserved when he imposed a harsh sentence of 25 years' and 20 years' imprisonment respectively and yet decided cases of offences of similar nature have lesser sentences.

He therefore urged this Court to interfere with the sentence that was passed and substitute the same with 5 years or sentence the appellants to a fine.

Respondent's submissions

Counsel submitted that the appellants' grounds of appeal are a gross violation of rule 66(2) of the rules of this Court as they are vague, argumentative, and repetitive and not specific to the errors that the appellants want this Court to address.

On grounds 1, 5 and 7, counsel submitted that the appellant's contention is majorly on identification, contradictions in the evidence of PW1, PW2 and PW3 and evaluation of evidence.

On the issue of identification, counsel submitted that the factors that favored proper identification were all in play namely; that the incident happened during day, the assailants were known to the witnesses and the incident lasted long for a time which facilitated proper identification of the assailants.

Counsel submitted that PW1 was a Police Officer at Kitodha in 2011 and during his time there, he had come to know the residents of Kitodha who included the appellants. She added that PW2 was a resident of Kitodha and he testified that he saw the 2nd appellant rallying people to kill the deceased. Further, that the 2nd appellant picked a bench to hit the deceased and that he later pursued the deceased and hit him again with an iron bar and fractured his head. PW2 also testified that the 1st appellant and Mukuve Sadam pursued the deceased when he tried to escape. She submitted that PW1 and PW2's evidence corroborated each other and the learned trial Judge rightly found them credible to make a finding to convict the appellants.

She further submitted that the contradictions in the evidence of PW1 and PW2 regarding who reported the matter to police and whether trouble was started when the deceased was hit with stones or a bench are minor and do not go to the root of the case and as such were rightly disregarded by the learned trial Judge. She referred court to the decision in ***Okwanga Anthony vs Uganda, (2001 – 05) HCB; Alfred Tajar vs Uganda; EACA CR Appeal No. 167 of 1969;*** *and* ***Kato Kyambadde & Anor vs Uganda; Supreme Court Criminal Appeal No 30 of 2014.***

On grounds 6 & 8, counsel submitted that PW1 and PW2 identified the appellants at the scene of crime and this evidence was weighed by the learned trial Judge against the appellants' alibi and he made a finding that the appellants had been placed at the scene of crime. Counsel argued that the appellants' defence of alibi was sufficiently rebutted

and discredited by the evidence of the prosecution.

Counsel also submitted on the issue of common intention that section 20 of the Penal Code Act is applicable. She contended that the 2nd appellant was the ring leader of the assault and he was helped by the 1st appellant which means the 2nd appellant had a common intention having been successfully placed at the scene of crime. She prayed that this ground fails.

On ground 3 & 4, counsel submitted that the learned trial Judge pronounced himself on the mitigating factors of the appellants before he reached his sentences. She pointed out that the appellate court can only interfere with the learned trial Judge's discretion to sentence if the sentence is illegal, or manifestly so excessive or so low as to amount to an injustice. Counsel referred to the sentencing guidelines that provide for a sentence of 35 years and a sentencing range of 30 years to death in cases of murder. She submitted that the sentences of 25 years' and 20 years' imprisonment respectively were not harsh and court rightly directed itself on the law and applied it to the facts.

In conclusion, counsel invited this Court to uphold the conviction and sentence and dismiss the appeal.

Resolution by Court

We have carefully studied the lower court record, considered the submissions for both parties, and the law and authorities cited to us; as well as those not cited but are applicable to this case.

Before we resolve the grounds of appeal, we wish to make some observations regarding the appellants' Memorandum of Appeal and written submissions. **Rule 66(2) of the Judicature (Court of Appeal Rules) Directions SI 13—10 (Rules of this Court)** provide that 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.

As rightly pointed out, by counsel for the respondent, we note that the appellant's Memorandum of Appeal is repetitive and not concise as stipulated under rule 66 (2) of the Rules of this Court. Grounds 5 and 7 raise the same issue of inconsistences and contradictions in the prosecution's case while grounds 6 and 8 raise the same issue of the defence of alibi. Further, the appellant's written submissions are also vague, and circumlocutory. This is clearly poor drafting by counsel for the appellant.

Be that as it may, we have considered the fact that rejecting the Memorandum of Appeal would occasion a miscarriage of justice to the appellants whose trial took long in the lower court and the appeal is also already three years old in this Court and is likely to delay further if not disposed of now. We are therefore inclined to accept the Memorandum of Appeal as it is and only merge and consider the similar grounds of appeal together in the interest of justice.

We thus find that counsel's poor draftsmanship should not result into rejecting the appellant's memorandum of appeal and submissions. We shall therefore proceed to consider all the grounds raised in the Memorandum of Appeal and argued in the written submissions. The duty of this Court as the first appellate Court is to re-evaluate all the evidence on record and make its own finding. In so doing, it should subject the evidence to a fresh and exhaustive scrutiny. ***See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10; and Kifamunte Henry vs Uganda; Supreme Court Criminal Appeal No. 10 of 1997; and Pandya vs R (1957) EA 336.***

Being alive to the above-stated duty, we shall proceed to resolve the grounds of appeal in the order argued by counsel for the appellant as below.

Grounds 1, 5 and 7

In these grounds of appeal, the appellant faults the learned trial Judge for ignoring the law on inconsistencies and contradictions; identification; and circumstantial evidence

thereby failing to properly evaluate evidence regarding the identification of the appellants at the scene of crime thus occasioning a miscarriage of justice to the appellants.

PW1 told court that he was a police officer at Kitodha police station when the offence was committed. He stated that on the fateful day, he saw a wild gathering opposite the police station at 4:00pm and Barasa Peter, Mukuve Sadam and the appellants were in attendance. He called Peter Barasa aside to caution him about safety issues and how to save the deceased in case the meeting went out of hand. He stated that while they were discussing this, the residents started stoning the deceased. The deceased managed to escape from the angry residents but was chased down. It was at this juncture that he went to pick a gun to disperse the crowd. Before he could go back to the wild mob, a one Mutesi came and informed him that the deceased had been killed but he later learnt that the deceased was alive. He proceeded to the scene and found the deceased in a critical condition. Arrangements were made to have the deceased taken to the hospital for medical attention. PW1 stated that he called Bugiri Police Station and informed them about the incident and he was shortly joined by a highway patrol. He stated that an attendance list was retrieved from the scene and it had 102 people who had registered and were in attendance of the meeting.

PW2 told court that the deceased was his father. He stated that on that fateful day at around 2:00pm, he saw an ongoing meeting at Kitodha Police Post which might have had 65 people. He joined it while the 2nd appellant a resident of their village was addressing the residents in that meeting. He stated that he heard the 2nd appellant allege that the deceased had poisoned his child to death and therefore he deserved to be killed. He added that shortly after, he saw the 2nd appellant lift a bench and use it to hit the deceased. Thereafter, Barasa Peter, Mukuve Saddam, the 1st appellant and others started stoning the deceased. Further, that he helped the deceased escape from the rowdy mob by locking him in a one Mukova's house, however, the 2nd appellant broke into Mukova's house and retrieved the deceased. He stated that the angry mob descended on the deceased and continued beating him while he watched helplessly by

the road side about 15 metres away. The mob comprised of Barasa Peter, Mukuve Sadam and the appellants.

In cross-examination, PW2 told court that while he was helping his father escape, he was not hurt by the stones that the mob was hurling at his father. He also stated that after he had successfully helped the father escape the mob by locking him in Mukova's house, he was pushed aside by a one Yazidi Mukuve. It is at this time that the mob broke into Mukova's house and beat his father while he watched at the roadside.

PW3 stated that the deceased was his father. He testified that on the fateful day, he got to the meeting at 2:00pm. He found the 2nd appellant, a fellow resident addressing the meeting and alleging that the deceased had poisoned his child to death and therefore he deserved to be killed. The 2nd appellant lifted a bench and used it to hit the deceased. Further, that Barasa Peter, Mukuve Saddam, the 1st appellant and others started stoning the deceased. The meeting was disrupted between 2:00pm and 3:00pm.

PW4 was the investigating officer and he testified that during his investigation, he learnt that Peter Barasa was the first to kick the deceased in the ribs before being shortly joined by other residents. He was told that the 1st appellant had stones.

We will address the complaint on contradictions and inconsistencies first before we handle the issue of identification and circumstantial evidence. It was submitted for the appellant that the learned trial Judge erred in law and fact when he ignored the contradictions and inconsistencies in the prosecution evidence and, as such the failure to properly evaluate this evidence occasioned a miscarriage of justice to the appellant. The areas of contradictions were pointed out in regard to the time when the offence took place, the number of the people that attended the meeting that turned into a rowdy mob and the participation of Peter Barasa and the inconsistencies in PW2's evidence as to what happened during the commission of the crime.

Upon our own re-evaluation of the evidence on record as summarised above, we find that indeed there were some contradictions in the prosecution evidence in the areas pointed out by counsel for the appellant, which the learned trial Judge did not address.

The law on the effect of contradictions/inconsistencies in the prosecution evidence was articulated in the authority of ***Obwalatum Francis vs Uganda; Supreme Court Criminal Appeal No. 30 of 2015,*** where the Supreme Court held that:

> *"The law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained."*

In ***R vs A.M, 2014 ONCA 769,*** the Ontario Court of Appeal in Canada, commenting on the significance of inconsistencies in evidence stated:

> *"...Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned."*

With the above principle on how to deal with inconsistencies in mind, we now proceed to consider the contradictions and inconsistencies in the prosecution evidence as pointed out by counsel for the appellant to determine whether the failure by the learned Judge to consider them caused a miscarriage of justice to the appellant as contended for him

On contradictions and inconsistencies on the time the offence took place, we observe that the direct evidence in this case is that of PW1, which was corroborated by the evidence of PW2 and PW3. We note that while PW1 told court that the time he went for the meeting was 4:00pm, PW2 stated that he got to the meeting at 2:00pm as it concluded. PW3 on the other hand stated that he got to the meeting at 2:00pm and it ended between 2:00pm and 3:00pm.

In our view, the different times given by PW1, PW2 and PW3 fall almost within the same range and this court takes into consideration the fact that at the time, none of these witnesses were observing the clock or their watches when the incident happened. Additionally, we believe what they said were merely guesses and not deliberate untruthfulness given that there was already passage of time when the witnesses testified. It would therefore be very unfair to expect them to say precisely the time when the offence took place. At any rate, the issue of precision of the time the offence took place is not material in proving the offence of murder with which the appellants were charged. However, we are mindful that it would have been a different matter if any of the witnesses had said the offence took place during daytime while others said it was at night. What we are sure of is that the incident happened between 2:00pm – 4:00pm.

For the above reason, we find the inconsistencies as to time minor since it is not on a material aspect of the evidence and as such does not go to the root of the prosecution case.

As regards the number of participants, PW1 did not tell court the number of people who had gathered but stated the number of the people who had signed the meeting's attendance list while PW2 estimated the meeting to having been comprised of about 65 people. We are of the view that the failure of the witnesses to know the exact number of people that attended the meeting is excusable and immaterial given that none of them counted the people and in any event, the trial took place about 2 years and 2 months after the offence was committed. What is not in dispute is that a meeting took place and many people were in attendance. We thus also find this inconsistency minor.

As regards the participation of Peter Barasa in the commission of the offence, counsel for the appellants contended that since Barasa had been acquitted due to the major contradictions and inconsistencies between the evidence of PW1 and PW2 on whether he (Barasa) had been part of the mob that killed the deceased, the appellants also ought to have been acquitted since their conviction was based on those very contradictory

pieces of evidence. On the record, PW1, a police officer testified that while he was on duty, he saw a meeting taking place across the police post. He went to investigate what was happening. When he reached there, he called Barasa Peter the Mayor and convener of the meeting aside and inquired from him on how he would save the deceased and while they were still on the side people started stoning the deceased. PW1 said at that point he went back to the police post to pick a gun but the people and the deceased disappeared. They had gone to the Mayuge Road direction. He returned to the station and a woman called Mutesi came and reported that the deceased had died. However, both PW2 and PW3 stated that the 2nd appellant was the first to hit the deceased with a bench and thereafter Barasa, Mukuve Saddam, the 1st appellant and others started stoning the deceased. PW4 told court that during his investigations the witnesses told him that Barasa was the first to kick the deceased in the ribs before being shortly joined by other residents and that the 1st appellant had stones.

We find that much as PW1 did not see Barasa stone, kick or hit the deceased, he could not account for what he (Barasa) did when he (PW1) went to pick his gun from the police post. It is possible that Barasa could have run and joined the mob in assaulting the deceased but the evidence of PW1 rules out the possibility that he was among the people who stoned the deceased at the meeting venue. That then discredits the evidence of PW2 and PW3 on his participation thus leaving only the evidence of PW4 which in our view is hearsay with no evidential value. We therefore find the evidence about Barasa's participation clearly so contradictory that the learned trial Judge was justified to so find and acquit him. However, we find that the learned trial Judge relied on other pieces of evidence which were not hearsay to convict the appellants and therefore, any allusions to PW4's evidence did not occasion any miscarriage of justice to the appellants.

On the issue regarding contradictions and inconsistencies in the evidence of PW2, it is true PW2 testified in court that while he was helping the deceased to escape, the stones that the mob was hurling at the deceased miraculously did not hurt him. He also stated that after he had successfully helped the deceased escape the mob by locking him in

Mukova's house, he left and stood at the side of the road and watched the mob. In cross-examination he contradicted himself and stated that he left Mukova's house because he had been pushed aside by a one Yazidi Mukuve.

We are of the view that this is also a minor contradiction and inconsistency that does not go to the root of the case. It is not in dispute that the deceased fled from the meeting venue to a house from where he was pulled out and lynched causing fatal injuries that caused his death. Our finding is that the events of that afternoon took place in a situation of considerable commotion occasioned by a mob involving many people. The contradictions and inconsistencies as to what PW2 did to protect his father, in our view, is immaterial since the ingredients of the offence are proved by the evidence on record.

On the whole as regards the contradictions and inconsistencies in the prosecution case, while we accept the contention that the learned trial Judge did not address his mind to them, upon our own re- evaluation of the evidence on record as above, we find that there were no material contradictions and inconsistencies in the prosecution evidence which went to the root of its case and occasioned a miscarriage of justice to the appellant.

We now turn to consider the complaint on identification. It was contended that; a) that PW1 could not identify the appellants since he was a mere police officer in Kitodha who could not have known the appellants, b) that PW2 and PW3 were not around during the incident as the same were stated to having been in Namayingo and Kampala respectively, c) that the 1st appellant did not know PW1 and PW2 and, d) that the 2nd appellant did not know any of the prosecution witnesses.

In circumstances where identification is difficult, the court is required to first warn itself of the likely dangers of acting on such evidence as the one above and should only do so after being satisfied that correct identification was made which is free of error or mistake. **See *Abdalla Bin Wendo vs R (1953) 20 EACA 106*; *Roria vs R [1967] EA 583* and *Abdalla Nabulere & two others vs Uganda [1975] HCB 77*).** In doing so, the court considers; whether the witnesses were familiar with the appellant, whether there was light

to aid visual identification of the appellant, the length of time taken by the witnesses to observe and identify the appellant and the proximity of the witnesses to the appellant at the time of observing the accused.

We note that the learned trial Judge found that the appellants were well known by the prosecution witnesses; that the incident happened at 2:00pm or thereabout which meant that it happened in broad day light; that both the appellants and the prosecution witnesses were in the meeting and therefore in close proximity to the appellants. The learned trial Judge found that these factors considered together provided excellent conditions for proper identification.

Upon our own reappraisal of the evidence on record, we find that PW1 was a Police Officer of Kitodha Police Post. We also find that PW1, PW2 and the appellants were residents of Kitodha. We further deduced that the 2nd appellant was a brother in law to PW2 and PW3, and that he was a land lord to the deceased. We also find that it is not in dispute that the meeting happened in broad day light and that the identifying witnesses attended the meeting. Some of the people who attended the meeting turned violent and assaulted the deceased. We observe that the contentions concerning identification were not put to the witnesses while they were giving evidence and thus this court finds them to be an afterthought. From the foregoing, we agree with the learned trial Judge that these factors provided favorable conditions for proper identification.

The appellants contended that during the trial PW1 alluded to recovering an attendance list, a small hoe and an iron bar but the same where not exhibited in court as evidence. It was also submitted that the prosecution did not present a key witness - Mutesi who reported to PW1 that Byansi, the deceased had been beaten up from her homestead.

We agree that Mutesi did not give evidence at the trial and the allegedly recovered attendance list, a small hoe and an iron bar were not exhibited in court as evidence. We however find that even without the evidence of Mutesi and the exhibits, there were other pieces of evidence that the learned trial Judge relied on to convict the appellants. We are

therefore of the view that even though this evidence ought to have been tendered into court, its absence did not occasion a miscarriage of justice to the appellants.

On the issue of circumstantial evidence, counsel for the appellants submitted that though PW1 told court that the appellants had run away to evade arrest, this was not true since the 1st appellant was arrested immediately after the incident and the 2nd appellant was never summoned to police during investigations.

We take note that this ground was not set out in the memorandum of appeal and never considered by the learned trial Judge while he was arriving at his decision of convicting the appellants. We however will still address the same so that no issue is left unresolved.

The principles which courts apply in deciding cases based on circumstantial evidence are well summarized in ***Akbar Hussein Godi vs Uganda; Supreme Court Criminal Appeal No. 03 of 2013*** as follows:

> *"There are many decided cases which set out the relevant principles which courts apply in deciding cases based on circumstantial evidence. In the case of Simon Musoke Vs. R (1958) EA 715 at page 718H, the Court of Appeal for East Africa held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon 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 also Teper Vs. R (1952) 2 ALLER 447. Also See Audrea Obonyo & Others Vs. R (1962) EA 542 where the principle governing the application by Courts of circumstantial evidence were considered.*

We note that the incident happened on 16/10/2011. PW3 and PW4 told court that the appellants together with other accused people had run away from the village after the incident. They stated that the 1st appellant was arrested on the same day with Barasa. Barasa informed court that he had been arrested from his home after one month. The 2nd appellant told court that he had been arrested on 10/7/2013 from Bulebe village where he was working as a driver for Habitat for Humanity. The 2nd appellant was arrested almost 2 years after the incident. In ***Remegious Kiwanuka vs. Uganda; Criminal Appeal 41 of 1995,*** the Supreme Court held that the

disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with the innocence of such a person.

In the instant case, the fact that the appellants were not immediately apprehended after the incident only points to the fact that they were in hiding. We find that the appellants' conduct of running away from the village after the incident is inconsistent with their innocence. However, we note that this evidence is circumstantial and the court needed corroborating evidence to convict the appellants which was available in this case.

From the foregoing therefore grounds 1, 5 and 7 fails.

Grounds 6 & 8

The contention of counsel for the appellant was that the learned trial Judge misdirected himself on the principle of common intention and the defence of alibi thereby occasioning a miscarriage of justice to the appellants.

The doctrine of common intention is provided for under **section 20 of *The Penal Code Act***, which states 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.

According to this doctrine, two or more persons who shared a common criminal plan as a result of which crimes were committed are responsible not only for those crimes they agreed to, but for all other crimes that would be considered the natural and foreseeable consequence of the plan.

Under **section 24 of The Trial on Indictments Act**, persons accused of the same

offence committed in the course of the same transaction as well as persons accused of different offences committed in the course of the same transaction, may be joined in one indictment and may be tried together. It does not matter which one of them struck the fatal blow.

Based on the doctrine of common intention, the learned trial Judge found that the appellants were identified by PW2 and PW3 as being part of the mob that actively assaulted the deceased. He held that the fact that death resulted from this collective action shows that the appellants had a common intention with others to commit the offence.

In a case such as the instant one, where the appellants have all been tried together as persons accused of the same offence committed in the course of the same transaction, we find that a question may arise as to whether all the accused can be found responsible for the final outcome. We note that the assault on the deceased was in 2 phases; he was first assaulted during the meeting and when he tried to escape and ran to the house of a one Mukova where he locked himself but the mob broke the door, pulled the deceased out and continued to assault him until he was left in a critical condition. He succumbed to the fatal injuries inflicted during this assault the next day.

There is a possibility that the 1st appellant may have participated at one phase and not the other. However, when a situation of fact (e.g. killing) is being considered, and a question arises as to when that situation began and when it ended, it may be arbitrary and artificial to confine the analysis to the ultimate act that resulted in death without considering in a broader sense, the context in which it happened. A criminal transaction comprises a series of acts, which are so connected together by proximity of time, community of criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction.

Acts linked by cause and effect will not necessarily form part of the same transaction. On the other hand, acts whether they occurred at the same time and place or at different

times and places, which are so interconnected and are also connected with the final outcome, will be deemed to form part of the same transaction. Where the transaction of which the alleged murder formed an integral part cannot be truly isolated from the assaults leading to the death, or where a killing is committed by the accused during what may be said to be a continuous orgy, the prior assaults will be deemed to form part of the same criminal transaction and any of the parties who took any significant part in the process, are deemed to have committed the offence. The distinction as to who participated at what phase thus become irrelevant.

The evidence on record establishes that a town mayor called a meeting to resolve a conflict between his subjects however in so doing, he failed to put safety measures to protect the deceased. The meeting turned into a violent mob which was comprised of the appellants that went on to assault the deceased in a manner that made it probable that as a consequence of the prosecution of that purpose his death would result, as such each of them is deemed to have committed the offence.

Upon our own re-evaluation of the evidence, we have no reason to fault the learned trial Judge for his application of the doctrine of common intention and therefore we find no merit in the complaint of the appellants in this regard.

On the issue of Alibi, Counsel for the appellants submitted that the learned trial Judge erred in law and fact when he ignored the defence of alibi raised by the appellants.

It is trite law 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 the crime and thereby proving that he is the one who committed the crime. The essence of an alibi is to prove that at the time of the commission of the crime, the suspect was somewhere else and it was impossible for him to have been at the scene of crime. In ***Festo Androa & Kakooza Joseph Denis vs Uganda*** *(supra)* the Supreme Court stated thus:

"It is trite that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible (that he could) have committed the imputed act." *(See also:* ***Sekitoleko vs Uganda, [1968] EA 531****)*

The expression, 'putting an accused at the scene of crime' was expounded on by the Supreme Court in ***Bogere Moses & Another vs Uganda*** *(supra)* where it stated;

"The passage cited earlier in this judgment shows that the learned trial Judge held the defences of alibi to be unsustainable because, "through the evidence of the eye witnesses the accused had been put at the scene of crime." What then amounts to putting an accused person 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. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces, evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable. In the instance case, we have found it very difficult to avoid the conclusion that the learned trial Judge considered and accepted the prosecution evidence alone, and then rejected the defence summarily simply because he had accepted the prosecution evidence. That was in our view a misdirection. Accordingly, we hold, with due respect that the Court of Appeal erred in law upholding the depth of the statement which had been arrived at pursuant to misdirection."

In the instant case, the defence adduced evidence to prove that the 1st appellant was not at the scene of crime at the time the offence is alleged to have been committed. The 1st appellant himself told court that during the incident, he was at home attending to mourners who had come to condole with him after he had lost and buried his brother on

10/10/2011. The 2nd appellant told court that during the incident, he had taken his wife, Namukove Zubeda and his children Sharif Maganda and Sumisa Namaganda to Lubanga landing site in Namayingo to see a traditional healer.

The evidence that the prosecution adduced and the trial court found that it placed the appellants at the scene of crime were that of PW1, PW2 and PW3. All this evidence has been summarized above so there is no need to reproduce them again. It suffices to say that PW1, PW2 and PW3 all consistently testified that the appellants were at the village meeting where the 2nd appellant alleged that the deceased had poisoned his child to death and therefore he deserved to be killed. Further, that 2nd appellant lifted a bench and hurled it at the deceased. Thereafter, Barasa Peter, Mukuve Saddam, the 1st appellant and others started stoning the deceased. The deceased escaped from the rowdy mob with the help of PW2 and locked himself in Mukova's house, however, the 2nd appellant broke into the house and dragged the deceased out while beating him. The angry mob descended on the deceased and continued beating him until he was unconscious.

Our perusal of the judgment indicates that the learned trial Judge considered both the prosecution evidence and the defence evidence of alibi. The learned trial Judge held that the appellants' alibi must fail because they had been properly identified and placed at the scene of crime. He held that the appellants were well known to the prosecution witnesses, that the incident had happened during broad day light and all parties were in the meeting and therefore in close proximity to each other. Additionally, the learned trial Judge held that there was no room for mistaken identity since the 2nd appellant was a land lord and an in-law to the deceased.

Upon our own re-evaluation of the evidence, we have no reason to fault the learned trial Judge for his finding. In the premises, we are satisfied that the appellants were placed at the scene of crime by the evidence of PW1, PW2, and PW3 as analyzed above which disproved their respective alibis. In the premises, we agree with the learned trial Judge

on his finding that the appellants participated in committing the offence therefore ground 6 and 8 also fail.

Ground 4

Counsel for the appellants submitted that the learned trial Judge erred in law and fact when he did not consider other mitigating factors of the appellants before sentencing them thus occasioning a miscarriage of justice to him.

The law on the role of an appellate court in reviewing the sentence of the trial court was articulated in the case of ***Kyalimpa Edward vs Uganda; Supreme Court Criminal Appeal No. 10 of 1995,*** when the Supreme Court referred to ***R vs De Haviland (1983) 5 Cr. App. R(s) 109*** and held as follows;

> *"An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the trial Judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount an injustice.* **See: *Ogalo s/o Owousa vs R (1954) 21 E.A.C.A. 270* and *R vs Mohammed Jamal (1948) 15 E.A.C.A. 126"***

This court also made a finding on the role of an appellate court in interfering with the sentencing discretionary powers of a trial Judge in ***Aharikundira Yustina vs Uganda, Court of Appeal Criminal Appeal No 33 of 2008*** where it held that;

> *"Interfering with the sentence of the trial court is not a matter of emotion but rather one of law. Unless it can be proved that the trial Judge flouted any of the principles in sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been the one trying the appellants. In the instant case, he found that the most appropriate sentence was death. Without proof that this discretion was biased or unlawful, this court would have no lawful means of interfering with the same".*

The sentencing regime in Uganda is further guided among others; by the ***Penal Code Act Cap.120*** which stipulates the various offences and the punishments to be handed down to persons found guilty of offences and by the ***Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions Legal notice No. 8 of 2013.*** The purpose of the sentencing guidelines is inter alia to provide principles and guidelines to be applied by courts in sentencing; to provide sentencing ranges and other means of dealing with offenders; to provide a mechanism for considering the interests of victims of crime and the community when sentencing and to provide a mechanism that will promote uniformity, consistency and transparency in sentencing.

The record shows that the learned trial Judge considered both the aggravating and mitigating factors that were presented to him. He then went ahead to weigh the mitigating factors against the aggravating factors. The mitigating factors were that the appellants were first offenders, they had spent time on remand, they had family and special note was made of the fact that the 2nd appellant had a large family and dependents; and that both appellants had pleaded for clemency.

The learned trial Judge however, observed that the offence was particularly a heinous crime committed in a savage manner, that the deceased escaped but was pursued, that he locked himself in the house but the same was broken into, that the injuries show the deceased had suffered a degree of harm, that the offence happened in front of his children, that mob just is rampant and people need to respect the rule of law, that the 1st appellant played a marginal role in the commission of the crime while the 2nd appellant played a key starring role.

In the premises he sentenced the 1st appellant to 20 years imprisonment and reduced the same by the time the 1st appellant had spent on remand. He did not take into account the period the 1st appellant had spent on remand. He sentenced the 2nd appellant to 30 years imprisonment but took into consideration the 5 years he had spent on remand and reduced the sentence to 25 years. With this evidence on the record, we find that ground

4 lacks merit and thus must fail.

Ground 3

The appellants submitted that the learned trial Judge erred in law and fact when he sentenced the appellants to a harsh and excessive sentence in the circumstance occasioning a miscarriage of justice to them. The submission on a harsh and excessive sentence relates to the consistency principle to the effect that the sentences passed by the trial court must as much as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts as the one in which sentence is being passed; and the appellate court, may if called upon to do so, be justified in interfering with the sentences which contravene this principle. (***See: Aharikundira Yustina vs Uganda (Supra)).***

The Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions (Supra) in the 3rd schedule provide that in murder cases, the starting point should be 35 years while the maximum point should be Death. The guidelines provide that the sentencing range of similar cases should be from 30 years to death after taking into account the aggravating or mitigating factors in each case.

We will now move to considering the sentences passed in previous murder cases involving mob justice.

In ***Turyahabwe Ezra and 12 others vs Uganda; Supreme Court Criminal Appeal No. 50 of 2015,*** the Supreme Court upheld the sentence of life imprisonment where a mob had attacked the deceased at his home, beat him up and later pursued him after the police had left and assaulted him to death.

In ***Mushikoma Watete & Ors vs Uganda; Court of Appeal Criminal Appeal No. 63 of 1998***, this Court upheld a sentence of death that was handed down to the appellants who murdered the deceased through mob justice.

In the present case, the 1st appellant's sentence is lower than what is stipulated by the sentencing guidelines and the range of sentences imposed in the cases cited above. The 2nd appellants' case falls within what is stipulated by the sentencing guidelines but is lower in the range of sentences imposed in the cases cited above. We therefore do not find the sentences harsh and excessive. In the premises, ground 3 of the appeal also fails.

In conclusion, this appeal is dismissed, and the appellants' conviction and sentences are upheld.

We so order.

Date at **Jinja** this ....21st.....day of ....February.....2022

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Hon Lady Justice Elizabeth Musoke

JUSTICE OF APPEAL

.....

Hon Mr. Justice Cheborion Barishaki.

JUSTICE OF APPEAL

.....

Hon Lady Justice Hellen Obura

JUSTICE OF APPEAL