THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama JJA*]

CRIMINAL APPEAL NO. 109 of 2017

(*Arising from High Court Criminal Session No.043 of 2014 at Kabale)*

BETWEEN

Ntirenganya Joseph ==========Appellant

AND

Uganda==========Respondent

(*An appeal from the Judgement of the High Court of Uganda [Kazibwe, J] delivered on 16th November 2016*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant and others at large on the 26th day of February 2013 at Mugwata village in Kisoro district unlawfully murdered Nsabimana Tomas. The learned trial judge sentenced the appellant to 26 years and 6 months' imprisonment.

[2] Dissatisfied with the conviction and sentence, the appellant appealed to this court on the following grounds:

> '1. The learned trial Judge erred in law and in fact when he relied on the unsatisfactory dying declaration of the

deceased without enough and cogent corroborative evidence.

2. The learned trial Judge erred in law and in fact when he ignored major contradictions and inconsistencies in prosecution evidence which occasioned a miscarriage justice,

3. The trial Judge erred in law and in fact when he failed to evaluate the evidence as a whole thereby reaching a wrong decision.

4. The trial Judge erred in law and in fact when he sentenced the Appellant to 26 ½ years imprisonment a sentence that was harsh in the circumstances.'

[3] The respondent opposed the appeal.

[4] At the hearing, the appellant was represented by Mr. Turyahabwe Vicent and the respondent by Mr. Peter Rubarema Zehurikize. Both parties opted to adopt their written submissions on record.

Submissions of Counsel

[5] Counsel for the appellant submitted that the law on dying declarations is set out in Kasonde Julius & Anor v Uganda Court of Appeal Criminal Appeal No. 049 of 2015 (unreported) and Kazarwa Henry v Uganda [2017] UGSC 22. He also relied on Oyee George v Uganda [2009] UGCA 8 for the conditions that must be met before any weight is attached to a dying declaration. Counsel for the appellant argued that the learned trial judge relied on the dying declaration without any warning to himself and the assessors which was erroneous. He further submitted that the conditions did not enable a proper identification of the appellant by the deceased given the fact that the attack happened around 2:00 am in the night when there was darkness which rendered visibility difficult. He stated that the deceased told PW6 that his attackers came from behind and covered his face with a sack like substance which aggravated the difficulty in visibility.

[6] Mr. Turyahabwe contended that the deceased was also not certain about the identity of his attackers since PW6 on cross examination told court that the deceased told him that he did not identify his attackers. He relied on Kazarwa Henry v Uganda (supra) for the submission that the fact the deceased may have told different people that the appellant was his attacker does not necessarily mean that the deceased was accurate. Counsel further argued that the corroborative evidence of previous threats given by PW4 and PW5 was never proved as the incidents were not reported to the police. He contended that there were contradictions and inconsistencies about the alleged grudges and threats contained in the evidence of PW1, PW4 and PW5.

[7] Counsel for the appellant submitted that the appellant was not under any moral obligation to visit the deceased or bury the deceased although he testified that he indeed visited the appellant while in hospital and he also buried the deceased. Counsel further submitted that there was no evidence that the appellant disappeared from the village. It was the appellant's unchallenged testimony that the only time he would leave home was to go to Kyegegwa district to teach.

[8] In reply, counsel for the respondent submitted that PW2, PW3 and PW5 testified that the deceased had told them that it is the appellant who had attacked him. He referred to the evidence of the witnesses. He contended that the evidence of the witnesses shows that the deceased was consistent in relaying the information that it is the appellant who waylaid him, assaulted him and poured the acidic substance on him.

[9] Counsel for the respondent referred to section 30(a) of the Evidence Act and Uganda v George William Ssimbwa Supreme Court Criminal Appeal No.37 of 1995 (unreported) on what amounts to a dying declaration and was of the view that the conditions were fulfilled. He contended that the deceased identified his assailants, he explained the nature of attack and the substance poured on him, he explained the reasons behind the attack, and he believed that he was dying. He submitted that the appellant and the deceased were well known to each other since they were brothers.

[10] Counsel for the respondent further submitted that the dying declaration was corroborated by various circumstantial evidence. He referred to the evidence

of previous threats and existing grudge between the appellant and the deceased contained in the evidence of PW3, PW4 and PW5 and the conduct of the appellant disappearing from the village.

[11] Regarding ground 2, counsel for the appellant submitted that the contradictions in the evidence of PW1, PW4 and PW5 on whether the deceased was able to talk while in hospital and the contradictions regarding the place that the deceased made the dying declaration rendered the evidence of the dying declaration unreliable. Counsel reiterated his submissions regarding the inconsistences in the evidence of previous threats.

[12] In reply, counsel for the respondent cited Sseremba v Uganda [2021] UGCA 14 for the position of the law on inconsistencies and contradictions in evidence. He contended that the contradicting evidence that the deceased told PW6 that he did not see who had attacked him but identified the appellant among his attackers to other witnesses is explainable given the deceased's state of health at the time. He further contended that it was in evidence that the appellant had grudges with both the deceased and his wife.

[13] In relation to ground 3, counsel for the appellant adopted his submissions in ground 1 and 2. In reply, counsel for the respondent submitted that this ground offends rule 66 (2) of the rules of this court and should be struck out.

[14] Regarding ground 4, counsel for the appellant submitted that there is need for consistency in sentencing. He relied on Aharikundira Yustina v Uganda [2018] UGSC 49. He referred to Batuli Moses & 7 Ors v Uganda [2020] UGCA 2009 where this court sentenced each of the appellants to 13 years and 9 months for the offence of murder. Counsel further referred to Rwabugande v Uganda [2017] UGSC 8 where the supreme court set aside a sentence of 35 years imprisonment and substituted it with 21 years imprisonment for the offence of murder. Counsel contended that a sentence of 26 ½ years imprisonment is higher than the range of sentences imposed in the above cases. He prayed that this court finds the sentence harsh and excessive and consequently exercise its powers under section 11 of the Judicature Act to impose an appropriate sentence.

[15] In reply, counsel for the respondent relied on Kakooza v Uganda [1994] UGSC 17 for the principles upon which an appellate court can interfere with

the sentence imposed by a trial court. He contended that the learned trial judge did not act on any wrong principle, did not overlook any material factor and judiciously exercised his discretion in imposing the sentence against the appellant. He referred to Turyamuhebwa v Uganda [UGCA] 79 for the submission that the sentencing range for the offence of murder of a single person, where the appellant is a first offender, the murder is not related to ritual sacrifice, was not premeditated and coupled with any offence is between 20 years' imprisonment on the lower end of the scale to 35 years' imprisonment on the higher end of the scale. Counsel contended that in this case, the sentence of 26 ½ years' imprisonment was not excessive because the murdered was premeditated. He referred to Aharikundira v Uganda [2018] UGSC 49 where the supreme court imposed a sentence of 30 years' imprisonment against the appellant who had murdered her husband.

Analysis

[16] It is our duty as a first appellate court to subject the evidence adduced at the trial to a fresh re-appraisal and draw our own conclusions regarding the law and facts of the case, bearing in mind, however, that we did not have opportunity to observe the witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

Grounds 1 and 2

[17] The issues under contention are whether the appellant was properly identified by the deceased as his assailant and whether the statements made by the deceased to the various prosecution witnesses amounted to dying declarations upon which court could base its conviction. Regarding the dying declaration, counsel for the appellant challenged the evidence of PW1, PW4, PW5 and PW6.

[18] PW1, Nyirakayinde Lydia, the wife to the deceased testified that on 14th December 2012 at 7:30 am, she was called by the appellant's wife informing her that the deceased had been found lying between Mugisha and Gasara villages. She went with Nizeyimana to see him, the deceased's face was

swollen and darkened, he could neither see nor talk. While the deceased was in Kisoro hospital, he talked. He told her that, 'it is A1 and A2 who have killed me.' The deceased was transferred to Mbarara hospital and later to Entebbe hospital where he died. She went to police to make a statement about what the deceased had told her while in Kisoro hospital and the police went to arrest the appellant and A2, but they had escaped.

[19] Upon cross examination, PW1 stated that she went to police before and after the deceased told her who had injured him. She told police that he could not speak in the last 2 days before his death. When she first went to police on 14th December 2012, she had not yet known the culprits. Her husband died on 25th February 2013.

[20] PW4, Sikubwabo John, a son to the deceased testified that his brother in the village called him on 14th December 2014 and informed him that his father, the deceased had been poured on something like acid. He reached Kisoro hospital and found the deceased in critical condition. The deceased was referred to Mbarara hospital and later transferred to Entebbe hospital. While at Entebbe hospital, when he had started improving, the deceased told him in the presence of his mother, elder brother Nsekanabo Emmanuel and other people who had come from Kampala that it was the appellant and his sons who had injured him. This was on 24th February 2013 and deceased died two days later. PW4 also testified that before the deceased told them that it was the appellant and his sons who assaulted him, the people who were at home had already reported the matter at police. Upon cross examination, PW4 stated that in the three months the deceased was hospitalised, he could speak like one word and keep quiet but at the time of his death, he talked, and they could hear.

[21] PW5, Kwizera Charles, the chairperson of Busarara village and a cousin to the appellant testified that he was informed on 14th December 2013 by a one Evas that the deceased had been poured on acid. He went and saw him in hospital that Sunday and he cried. He went back to see the deceased in Kisoro hospital on16th December 2013. As the deceased was about to be transferred to Mbarara hospital, he heard him saying that 'however much you are taking me to the hospital I am going to die but it is my brother and his children.' He was with a police officer. Upon cross examination, PW5 stated that at Kisoro hospital when the deceased spoke, it was as though he

was dreaming. PW5 stated on re-examination that when the deceased spoke, his wife was not present, she had gone to escort people.

[22] PW6, 44161 Detective Mugume Vicent attached to Kisoro police station testified that he received the first complaint of the attack on the deceased on 14th December 2012. He visited the deceased at Kisoro hospital. Although the deceased could not talk properly, he obtained a brief statement from the deceased. The deceased stated that on the fateful night at around 2:00pm, he was attacked by unknown people who came from behind him, they first covered his face with a sack like substance, poured a hot substance on his body, assaulted him and then left him on the verge of death. PW1 later took him to the scene of the crime but he did not recover any evidence because the scene had been compromised by the residents who came to rescue the deceased.

[23] In Kazarwa v Uganda [2017] UGSC 22, the Supreme Court stated:

> 'It has been reiterated time and again in a series of decisions by this Court and its predecessors, that where prosecution is based on evidence of a single identifying witness the Court must exercise great care so as to satisfy itself that there is no danger of basing conviction on mistaken identity.
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> See **Abdulla Bin Wendo and another v R [1953] EACA 166 , Roria v Republic [1967] EA 583, Abdalla Nabulere & Another v Uganda Cr. Appeal No 9 of 1978 (un reported) Moses Kaona v. Uganda Cr. Appeal No12 of 1981 (unreported) and Bogere Moses and another v. Uganda Cr. Appeal No I of 1997 (un reported).**
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> **It was stressed in the case of Abdulla Nabulere and Another v Uganda supra, that "apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time, the victim had to observe and even the opportunity to hear the assailant are factors to look out for. The Court said "All these factors go to the quality of the identification evidence.**

If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution." (Emphasis is ours)

In the case of **Isanga Lazaro, Amuza Kimbugwe, Ngobi Mutoigo v Uganda Criminal Appeal No 10 of 99 (SC)** it was said:-

We think that the aforesaid is even more compelling where the prosecution is based on a dying declaration even if the declaration is repeated to several witnesses.'

[24] It stated further:

'The Court of Appeal referred to the **Supreme Court decision in Criminal Appeal No.9 of 1987 Tindigwihura Mbahe v. Uganda** where it was held among others- ...

"evidence of dying declaration must be received with caution because the test of the cross examination may be wholly wanting; and have occurred under circumstances of confusion and surprise; the deceased may have stated this inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in darkness when identifications of the assailant is usually more difficult than day light.

The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case. It is not guarantee of accuracy. It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be

> **circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration a deceased person, made in the absence of the deceased and not subject to cross examination unless there is satisfactory corroboration."**
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> Also see (Okoth Okale and others v. Republic [1965] EA 55 and Tomas Amukono v Uganda [1978].
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> It is clear from the passages as reproduced in this judgment from the court of Appeal judgment, that the evidence of the dying declaration was treated like evidence of a single eye witness who appeared before court and there was an opportunity to subject him to thorough questioning with a view of testing the veracity of his evidence. But as was held in the **Nabulere Abdulla** case supra even III a case of an eye witness who testifies in court more caution has to be taken.'

[25] PW1, PW4 and PW5 all testified that the deceased told them that it was the appellant and his sons who attacked him on that fateful night. However, it was the testimony of PW6, the policer officer who recorded a statement from the deceased that the deceased told him that he was attacked by people he did not recognize. In his statement under paragraph 7 that was read by PW6 during cross examination, the appellant stated:

> 'Although I didn't see or identify the assailants as there was darkness I highly suspect my brother especially one Ntiringanya Joseph and his sons.'

[26] We are unable to accept that the deceased identified his assailants as held by the learned trial judge. The assailants attacked the deceased from the behind, covered his face with a sack like substance and it was late in the night. These circumstances surrounding the attack could not afford a positive identification. From the evidence of PW6, it is clear that the deceased never recognised the assailants. It is probable that the deceased suspected them to be the assailants on account of the bad relationship that existed deceased's family and the appellant's family. We find the dying declaration in this appeal to be of no evidential value.

[27] The case against the appellant now solely rests on circumstantial evidence. In Byaruhanga Fodori vs. Uganda [2004] UGSC 24 the Supreme Court while expressing itself on the position of the law regarding circumstantial evidence stated:

> '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 Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480).'

[28] Essentially there are 3 pieces of circumstantial evidence against the appellant. Firstly, the alleged previous threats by the appellant against the deceased. Secondly that the appellant never visited the deceased while he was hospitalized which was contested by the appellant. Thirdly that the appellant never attended the burial of the deceased.

[29] In Waihi and another v Uganda [1968] 1 EA 278 at page 280, the former Court of Appeal for East Africa stated:

> 'Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or impulsively in sudden anger or jokingly, and reason for the threat, if given, and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is, we think, capable of corroborating a confession.'

[30] PW1, PW4 and PW5 testified to the existence of a grudge between the appellant and the deceased, and previous threats issued by the appellant to the deceased prior to the night of the attack on the deceased. PW1 testified that the appellant used to threaten to kill the deceased on several occasions and the villagers were aware of it. The appellant and A2 at one time assaulted her daughter in law in car which led to a case being filed in court where the appellant was sentenced to 8 months imprisonment. During cross examination, PW1 stated that the appellant threatened the deceased of revenge after serving his sentence while they were at Kisoro court. She further stated that efforts at reconciliation where futile following the appellant's release from prison in October 2012. This was because the appellant refused to settle the matter with the deceased. She also stated that the appellant last threatened the deceased in October 2012. She stated that the threats began after the deceased told the appellant to settle the dispute with their daughter in law.

[31] PW4 corroborated the evidence of PW1. PW4 testified that the appellant used to threaten his wife (PW1's daughter in law) and at one time they had a case against the appellant in court. He thought that the problem between the deceased and the appellant was due to the grudge between the appellant and his wife. Upon cross examination, PW4 stated that his father was involved in the grudge between his wife and the appellant because he used to escort his wife to court. At times also his mother would escort his wife to court. He testified that when the appellant was sentenced, the sons of the appellant would attack his wife and beat her.

[32] PW5, the chairman of the appellant's village and a cousin to the appellant confirmed the existence of previous threats by the appellant to the deceased. He testified that after the appellant was released from prison, the deceased used to report to him that the appellant and his sons would attack him and that they wanted to kill him. The appellant and his sons would waylay the deceased and would not allow him to enter his gate if he did not have anyone escorting him late in the night. The appellant and the deceased were staying in the same compound. PW5 testified that these attacks on the deceased happened two weeks prior to the night that the deceased was attacked. He also stated that the appellant refused to go for reconciliation after he was released from prison.

[33] The appellant (A1) denied the existence of a grudge between him and the appellant. He also stated that PW5 has a grudge against him because he supervised UNEB exams in 1998 in a school where PW5's son was a candidate, two of the son's exams were not returned by UNEB and PW5 suspected that he had a hand in it. While evaluating this evidence, the learned trial judge stated:

> 'In the same way I find it unbelievable that Kwizera Charles carried a grudge against A1 since 1998 and only got the opportunity to revenge by giving the testimony against the accused in court. The witness told court he is a cousin and the village leader who even once resolved a boundary dispute between A1 and the deceased. It is not plausible that he could have carried a grudge about his son's missing examination results for 24 years.'

[34] The learned trial judge believed the evidence of PW1, PW4 and PW5 regarding the previous threat by the appellant to kill the deceased, despite denial by the appellant. He had the advantage of seeing those witnesses testify and we have no reason to doubt his findings that they were truthful witnesses. In Kifamunte Henry v Uganda (supra), the Supreme Court stated:

> 'Evidence of previous threats is relevant and, as was pointed out by the Court of Appeal for East Africa in Okecha s/o Olilia v R (1940) Vol. 7 E.A.C.A. 74, as such evidence shows an expression of intention, it goes beyond mere motives and tends to connect the accused person with the killing. Also see Waibi and Another v. Uganda (1968) E.A. 228.'

[35] Counsel for the appellant contended that the testimony of PW1 was inconsistent with that of PW4 and PW5 concerning the person that the appellant had a grudge with. We have analysed the evidence of the witnesses and it is evident that the grudge between the appellant and the deceased resulted from the deceased's collaboration with his daughter in law, with whom the appellant had a grudge. We therefore find counsel for the appellant's contention unfounded. The other contention regarding the

inconsistencies in the dying declaration is moot because we have already found the dying declaration unreliable.

[36] The conduct of the appellant following the attack on the deceased and his subsequent death, if looked at in isolation, may well be suspicious. PW6 testified that that he went to the appellant's home, but he did not find him there. The appellant's wife informed him that they had known about the attack on the deceased, but the appellant could not go to hospital because they had a grudge with the deceased. He left summons with the local police post and the local council chairman, but the accused could not be traced. The appellant was arrested later when he was caught stealing irish potatoes from a garden in a neighbouring village. PW1 stated in her testimony that the appellant did not bury the deceased and neither did he come to hospital to see the deceased. PW5 also testified that he did not see the appellant at the burial of the deceased and that he was missing from the village for about one month.

[37] On the other hand, the appellant stated in his defence that he learnt about the attack on the accused on 14th December 2012 and went to visit the deceased in hospital on 17th December 2012. He also stated that he attended the burial ceremony of the deceased.

[38] PW2, Bukeeka Paul, the chairman LC1 Migeshi testified that on 13th December 2012, at 1:30 am, a one Kasaija came to his home and told him that they had arrested the appellant in his irish potato garden. He referred them to police. Police told him that they had been looking for the appellant because he had injured his brother, the appellant was detained, and he went back home. Upon cross examination, he stated that his home is two miles from that of the deceased, that they are on neighbouring villages.

[39] PW3, Harerimana Gilbert Kasajja testified that prior to 1st May 2013, he knew the appellant as a teacher at Kisoro High School. On that day, he was guarding irish potato gardens with Habiyaremye at around 1:00 am when three men came and started harvesting irish. The men were moving towards them as they were harvesting the garden. As they were about to reach them, they suspected their presence, and they ran away. They chased the thieves and managed to arrest the appellant. They took the appellant to the chairman LC1 of Migeshi village who referred them to police. When they went to

police, the police informed them that they had been looking for the appellant. They handed the appellant over to police.

[40] The appellant stated in his defence that he travelled to Kyegegwa district where he was a teacher in a school four days after the burial and on 30th April 2013, while on his way from Kyegegwa he was attacked by three men who tried to rob him. He reported them to PW2 who referred the case to Kisoro police where the assailants were detained as he proceeded to hospital for treatment. He was, however, arrested when he went back to police to follow up on the case on the allegations that he had attacked the deceased.

[41] We find that we are unable to believe the evidence of the appellant that he was in the village following the attack of the deceased. PW6 testified that he went to his home but did not find him there. He left summons with the local police post and the area chairman, but he could not be traced. PW1, with whom the appellant shares a compound would have seen the appellant at the burial. It is impossible that she would have missed seeing him twice when he came to the hospital to visit the deceased. PW5, whose home is about 250 meters from the home of the appellant did not see him at the burial and in the village after the deceased was attacked.

[42] The learned trial judge rejected the appellant's defence as an afterthought. The evidence of PW2 and PW3 concerning the arrest of the appellant was never challenged in cross examination. Failure to cross-examine a witness on a material point may lead to inference that the opposing party accepts the evidence. See James Sawoabiri, Fred Musisi v Uganda [1991] UGSC 1.

[43] Even if the version of events put forward by the appellant is rejected it remains incumbent upon this court to consider whether the circumstantial evidence that is now available irresistibly leads to only one conclusion that the appellant participated in causing the death of the appellant. Given the bad blood that existed between the deceased and the appellant this could explain the failure of the appellant to visit the deceased in hospital or the appellant's failure to attend the deceased's burial. That leaves only the question of previous threats by the appellant to kill the deceased. While this may be evidence of the possible existence of an intention to cause the death of the deceased it is not dispositive of all of the elements necessary to prove this offence.

[44] The pieces of circumstantial evidence are behavioral in nature, calling upon the court to interpret, whether or not they point to the participation of the appellant in the commission of the offence with which he was charged. They could be open to several different interpretations and it would not be safe to base a conviction upon the same.

[45] We are not satisfied that the available pieces of circumstantial evidence irresistibly lead to only one conclusion that the appellant participated in causing the death of the appellant. They raise great suspicion but no more than that.

[46] We uphold grounds 1 and 2.

Ground 3

[47] We are of the view that this ground offends rule 66(2) of the Judicature (Court of Appeal Rules) Directions S.1 13-10. Rule 66 (2) of the Rules of this Court requires that a memorandum of appeal sets forth concisely and without argument the grounds of objection to the decision appealed against specifically the points of law or mixed fact and law. The ground does not state the evidence that was wrongly evaluated.

[48] We would therefore strike out this ground because it offends rule 66(2) of the rules of this court.

[49] As we have allowed grounds 1 and 2 it is unnecessary to consider ground 4.

Decision

[50] This appeal is allowed. The conviction against the appellant is quashed and the sentence set aside. We order the immediate release of the appellant, unless he is held on some other lawful ground.

Signed, dated and delivered at Mbarara this 3rd day of March 2022.

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal