THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

(Coram: Muzamiru Mutangula Kibeedi, Christopher Gashirabake, Eva K. Luswata, JJA)

CRIMINAL APPEAL No. 0048 OF 2019 AND 0056 OF 2019

1. BUSINGYE PAUL (A1 at trial)]
2. AMPEREZA LAWRENCE (A3 at trial)] :: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

[An appeal against the decision of the High Court of Uganda at Rukungiri (Hon. Justice Moses Kazibwe) rendered on the 24th day of June 2019 in Rukungiri Criminal Session Case No: 0120 of 2017]

JUDGMENT OF THE COURT

Introduction

The appellants were jointly indicted with three others (who were acquitted by the trial court) for the two offences, namely: murder contrary to sections 188 and 189 Penal Code Act, Cap 120, and aggravated robbery contrary to sections 285 and 286(1) of the Penal Code Act. At the trial, the first appellant was accused number one (A1); while the 2nd appellant was accused number three (A3).

The appellants were convicted on both counts as charged. On the first count (of murder), each one of the appellants was sentenced to 27 years' imprisonment after deducting the 3 years spent in lawful custody. On the second count (of Aggravated Robbery), each one of the appellants was sentenced to 17 years' imprisonment after deducting the three years they had spent in lawful custody. The above sentences were to run concurrently.

In addition, a compensation order for the sum of Ugx 4,000,000/= was made in favour of Kurama Moses, the owner of the robbed motorcycle, to be paid by the appellants after serving their respective sentences.

Background facts

The facts of the case as admitted by the trial Court were that on the 17th of June 2016, the two appellants were seen together at around 4:00pm at the bar of a one Byaruhanga Kenneth within Katojo Trading Centre, Kambuga Sub-county in Kanungu district. The presence of the second appellant, Ampereza, raised suspicion among the community of boda-boda (motor cycle) riders of the area on account of his past history whereby he had disappeared from the locality after stealing a boda boda. The boda boda cyclists closely observed and watched him in the close company of the first appellant, Paul Busingye, and another person while they were at the bar of a one Kenneth and while they were all riding on one motorcycle.

At about 7:30pm, the first appellant went to Katojo boda-boda stage and hired the deceased to carry him on the boda boda. They first picked another person from Kenneth's bar and the trio were last seen heading to Kambuga direction. Soon thereafter (about 25 minutes later), the deceased was found badly injured and unconscious lying in a pool of blood and his motorcycle was nowhere to be seen. He was immediately picked and rushed to Nyakibale for medical attention but died on arrival.

Upon investigation by the Police, five people were indicted for the offences of murder C/S 188 & 189 and aggravated robbery C/S 285 and 286 (1) of Penal Code Act. At the trial, two people (A4 & A5) were acquitted on no case to answer. The remaining three, who included the current appellants, underwent full trial and gave unsworn testimonies denying participation and raising *alibis*. A2 (at the trial) was acquitted while the appellants were convicted and sentenced as already stated in this judgment.

The appellants were aggrieved by both the conviction and sentence, and the consequential compensation orders and appealed to this court.

Grounds of appeal

The appellants filed a joint Memorandum of Appeal in person setting forth the following grounds of appeal: -

1. *That the learned trial Judge erred in law and fact when he relied on very weak circumstantial evidence in convicting the appellants thereby occasioning a miscarriage of justice.*
2. *That the learned trial Judge erred in law and fact when he failed to exercise court duty in failure (sic!) to call material witnesses that is, the investigating officer who made the sketch plan, and the medical doctor who examined the deceased.*
3. *That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thus arriving to a wrong decision.*
4. *That the learned trial Judge erred in law and fact when he relied on the postmortem report of the deceased which had no link to the appellants and no scientific evidence adduced by the prosecution to corroborate statements from witnesses thereby occasioning a miscarriage of justice.*
5. *That in the alternative and without prejudice to the above, the learned trial Judge erred in law and fact when he imposed a 27 years' sentence and a fine of four million Uganda Shillings on the appellants which is manifestly harsh and excessive in the circumstances of the case.*

Representation

At the hearing of the appeal, Mr. Sam Dhabangi, represented the appellants on state brief; while Ms. Carolyn Hope Nabaasa, a Principal Assistant Director of Public Prosecutions in the

office of the Director of Public Prosecutions (DPP) appeared for the respondent. The appellants were present in court.

The parties, with leave of the Court, relied on their written submissions in support of their respective cases.

Appellants' submissions

In their written submissions, the appellants presented their arguments on grounds 1,3 and 5 only. As such, we inferred from such an approach to mean that grounds 2 and 4 were abandoned.

While submitting on grounds 1 and 3 jointly, the appellants submitted that the case was riddled with contradictions which were never resolved and, as such, there is no way court could discuss either circumstantial evidence or common intention. That there could be no common intention as the other killers and robbers were mysterious, were neither seen nor identified, and were never disclosed in evidence. Counsel submitted that there was no known hit-man with whom the appellants would form a common intention; and that without any exhibit from the scene of crime recovered, or credible evidence from any of the prosecution witnesses, the prosecution case is a hypotheses incompatible with the guilt of the appellants.

It was also the submission of the appellants that the learned trial Judge erred in law and fact in considering the alleged banishment of the second appellant as part of circumstantial evidence without investigating the areas and the stealing of the motorcycle. That it was most improbable that the banished appellant would dare return to the same area. That according to PW7, the appellants were arrested because they were seen with the deceased leaving Katojo stage before he was assaulted.

Counsel for the appellants also contended that none of the state witnesses knew how the deceased left the known destination and how he ended up at the scene of crime. That this was

a matter in the exclusive knowledge of the deceased. With such gaps in the prosecution evidence, court wrongly convicted the appellants.

On the issue of *alibi*, Counsel contended that both appellants were not at the scene of crime at the material time of the mysterious and invisible hit-man, and no circumstantial evidence squarely placed them there or at all.

Counsel also criticized the Police Identification Parade which was carried out and the report of which was admitted as being a sham in so far as they used people who already knew the suspects very well. That with the denials of each other by the appellants, there was no circumstantial evidence to corroborate any fact.

On ground 5, Counsel argued that the trial court did not take into account the material antecedents of each of the appellants like their respective ages and possible rehabilitation and reform away from hard core criminals.

Counsel further contended that the sentences were far out of range of sentences in similar cases. Counsel proposed that the appropriate sentence is 10 years' imprisonment less the 3 years remand period running from the date of conviction for each of the appellants.

Counsel concluded by praying to this court to allow the appeal, and set aside both the conviction and sentence.

Respondent's submissions in reply

Counsel for the respondent supported the conviction of both the appellants by the trial court and the sentences handed down by the learned trial Judge.

Counsel raised a factual point necessitating rectification of the court record. That there exists an error relating to the numbering of the Prosecution Witnesses (PWs). That it is indicated in the original record that the first witness after the admission of the agreed documentary evidence was quoted as "PW7 (Ampereza Elias)". In the typed record, the same witness is indicated as

"PW1-8". The next page of typed record indicates PW8 as Kuruma Moses. The same is reflected in the original record. That what is not clear is whether there were other witnesses from PW1-PW6 such as the different doctors who authored the admitted documentary evidence or whether it was the trial Judge's way of numbering witnesses.

Counsel prayed that this court does re-visit the original file with a view of rectification of the record.

Counsel for the Respondent then proceeded to raise two points of law. The first one related to the manner in which Counsel for the appellant abandoned some of the grounds of appeal without leave of Court. Counsel contended that it offends rule 67 of the Rules of this Court and should be condemned by court.

The second point of law related to ground 3 as set out in the Memorandum of Appeal which, according to Counsel, offends Rule 66(2) of the Court of Appeal Rules in so far as it is not concise, but was general and argumentative. Counsel prayed that the ground be struck out for offending the Rules of this Court. Counsel cited the case of *Sseremba Dennis Vs. Uganda Criminal Appeal No. 0480 of 2017,* where this Court struck out two grounds for offending the said rule, one of which was similar to the one objected to by Counsel for the respondent.

In reply to ground 1, Counsel for the respondent submitted that it was clear from the facts that there was no eye witness to the murder. But nonetheless, the several pieces of evidence led through the prosecution witnesses were analyzed properly by the learned trial Judge and also the factors that led to proper identification of the appellants such as the time the two appellants were seen together, prior knowledge of witnesses, proximity and time spent together were all appraised in the evidence vis-a-vis the *alibi* defences raised by the appellants before coming to the right decision to convict the appellants.

Counsel submitted that, A1 Paul Busingye, was the person last seen with the deceased alive in a span of 25-30 minutes before the incident. That the 2nd appellant, Laurence Ampereza, had all

along been seen in the company of A1 Busingye soon before the incident and then he disappeared from the village again. That the two appellants cannot be delinked from participation in the assault of the deceased and robbery of the motor cycle in issue. That the learned trial Judge properly directed himself and analyzed the prosecution evidence mindful of "***last seen alive***" factor, and concluded that there was no chance of mistaken identity of the appellants. Moreover, he also correctly found that the prosecution evidence had placed the appellants near the deceased and that their denial of being at Katojo and further disowning each other corroborated prosecution evidence.

Counsel for the respondent, while being mindful of the fact that our jurisprudence had not yet developed the doctrine of ***"Last Seen alive***", invited this Court to be persuaded by the finding of the Supreme Court of Nigeria sitting at Abuja in a case of; *Tajudeen Lliyasu Vs The State, SC 241/2013* found on *www.https://legalpediaonline.com/just-decided-latest-judgment-supreme-court,* where it was decided *inter alia* that where a person with whom the deceased was last seen cannot give an explanation as to the death of the deceased, the court is justified to draw a necessary inference that such a person is responsible for the death of the deceased.

Counsel implored this court in re-appraisal of evidence to analyse the conduct of both appellants before and after the incident, and the circumstances that prevailed before and soon after picking the deceased from the stage. That an analysis of those pieces of evidence will reveal that there is no other hypothesis disconnecting those who picked the deceased from the stage from knowledge of the attack that claimed his life. Further still, that the association of the 2nd appellant to the 1st respondent the whole time soon before the 1st respondent picked the deceased and his conduct soon after the incident plus his attempt to disassociate from each other and the offence corroborate the rest of evidence against him.

Counsel concluded that it would not be correct to declare the evidence relating to the circumstances in the instant case too weak when it places the appellants in close contact with the deceased in the last minutes of his life.

As regards the contradictions raised by the appellant's Counsel in his submissions, Counsel for the respondent observed that without pointing out the specific areas under reference, the claims were too general to be of any meaningful use. Counsel for the respondent submitted that each witness gave an account of what he saw and heard at the given time. That there was no grave contradiction that would go to the root of prosecution case.

With regard to the complaint about the application of the principle of common intention, Counsel for the respondent replied that the learned trial Judge's conclusion that both appellants had formed common intent to execute an unlawful purpose was grounded in law. That the suspicious association and dealings of both appellants on the date in issue, especially, the hours that preceded the picking of the deceased by the 1st appellant and another was corroborated by their disproved *alibi* defences and their lies relating to their denials about knowing each other.

Counsel for the respondent objected to the attempt by Counsel for the appellants to introduce new facts and conclusions through the written submissions. That the appellants' Counsel talks of a "Hit-man", yet nowhere in the judgment did the trial Court refer to such a thing as a hit-man. That the common intention Court referred to was between the two appellants and that the Court was right to make such an inference since the two appellants were present in the vicinity of the scene of crime and in close association the whole time, save for the moment that the 1st appellant picked the deceased from the stage soon before the attack on him.

With regard to ground 5 on the harshness and excessiveness of the sentence, Counsel for the respondent submitted that the appellants did not demonstrate how 27 years in prison and the compensation of the robbed motorcycle in the cruelest and brutal manner by people who clearly pre-planned and meticulously implemented their unsuspecting victim was manifestly excessive, illegal or was based on a wrong principle or how a material fact was left out.

Counsel further argued that the appellant's submission that the appellants' ages and likelihood of reforming were not taken into account is devoid of merit and was untrue since the two were

considered by the learned trial Judge under the sentence and reasons. Furthermore, that the appellant's claim that the custodial sentences of 27 years and 17 years were far out of range of the sentences in similar cases, was a vague and unmeritorious statement of argument.

Counsel concluded their submissions by stating that the learned trial Judge properly considered all mitigating factors including the ones complained about. That he also considered the aggravating factors, and, in his discretion, he spared the appellants the maximum sentence of death for both counts and found that 27 and 17 years respectively would meet the ends of justice. Counsel invited this Court not to interfere with the sentences and incidental orders and disallow this ground of appeal.

Counsel for the respondent prayed that the appeal be dismissed, and that both the conviction and the sentences be upheld.

Resolution of the factual matters raised by the respondent

Counsel for the respondent drew the attention of this court to the numbering of the prosecution witnesses (PWs) in the record of appeal which started from PW7 and ended with PW11 instead of the more common form of numbering which starts with PW1. According to Counsel, it is not clear whether there were other prosecution witnesses whose testimonies were omitted from the record of appeal starting from PW1-PW6, such as the different doctors who authored the admitted documentary evidence, or it was simply the trial Judge's way of numbering the witnesses. Counsel prayed that we look at the original file with a view of rectifying of the record.

We have looked at the record of appeal. The concerns raised by the respondent's Counsel about the numbering of the prosecution witnesses are valid. By the record indicating the first prosecution witness as "PW7", it gives a first impression that possibly there also existed six prosecution witnesses (PW1 – PW6) whose evidence was omitted from the record of appeal that was filed before this court. However, that impression is resolved by looking at the judgment of the trial court where the trial Judge first summarised the testimonies of all the witnesses

before him. The prosecution witnesses were stated by the trial Judge to be PW7 Ampereza Elias, PW8 Kurama Moses, PW9 Tumusiime Yona, PW10 Junior Vincent and PW11 Tumuramye Andrew.

As such, we are satisfied that there were only five prosecution witnesses who were numbered starting with PW7 upto PW11 as already stated. We therefore saw no necessity of calling for the handwritten record of the trial Judge for further scrutiny.

Resolution of the preliminary points of law raised by Counsel for the respondent

The first point of law raised by the respondent's Counsel was that the manner in which the appellant abandoned some of the grounds of appeal without leave of Court offends Rule 67 of the Rules of this Court and implored us to condemn it.

Rule 67 of the Rules of this Court states that:

> *"**67. Supplementary memorandum.***
>
> *(1) The appellant may, at any time, with the leave of the court, lodge a supplementary memorandum of appeal."*

The above rule does not support the respondent's contention that an appellant must first seek leave of court in order to abandon any ground of appeal set out in the memorandum of appeal. The rule simply gives an appellant the right to seek leave of the court in case he/she desires to file a supplementary memorandum of appeal. In the instant matter, the appellants never filed any supplementary record of appeal. They simply abandoned two grounds of appeal by not submitting on them. No injustice has been occasioned by such a course of action. As such, we disallow the respondent's objection to it.

The second point of law raised by the respondent is that ground 3 in the memorandum of appeal should be struck out for offending rule 66(2) of the Court of Appeal Rules in so far as it is general and argumentative and not concise.

Rule 66 (2) of the Rules of this Court provides that:

> *"(2) 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 and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided."*

On the other hand, ground 3 which the respondent objected to was couched as follows: -

> *"That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record thus arriving to a wrong decision."*

This court (Egonda-Ntende, Madrama and Bamugemereereire, JJA) considered a similar scenario in the case of *Sseremba V Uganda (Criminal Appeal No. 480 of 2017)[2021]UGCA 142 (3 November 2021)* and struck out a similar ground for offending rule 66(2) of the Rules of this court. We find no reason to depart from the said decision of this court.

Accordingly, ground three of the memorandum of appeal is struck out. This leaves us with only grounds 1 and 5 to resolve on their merits.

Resolution of the appeal

We have carefully read the submissions of both counsel and we have also read the record and the authorities cited to us, and others not cited by the parties. The appeal before us is against both conviction and sentence. As a first appellate court, it is our duty to re-appraise all evidence that was adduced before the trial court and come to our own conclusions of fact and law while making allowance for the fact that we neither saw nor heard the witnesses testify. (See: *Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10; Fredrick Zaabwe vs. Orient Bank Ltd, Supreme Court Civil Appeal No. 4 of 2006;* and *Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997*.

We shall bear in mind the above principles as we resolve the remaining two grounds of appeal separately.

Ground 1 - Circumstantial evidence

Ground 1 is couched as follows:

> ***That the learned trial Judge erred in law and fact when he relied on very weak circumstantial evidence in convicting the appellants thereby occasioning a miscarriage of justice.***

From the evidence tendered before the trial court, it is clear that none of the prosecution witnesses actually saw or witnessed the appellants or indeed any other person commit the offences for which they were convicted. As such, there was no direct evidence linking the appellants to the commission of any of the offences. The prosecution case therefore hinged on circumstantial evidence.

The law on circumstantial evidence is settled. In *Byaruhanga Fodori Vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12* at p. 14, the Supreme Court of Uganda spelt it out thus: -

> *"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."*

Subsequently, in the case of *Tindigwihura Mbahe Vs. Uganda, S.C. Crim. Appeal No. 9 of 1987*, the Supreme Court cautioned that circumstantial evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference.

The circumstantial evidence relied upon by the trial court to convict the appellants consisted of the testimonies of the prosecution witnesses who identified the appellants as the last persons seen with the deceased alive, namely PW9, PW10 and PW11.

A review of the record of appeal indicates that the deceased was known to PW7 Ampereza, PW8 Kurama, PW9 Tumisiime, PW10 Junior and PW11 Tumuramye as a Boda-boda cyclist operating from Katojo stage. PW7 was the Chairman of the Boda-boda riders of Katojo stage, while PW8 was the actual owner of the Boda-boda which the deceased used to ride. The 2nd appellant was before the date of the death of the deceased known by PW8, PW9, PW10 and PW11 as a former resident of the area who had disappeared from the area after stealing a motorcycle. This evidence was corroborated by PW7.

PW8 testified that he was the owner of the boda-boda which the deceased used to ride. That on 17.06.2016 at around 8PM he received a call informing him of the robbery of the boda-boda and the assault of the deceased. He went to the scene, and found the deceased being taken to the hospital. He is the one who returned with the deceased's corpse from the hospital for burial. He knew the 2nd appellant before the fateful day. That the 2nd appellant had disappeared from the village after stealing a motorcycle. However, he resurfaced on 17.06.2016 and once again disappeared till he was arrested by the police.

PW8's evidence of the disappearance of the 2nd appellant on 17.06.2016 was corroborated by PF24 which indicated that the police arrested the 2nd appellant on 20.10.2016.

PW9 testified that on the fateful date (17/6/2016), at about 4pm, when he saw the 2nd appellant return to the area with the 1st appellant and another person riding on a motorcycle, his suspicion was raised because of the 2nd appellant's previous record of theft of a motorcycle. The witness and the other Boda-boda riders therefore took a keen interest in the presence of the 2nd appellant in the trading centre. PW9 testified that the appellants were riding from Kambuga towards Kihiihi. The 1st appellant had a bag on his back. They stopped at Kenneth

Byaruhanga's bar (also known as Kenneth's bar) within Katojo trading centre. They spent about 30 minutes at Byaruhanga's bar and then left towards Kanungu.

PW9 stated that when he learnt around 8pm of the same day that the deceased had been hit and the boda-boda stolen, he suspected the appellants to be part of the assailants. He helped the police in investigating the case. He told the Police that he knew the appellants. He also told their Chairman (PW8) that he had seen the appellants on the fateful day in the area. But the 2nd appellant had disappeared thereafter. He was present when the 1st appellant was arrested by the police from the school where he was studying, Gables Vocational Training Institute.

PW10 Junior Vincent stated that he was a Boda-boda rider operating from Katojo stage where the deceased used to operate. He knew the appellants long before the incident. That on the fateful day (17/6/2016) at around 7:30pm while he was at Katojo Boda-boda stage, he saw the 1st appellant come to the stage. He called for a Boda-boda to take him. The deceased came and the 1st appellant boarded the deceased's boda-boda. They first went to Kenneth's bar to pick someone. Then after about 5 minutes, the deceased and his two passengers rode past the witness at the boda-boda stage and took the Kambuga direction of Kigando. The witness was able to recognize them because darkness had not yet set in. Then after about only 25 minutes, he got a call that the deceased had been assaulted and his boda-boda taken. He suspected the 1st appellant and the 2nd passenger as the culprits as they were the persons, he last saw the deceased with.

PW11 Andrew Tumuramye testified that he was a Boda-boda rider operating from Katojo trading centre. He knew the appellants and the deceased. That he had seen the appellants during daytime before the incident. They were drinking in Kenneth's bar around 4pm. Then at 6pm, he took the 1st appellant and another person who he did not know to Kyepatiko about 8 km away. The 1st appellant had a heavy bag. The witness advised the 1st appellant to put the bag in the front basket of the Boda-boda, but he refused. At that moment, PW11 became suspicious of the 1st appellant. He overtook two bicycles which were in front of him so that in

case the 1st appellant inflicted any harm upon him, the bicycle riders he had overtaken would be able to see and come to his help. Along the way, the 1st appellant asked the witness to stop to enable him to have a short call, but the witness refused to stop as the point was lonely and appeared unsafe. The witness later stopped at another point which in his assessment was safe, but the 1st appellant informed him that he no longer had the urge to urinate. They drove back to Katojo and arrived there at around 7pm. Later, the 1st appellant came to the stage to hire a boda-boda to carry him. The deceased took him (the 1st appellant) and another person. That hardly had thirty minutes elapsed, than he got a call that the deceased had been assaulted and the Boda-boda stolen. He suspected the 1st appellant to be part of the culprits. He knew the 1st appellant by face and not his names.

In his defence, the 1st appellant in his unsworn testimony stated that at the material time, he was a student at Gables Vocational Training Institution Rukungiri – Boarding Section. That on the fateful day, he obtained permission from the school authorities to go home to get his Ordinary level results slip for purposes of registering with UBITEB. That he reached home around 6pm. At home he found his mother. He remained home till he returned to school on Sunday (19/06/2016). He was arrested from school on 22/6/2016. He denied any involvement in the commission of the offences.

The 2nd appellant likewise made an unsworn testimony by which he denied going to Kambuga as alleged. He stated that on 17/6/2016 he was at his place of work (Kebisoni). He was arrested on 02/10/2016 from Nyakinengo.

The Principal of Gables Vocational Training Institute, Byabagambi Abel Buta while testifying as DW4, confirmed that the 1st appellant was his student at the Institute. That he and several other students were granted permission on 17/06/2016 to return home to pick their Ordinary level results slips. That the 1st appellant left school on 17/06/2016 and returned to the institute on 19/06/2016. That on 22nd June 2016 the police officers went to the institute looking for the 1st appellant and another student. That from the description of the 1st appellant's size and colour

given by the police, he was able to tell that it was the 1st appellant who was wanted by the police. That he immediately got him and handed him over to the police.

After evaluating the evidence before him, the trial Judge found that the conditions existed for the favorable identification of the appellants. The 2nd appellant was known by PW9 and PW10 before the fateful night. He was seen by them during daytime on the fateful day. The appellants were seen by PW9 and PW10 travel together and in the bar during daytime. PW11 evidence further reinforced the evidence of PW9 and PW10. He likewise saw the1st appellant during daytime. He talked to him, spent enough time with him during the day while they were on the same bike on the journey to Kyempetiko. He could not have failed to identify him at 7.30PM as the person who boarded the deceased's boda-boda the last time PW11 saw him alive.

The trial Judge also considered the alibis put up by the appellants and rejected them. He was satisfied that the appellants were properly identified and put at the trading centre. The description of the 1st appellant given by PW11 to the police assisted his being easily identified by DW4 (the Principal of the institute) from where he was arrested. DW4's evidence confirmed that the 1st appellant was absent from school on the fateful day which supported the prosecution evidence that he was in the trading centre at the material time the offence took place. The prosecution evidence further proved that the appellants were acting in a close and coordinated manner and that both were liable for the offences charged under the principle of common intention which is provided for in section 20 of the Penal Code. To the extent that the appellants were seen riding on the same boda bodas and drinking together during daytime, they were known to the other and not strangers and their activities for that day were closely interconnected. However, the evidence before the trial court did not directly place the appellants at the actual place where the deceased was assaulted and robbed of the boda-boda namely, Kambuga Primary School playground. However, the doctrine of ***"last seen"*** becomes applicable.

In the Nigerian case of *Moses Jua Vs. The State (2007) LPELR-CA/IL/42/2006*, the court, while considering the ***'last seen"*** doctrine held thus:

> *"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."*

In yet another Nigerian case, *Stephen Haruna Vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009* the court opined thus:

> *"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."*

Locally, the doctrine was invoked in the case of *Matovu Frank and Anor Vs. Uganda, Court of Appeal Criminal Appeal No. 111 of 2018.* The prosecution in that case, adduced evidence at the trial that the deceased was last seen with the appellants taking alcohol in the bar and based on those facts, and how the accused persons conducted themselves upon and after leaving the bar, the prosecuting counsel persuaded the court to invoke the "last seen doctrine " which has global application to homicides.

In resolving the above case, this court held that: -

> *"According to the decision in Tajudeen Hiyasu Vs The State (Supra) "..., creates a rebutable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death.... Thus where an accused person was the last person to be seen in the company of the deceased person, they have the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial court.....will be justified in drawing the inference that the accused person killed the deceased person".*

In addition, the last seen doctrine cannot be applied when the accused was the last person to be seen with the deceased but there is no other circumstantial evidence. See Ismail Vs the State quoted in Criminal Evidence in Nigeria by Jide Bodede 2nd Edition (at www.lawfiellawyers.com) The Court in Taylor Vs R warned that "..... in dealing with the conviction which is exclusively depended on circumstantial evidence, it is necessary before drawing the inference of the accused's guilt to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

We agree that the prosecution was able to put the accused at the scene of the crime and discredited the alibi raised by the Appellants. The evidence of the prosecution was consistent. The defence evidence was inconsistent." [Emphasis added]

The above statement of the law is still good. It is applicable to the instant matter. The deceased was last seen with the 1st appellant when he took the 1st appellant and another as a passenger on his boda-boda. The deceased was hit about 30 minutes after setting off from the Katojo Boda-boda stage and died on his way shortly thereafter while being taken to the hospital. The doctrine of "**last seen**" imposes a duty on the 1st appellant to give an explanation relating to how the latter met his death. No such explanation was furnished to the trial court by the 1st appellant. His defence of *alibi* was discredited. As such, the court would be justified in drawing the inference that the 1st appellant participated in causing the death of the deceased person.

As for the 2nd appellant, his actions and movements on the fateful day were so closely interwoven with those of the 1st appellant that the trial court cannot be faulted for invoking the principle of common intention to hold the 2nd appellant likewise guilty of the offences charged. His disappearance from the trading centre and his known residence upon the death of the deceased till he was eventually arrested about four months after the occurrence of the death of the deceased was not conduct of an innocent person. The 2nd appellant becomes liable under the principle of common intention as rightly found by the trial Judge.

In the premises, ground one fails.

Ground 5 - Sentence

The appellants' complaint in ground 5 is that the sentence of 27 years' imprisonment imposed by the High Court and the compensation order were harsh and manifestly excessive and deserve to be set aside by the court. The basis for the appellants complaint was that the trial court did not take into account the material antecedents of each of the appellants, like their respective ages and possible rehabilitation and reform away from hard core criminals.

Further, that the sentences were far out of range of sentences in similar cases.

The respondent disagreed and supported the trial Court's findings.

As an appellate court, we cannot interfere with the discretion of the sentencing Judge unless it is shown that the trial court acted on a wrong principle or overlooked a material factor, or the sentence is illegal or harsh and manifestly excessive in the circumstances of the case. *See: Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014; Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No. 16 of 2000* and *Kiwalabye Bernad Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001*

The Supreme Court in *Kyalimpa Edward Vs. Uganda SCCA No. 10 of 1995* stated the mandate of the appellate court thus:

> *"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 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: Ogalo s/o Owuora Vs R (1954) 21 E.A.C.A 126, R Vs Mohamedali Jamal (1948) 15 E.A.C.A 126."*

We shall bear in mind the above principles while resolving ground 5 of the appeal.

From the record of appeal, the sentence of 27 years was imposed by the trial court in respect of the offence of murder after deducting the 3 years spent by the appellants in lawful custody before their conviction. On the other hand, the compensation order was consequential upon the conviction of the appellants for the offence of aggravated robbery and sentence of 17 years' imprisonment imposed upon the appellants after deduction of the three years spent in lawful custody.

The sentencing order of the trial Judge stated:

> *"Sentence and Reasons: -*
>
> *I have considered the submissions of counsel and the allocutus by the convicts.*
>
> *I note that the convicts are both first offenders, and young men capable of reform.*
>
> *On the other hand, murders and Aggravated Robberies are rampant and courts have a duty to express disapproval of such conduct.*
>
> *Weighing the aggravating and mitigating factors, and also considering the sentencing guidelines, I sentence the convicts as follows: -*
>
> *(1) A1 Busingye Paul and A3 Ampereza Laurence shall each serve a prison sentence of 30 years less the 03 years spent on remand i.e- 27 years on the count of Murder.*
>
> *(2) A1 and A2 shall also serve 20 years less the 03 years i.e.- 17 years on the counts of Aggravated Robbery.*
>
> *(3) The sentences shall run concurrently from the 24/06/19.*
>
> *(4) A1 and, A3 shall compensate KURAMA MOSES with UGX. 4,000,000/= after serving the sentences.*
>
> *KAZIBWE MOSES KAWUMI*
>
> *JUDGE*
>
> *24/06/2019"*

From the above excerpt, it is clear that the trial Judge while sentencing the appellants made specific reference to their age, and the reformative aspect of the court sentences. As such, the appellants' complaint in that aspect is without any basis. It is hereby rejected.

As far as consistency of the sentence with decided cases is concerned, the sentence of 30 years for the offence of murder is within the range of sentences that have been confirmed by this court and the Supreme Court in murders committed under similar circumstances. In *Kyaterekera George William V Uganda, Court of Appeal Criminal Appeal No.773 of 2010*, this Court confirmed the sentence of 30 years imposed by the trial Court on the appellant who had fatally stabbed his victim on the chest. In *Ssemanda Christopher and Muyingo Denis Vs. Uganda, Court of Appeal Criminal Appeal No. 77 of 2010*, this Court confirmed a sentence of 35 years' imprisonment for the offence of murder. In *Aharikundira Yustina Vs. Uganda Supreme Court Criminal Appeal No. 027 of 2015* where the appellant brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the death sentence imposed by the trial Court and substituted it with a sentence of 30 years' imprisonment. In *Kisitu Majaidin alias Mpata Vs Uganda, Court of Appeal Criminal Appeal No. 028 of 2007*, this Court upheld a sentence of 30 years' imprisonment for murder. The appellant had been convicted of murdering his mother.

We find that the 27 years' imprisonment term for the offence of murder is neither harsh nor excessive in the circumstances of this case.

With regard to the compensation order, it is grounded in section 286 (4) of the Penal Code Act where it is mandatory for the court to order compensation of the victim of the aggravated robbery, if the convict of the offence is not sentenced to death. In the instant matter, the sum of Ugx 4,000,000/= which the appellants were ordered to compensate PW8 Karuma Moses was based on the documentary evidence tendered into court in proof of the ownership and purchase price of the motor cycle (boda boda) robbed from the deceased which belonged to PW8. We find no valid basis to interfere with it.

Conclusion

The appeal is void of merit and is dismissed accordingly. The conviction, sentence and compensation order by the trial court are upheld.

545 **We so Order.**

Delivered and dated this ..6th.. day of ..Sept.. 2023

.....

MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

.....

CHRISTOPHER GASHIRABAKE
Justice of Appeal

.....

EVA K. LUSWATA
Justice of Appeal