THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 024 OF 2015

(Coram: Kibeedi, Gashirabake & Luswata, JJA)

5 **ARIHO ABEL::APPELLANT**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Rukungiri before Elubu, J. dated 15th January, 2015 in Criminal Session Case No. 0112 of 2013)

10 **JUDGMENT OF THE COURT**

This appeal is from the decision of the High Court (Elubu, J.) by which the appellant was convicted of the offence of murder contrary to **Sections 188 and 189** of the **Penal Code Act, Cap. 120** and sentenced to 38 years' imprisonment.

15 **Background**

The High Court decision followed the trial of the appellant on an indictment alleging that he had on the 23rd day of September, 2012 at Keitumura Cell in the Rukungiri District murdered Kembaho Evarine (the deceased).

20 The facts as we have gathered from the record, can be summarized as follows: On the fateful day, the police were alerted that the deceased's body was lying at the road side near her home in Keitumura Cell in Rukungiri. The police officers went to the scene and found the deceased's body with injuries on the head and eyes. 25 Some of the residents who had gathered at the scene carried the

deceased's body to her home. The police officers went along and searched the home. They found utensils strewn on her kitchen floor, which suggested that she had been cooking shortly before she was murdered.

5 The appellant was the deceased's grandson and lived in a house just behind that of the deceased. Police Officers, upon conducting a search, found abandoned shoes belonging to the appellant at the back of the deceased's house. It also transpired that the appellant had disappeared from the village shortly after the deceased's 10 murder but was subsequently arrested in connection with the murder of the deceased. During interrogation, the appellant is said to have given a false account of his whereabouts on the night of the deceased's murder. The appellant was subsequently charged and tried in connection with the murder of the deceased, and as stated 15 earlier, he was convicted as charged and sentenced accordingly.

The appellant was dissatisfied with the decision of the trial Court and appeals to this Court on the following grounds:

> ***"1. The learned trial Judge erred in law and fact when he convicted the appellant on insufficient circumstantial*** 20 ***evidence.***
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> ***2. The learned trial Judge erred in law and fact when he rejected the appellant's defence of alibi thereby occasioning a miscarriage of justice.***
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> ***3. The learned trial Judge erred in law and fact when he*** 25 ***conducted hearing in the absence of assessors during the hearing of prosecution evidence and in the presence of only one witness (sic) in the hearing of the defence.***

4. ***The learned trial Judge erred in law and fact when he passed a harsh and excessive sentence against the appellant.***

5. ***The learned trial Judge erred in law and fact when he failed to consider and properly evaluate the evidence as a whole in the following ways;***

   a) ongoing grudge between the deceased and appellant

   b) contradictions and inconsistencies

   c) participation of the appellant."

Representation

At the hearing, Mr. Vincent Turyahabwe appeared for the appellant on State brief. Mr. Peter Rubarema appeared for the respondent. The appellant was present.

The parties, with leave of this Court, argued their respective cases by way of written submissions, which we have considered when deciding this appeal.

Analysis

We have carefully considered all the materials in the appeal including the record, the submissions of counsel for either side and the law and authorities cited. As this is a first appeal, we shall begin by reiterating the duty of this Court while handling such appeals. Under **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions, S.I 13-10**, this Court, on appeal from a decision of the High Court, may reappraise the evidence and make inferences of fact. In **Kifamunte Henry vs. Uganda, Supreme**

Court Criminal Appeal No. 10 of 1997, it was held that a first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge, and then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. We shall now proceed to consider the grounds of appeal.

Grounds 1, 2 and 5

We shall consider grounds 1, 2 and 5 together as they relate to the learned trial Judge's decision to find that the appellant participated in the murder of the deceased.

Appellant's submissions

Ground 1 and 5

Counsel for the appellant submitted that the learned trial Judge erred in convicting the appellant basing on weak circumstantial evidence. He cited the cases of **Teper vs. R [1952] AC 489**; **Simon Musoke vs. R [1958] EA 715**; and **Uganda vs. Nakwanga and 5 Others, High Court Criminal Session No. 243 of 2015 (per Luswata, J. (as he then was)** quoting with approval the Nigeria Supreme Court Case of **Tajudeen Iliyasu vs. State, SC 241/2013**. In the latter case it was held that:

> ***"Circumstantial evidence is evidence of surrounding circumstances which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics...this is so for their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person caused the death of the deceased person."***

Counsel submitted that the circumstantial evidence relied on by the trial Court did not pass the test of circumstantial evidence highlighted above. He contended that the aspect of the circumstantial evidence that was based on a land wrangle between the appellant and the deceased was weak because the evidence of PW3 Twinamatsiko James, the LC1 Chairperson and that of PW4 Kehanda Jane was that the land dispute between the deceased and the appellant had happened once and had been resolved at the time of the deceased's murder. Counsel submitted that it was erroneous for the learned trial Judge to place too much weight on the past dispute between the parties as supporting the assertion that the appellant murdered the deceased.

Counsel further faulted the learned trial Judge for finding circumstantial evidence in the allegation that police officers searched the appellant's house and found forged documents bequeathing the deceased's land to him. Counsel submitted that there was no evidence to support that finding as the said document was never exhibited in Court to prove that it was a forgery. Counsel further contended that the learned trial Judge wrongly found that this document was adduced in evidence by PW2 which was not the case. Further still, counsel submitted that there was a contradiction about the contents of the said document in that PW2 said that the document recorded the appellant's grandfather (the deceased's husband) bequeathing land to him, while PW4 said that the document recorded that the appellant was being appointed as his grandfather's heir.

Counsel further submitted that the learned trial Judge erred in considering that the proximity of the appellant to the area where the deceased's body was found was circumstantial evidence against the appellant. He contended that the appellant explained that he was spraying his tomatoes in a garden near the scene of crime which was also near his home.

It was also submitted that the learned trial Judge erred when he found circumstantial evidence in the fact that a shoe belonging to the appellant was found at the scene of crime. Counsel submitted that the learned trial Judge erroneously held that PW3 gave evidence that shoes belonging to the appellant were found at the scene of crime yet this was not the case. Counsel further submitted that the shoe was not tendered as an exhibit and it was difficult to prove whether it belonged to the appellant or not. Furthermore, counsel contended that one Twijukye who testified that the shoe belonged to the appellant was not called as a witness.

Counsel further submitted that the appellant gave a reasonable explanation that although he previously owned the shoe found at the scene of crime, he had thrown it away after it became very old. He faulted the learned trial Judge for rejecting the appellant's explanation.

Counsel also submitted that the learned trial Judge erred when he found circumstantial evidence in the allegation that the appellant disappeared and was no longer staying in an incomplete house near the deceased's home, shortly after she was murdered. He submitted that the appellant duly explained that because that house was

incomplete, he did not ordinarily stay there but in another house in Buyanja. The appellant also explained that he often went to the said house to tend to his nearby garden.

It was further submitted that the learned trial Judge erred in finding that the appellant was arrested while hiding from a swamp and considering the act of hiding as circumstantial evidence against him. Counsel submitted that there was no evidence to prove that the appellant was arrested while hiding in a swamp.

In view of his submissions, counsel contended that the alleged circumstantial evidence that the learned trial Judge relied on was insufficient to prove his guilt. Counsel submitted that ground 1 ought to succeed.

Respondent's submissions

In reply, counsel for the respondent submitted that the trial Court correctly applied the principles on circumstantial evidence and reached the right decision to convict the appellant. Counsel submitted that the principles on circumstantial evidence were discussed in the case of **Akbar Godi vs. Uganda, Supreme Court Criminal Appeal No. 02 of 2013** where it was held that circumstantial evidence is in the nature of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing the existence of facts required to be proved, is admissible as making the facts in issue probable by reason of its connection with them or in relation to them.

Counsel submitted that the learned trial Judge considered different pieces of circumstantial evidence including land wrangles, forged land documents recovered from the appellant's house, and evidence that shoes belonging to the appellant were found at the scene of crime. Counsel submitted that the learned trial Judge rightly concluded that the land wrangle was still ongoing at the time of the deceased's murder. He also submitted that the learned trial Judge rightly considered that the appellant's shoe was left at the crime scene due to a scuffle with the deceased. Counsel submitted that the learned trial Judge correctly handled the circumstantial evidence, and urged this Court to disallow grounds 1 and 5.

Ground 2

Appellant's submissions

Counsel for the appellant submitted that the learned trial Judge erred in rejecting the appellant's alibi that he was at another place called Buyanja on the fateful day yet the prosecution failed to adduce evidence to destroy the alibi. Counsel submitted that the appellant ably explained that he was at Buyanja where he ordinarily lived with his wife and children. Counsel cited the case of **Festo Androa Asenua vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1998** for the proposition that when an accused person sets up a defence of alibi, he doesn't assume the responsibility of proving it. The prosecution must instead negative the alibi by evidence. Counsel submitted that the learned trial Judge based his decision to reject the appellant's alibi on the evidence of PW5 Detective Assistant Inspector of Police Niwamanya Wilberforce that he went to

Buyanja and asked whether the appellant had a home there but several people at Buyanja denied knowledge of the appellant. Counsel submitted that PW5's allegations were never substantiated as none of the people from Buyanja were called as witnesses. Counsel also noted that whereas PW5 testified that the information on the people from Buyanja was recorded in the Station Diary, the same was not produced in evidence.

Respondent's submissions

Counsel for the respondent disagreed and submitted that the learned trial Judge properly addressed himself to the law regarding the defence of alibi and came to the right conclusion that the prosecution evidence placed the appellant at the scene of crime thereby destroying his alibi.

Decision on grounds 1, 2 and 5

We have carefully considered the parties' submissions on grounds 1, 2 and 5. The gist of counsel for the appellant's submissions is that the circumstantial evidence that was relied on to convict the appellant was insufficient. We note that circumstantial evidence is evidence in the nature of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. **See: Akbar Hussein Godi vs. Uganda, Supreme Court Criminal Appeal No. 003 of 2013.** In the case of **Iwutung Stephen vs. Uganda, Criminal Appeal No. 0020 of 2016**, this Court, while discussing the principles on circumstantial evidence, stated as follows:

"The law on circumstantial evidence has a common law origin. In Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136 a rule on circumstantial evidence was articulated to the effect that where a case is based on circumstantial evidence, before convicting an accused person upon such evidence, the Court must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused person, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

In the authority of Simoni Musoke vs. R [1958] 1 EA 715 (East African Court of Appeal) it was held that:

"...in a case depending exclusively upon circumstantial evidence, (the Court) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The Court quoted with approval from the Textbook "Taylor on Evidence" (11th Edition) at page 74, the following statement:

"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."

The Court also cited with approval, a passage from the judgment of the Privy Council in Teper v. R. (2), [1952] A.C. 480 at p. 489 that:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

In the present case, there was no direct evidence identifying the deceased's killer. The trial Court, however, found the appellant guilty of the deceased's murder basing on circumstantial evidence consisting of the following facts: 1) existence of a bad relationship between the deceased and the appellant arising from a land dispute; 2) the fact that forged documents naming the appellant as his grandfather's heir were found at the appellant's house; 3) the appellant's being seen in the vicinity of the crime scene earlier on the day the deceased was murdered; 4) the fact that shoes belonging to the appellant covered with mud, were found near the deceased's kitchen and the fact that there was evidence of a struggle in the kitchen. The conduct of the appellant before and after the death of the deceased particularly the fact that the appellant disappeared from the scene/village soon after the murder, coupled with other evidence on record point to the appellant as the killer.

Counsel for the appellant submitted that the circumstantial evidence relating to the bad relationship between the appellant and the deceased ought not to have been believed as there was evidence that the relationship between the two had been repaired at the time of the deceased's death. PW3 Twinamatsiko James, the LC1 Chairperson of Nyaruharo Village, where the deceased lived, testified that as a local leader he had been informed of the existence of a bad relationship between the appellant and the deceased which arose from a land dispute. PW3 stated that the bad relationship reached its climax in August, 2012 when the appellant sued the deceased for refusing to allow him to cultivate a piece of land. PW3

testified that as the area leader, he had mediated in the wrangle and urged the warring parties to resolve the issue amicably, and that subsequently, several family members urged the deceased to allocate some land to the appellant. PW3 testified that the deceased agreed and was due to subdivide the land in December, 2012 and allocate some of it to the appellant. PW4 Kehanda Jane testified that the land dispute between the appellant and the deceased that had caused a bad relationship between them had been resolved in a family meeting, at the time of the deceased's murder. At the time of commission of the offence by the appellant, according to the testimony of PW4, although an attempt at mending the relationship had been under taken by LC I, the land wrangle which counsel for the appellant calls "farfetched" in his submission had not yet been resolved for the appellant had not yet been given the piece of land. The appellant still kept the forged documents as the heir to his grandfather entitling him to the disputed land. This is a clear indication that inspite of the attempt to resolve wrangle between him and the deceased, he still was not satisfied with the settlement before the LC1.

We observe that the learned trial Judge considered evidence of the appellant being found in possession of forged documents relating to the disputed land over which the appellant and deceased had conflict. The trial Judge relied on this piece of circumstantial evidence coupled with other pieces of circumstantial evidence to come to the conclusion that the appellant was the one who killed the deceased. The analysis of the relevant evidence by the trial Judge is self-explanatory and we do not need to repeat it in the

judgment. We entirely agree with the Trial Judge's evaluation and finding on this.

Counsel for the appellant faulted the learned trial Judge for finding that shoes belonging to the appellant were found near the scene of crime. Counsel submitted that in reaching that finding, the learned trial Judge erroneously considered that PW3 had testified that he had seen the appellant wearing the shoes in question on the relevant date. The Appellant admitted that the shoes were his. If indeed he was staying in Buyanja as alleged at the time, it begs the question as how the shoes found their way to the scene?

The learned trial Judge stated in his judgment as follows:

> ***"A pair of old brown shoes with mud were recovered by the police outside the kitchen of the deceased. The accused person's house was about 100 meters from this kitchen. They were exhibited by the police who were informed that the shoes belonged to the accused who used to wear them. The shoes were just two metres from the kitchen of the deceased. PW3 told Court that she had seen the accused putting them on the day the deceased was killed."***

PW3's testimony was that they conducted a search and found shoes that were said to belong to the appellant about three metres from the scene of crime.

Counsel for the appellant also faulted the learned trial Judge for accepting that the shoes in question belonged to the appellant, and contended that the prosecution ought to have called one Twimukye who allegedly stated that the shoes belonged to the appellant as a witness. We think that calling Twimukye as a witness was

unnecessary considering that the appellant admitted that he owned the relevant shoes although he testified that at the time they were discovered, he had long discarded them since they had become worn out. The learned trial Judge did not consider this explanation given for the appellant. The trial Judge rightly ignored the appellant's explanation, we are convinced that he was entitled to draw an inference that the finding of muddy shoes, that the appellant admitted he owned two metres away from the deceased's kitchen had a connection with the struggle in the deceased's kitchen.

Counsel for the appellant further criticized the learned trial Judge for finding circumstantial evidence in the fact that the appellant did not spend the night in his incomplete house on the fateful night as he normally did, and contended that there was no evidence that the appellant stayed in the said house. We observe that while the learned trial Judge commented on the fact that the appellant did not spend the night in his house, he did not base any decision on this comment. It is therefore unnecessary to make any further comment on this issue.

The learned trial Judge also considered and rejected the appellant's alibi as a pack of lies, and the decision in this regard has been attacked in ground 2. It will be observed that the appellant testified that from 4:00 p.m on the day the deceased was murdered, he had gone to his garden situated near the deceased's home to spray tomatoes, but had left to go home shortly thereafter as he did not have energy to complete the task.

The appellant also testified that PW3 called him in the morning after the deceased's murder and asked him where he was, to which he answered that he was in the nearby Buyanja Village. PW4 also confirmed that she saw the appellant spraying his tomatoes between 4 to 5 pm on the fateful day. PW4 testified that when the appellant left at 5pm, she did not know where he went.

We have also noted PW5 Detective Assistant Inspector of Police Niwamanya Wilberforce's evidence relating to the appellant's alibi. PW5 testified that he interviewed the appellant while in police custody and the appellant testified that he spent the night at the home of Dan and Nicholas in Buyanja, which the appellant described to him. PW5 testified that he went to the described area but was told that there was no Dan or Nicholas who lived there. PW5 testified that upon further interrogation, the appellant testified that he had spent the night at another place called Kyamakanda. The appellant in his evidence seemed to deny this part of PW5's testimony. The appellant could not have stayed at two places in the same night or failed to know where he stayed. He deliberately wanted to confuse the investigators on that account.

The law is that the prosecution bears the burden to adduce evidence to disprove an alibi set up by an accused person by adducing evidence placing the accused person at the scene of crime. As to what amounts to placing the accused person at the scene of crime, the Supreme Court in **Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997**, had this to say:

"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 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."

This is a claim or piece of evidence that one was elsewhere when an act, typically a criminal one, is alleged to have taken place. Alibi under criminal law is a defense where one claims they were not at the crime scene when the alleged crime was committed. An alibi is a factual defence which the accused puts forward to explain that he or she was in some other place at the time the alleged offence was committed. Rather than a defence put forward to justify or provide and excuse for why a person committed a certain act, alibi is a common defence which is relied upon to assert that a person did not in fact commit the offence at all, because they were not present when the offence was committed. However, an alibi is more than an assertion that they were not in a particular place at a particular

time. Not being at the scene of crime at the time it was committed does not necessarily mean you are not party to a crim.

The position of the law regarding the defence of alibi "It is not the duty of accused person to prove his alibi. It is up to the prosecution to destroy it by putting the accused person squarely at the scene of crime and thereby proving that he is the one who committed the crime" this was observed in the case of **Sekitoleko v. Uganda [1968] EA 531.**

Furthermore, In the case of **Uganda Versus Dusman Sabuni (1981) HCB 1** Court held that when it comes to the principle of Alibi, it is established law in Uganda that when an accused person sets up the defence of alibi, the accused does not assume the responsibility of proving the alibi. The prosecution must instead negative the alibi by evidence adduced before the evidence is put forward or by calling witnesses to give evidence in rebuttal. Court went on to say that all evidence must be considered as a whole and if some doubt is thrown upon the prosecution case or if they fail to negative the alibi, then they will not have proved their case beyond reasonable doubt and the accused will be entitled to an acquittal.

Therefore, when an accused who puts up the defence of alibi, they do not assume the burden of proving the defence. The burden rests on the prosecution to disprove or destroy the alibi.

On the question of circumstantial evidence, where that evidence does not point to the guilt of the accused and where there is other evidence which may rebut the inferences drawn from circumstantial evidence, then that circumstantial evidence cannot be relied on to

convict the accused. Therefore, the prosecution has the burden to place the accused at the scene of crime weakening the alibi raised by the accused.

The review of evidence we conducted earlier shows that the
5 prosecution did adduce evidence placing the appellant at the scene of crime.

We therefore find that the learned trial Judge rightly rejected the appellant's alibi especially as the circumstantial evidence adduced to implicate him in the murder of the deceased was sufficient to
10 support the appellant's conviction for the murder of the deceased. We therefore find that grounds 1, 2 and 5 must fail.

Ground 3. Learned trial Judge erred in law and fact when he concluded a trial in absence of assessors.

The original trial court record indicates *"summing up to the*
15 *assessors done"*, court issues summary of proceedings to the assessors on page 50. The assessors' opinion is also referred to by the trial Judge. It is therefore not true that the trial proceeded without assessors. This ground therefore fails. The Judge did not record the presence of assessors on 4th, 5th and 18th /12/14. This
20 must have been an inadvertent omission by the Judge. As it commonly happens for the Judicial Officer to forget recording all present on some days in this particular case, the record shows that there were lapses in the attendance and recording of the assessors. The lapses were not fatal, it did not occasion substantial
25 miscarriage of justice. On 6/1/12 only one assessor was present. On 7/1/12 the Judge still did not mention presence of an assessor

but still summing up was conducted and it is only one assessor who gives an opinion.

On whether the above omission of not recording assessors present occasioned a miscarriage of justice and is fatal to the trial; this court in the earlier decision of **Byaruhanga Fodori V. Uganda Criminal Appeal NO. 24 of 1999** had this to say;

> ***"In consideration of similar objection raised by the appellant with regard to the conduct of the trial and in consideration of the other apparent irregularities like the deficiency in the record on the assessors and the decision of the trial judge to commence and proceed with the trial with a single assessor, this court must determine whether the irregularity caused a substantial miscarriage of justice. Section 34(1) of the Criminal Procedure Code provides: -***
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> > ***"The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on grounds that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred."***

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In order to determine whether in fact any miscarriage of justice occurred, the role of the assessors in our criminal justice system must be taken into account. Their importance in advising a trial judge on matters of fact cannot be underestimated. However, their role is merely advisory and not binding on the trial judge. While their role might have been very important when the judges were foreigners and therefore not acquainted with our customary laws and usages, their role is diminishing with the replacement of foreigners with Ugandan judges. In our view, failure to record the particulars of the assessors or whether they were sworn in or not does not cause any miscarriage of justice. The judge could obtain their particular and even swear them in but fail to record the fact. Where the defense is represented by counsel and no objection is raised, the accused cannot be said to have been prejudiced when he only remembers to raise such a matter on appeal. Similarly, if trial with a single assessor can be permitted when the other assessor(s) absent himself, we do not see any big difference when the trial starts and ends with assistance of a single assessor. This ground of appeal must in our view fail".

Similarly, in this particular case, this ground of appeal must fail.

Ground 4. The learned trial Judge erred in law and fact when he passed a harsh sentence

25 We have taken note of both the aggravating and mitigating factors presented by the appellant at trial and also considered previous decisions.

The sentence being harsh and excessive are matters that raise the severity of the sentence. The appellant in his submissions indicated

that the sentence of 38 years' imprisonment for this murder was harsh and excessive and there is need for consistency in sentencing. He did not cite the authorities he was relying on. He prayed that this court allows the appeal, set aside the sentence and substitute it with one which is fair. He also did not propose what should be the fair sentence. The applicant's submissions bring out two elements of error about the sentence: -

- That the sentence against the appellant was harsh and excessive in the circumstances.
- The learned Trial Judge did not consider other mitigating factors of the appellant.

In responding to this ground, we shall first consider the role of the appellate court. We shall refer to the case of **Wamutabaniwe Jamiru V. Uganda, SCCA No. 74 of 2007** which almost word for word agreed with **Kamya Johnson Wavamunno CA No. 16 of 2000,** where court held that;

> ***"the appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion, unless the exercise of the discretion or is such that it results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle".***

In the same regard, the principles upon which the appellate court should interfere with a sentence imposed by the trial court were

considered by the Supreme Court case of **Kyalimpa Edward V. Uganda, Supreme Court Criminal Appeal No. 10 of 1995** where court referred to the case of **R V De Haviland (1983) 5 Cr. App. R 109** and held that:

5 ***"It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing 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 to an injustice".***

10 In arriving at the sentence of 38 years' imprisonment for the appellant, the Trial Judge had a comprehensive consideration of both the mitigating factors that is the appellant being a first offender, a young man with a wife and children. We in that regard rely on **Karisa Moses V. Uganda (SCCA No. 23 of 2016** where a 15 22-year-old appellant had been convicted of murdering his grandfather and sentenced to life imprisonment. The Supreme Court in their judgment dated 22/08/2019 while confirming the sentence had this to say;

"An appropriate sentence is a matter for the discretion of the 20 ***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 sentencing Judge unless the sentence is illegal or unless court is satisfied that the*** 25 ***sentence imposed by the Trial Judge was manifestly so excessive as to amount to an injustice".***

Furthermore, the appellant had been indicated for murder C/S 188 and 189 of the Penal Code Act. The maximum penalty under

section 189 is death. Further, under the Constitution (Sentencing Guidelines for (courts of Judicature) (Practice) Directions, 2013, the 3rd schedule, part one provides the starting point for murder to be 35 years and the sentencing range is 30 years to death.

5 Considering all the above, the sentence of 38 years' imprisonment meted out to the appellant was not harsh and the trial Judge rightly directed himself on the law and applied it to the facts.

Accordingly, the appeal fails. We confirm the appellant's conviction for the murder of the deceased and the sentence imposed. The 10 appellant will serve the term imposed from the date of his conviction.

We so order.

Dated at Kampala this 4th day of Sept 2023.

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Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

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Christopher Gashirabake
JUSTICE OF APPEAL

25 ....

Eva K. Luswata
JUSTICE OF APPEAL