THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT JINJA

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

CRIMINAL APPEAL NO. 827 OF 2014

LUBANGO ABRAHAM:: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

[Appeal from the decision of the High Court of Uganda sitting at Mbale ***(Hon. Justice Lawrence Gidudu)*** *delivered on 19th September 2014 in Criminal Session Case No. 127 of 2012]*

JUDGMENT OF THE COURT

The appellant in this case was convicted of the offence of murder c/s 188 and 189 of the Penal Code Act and sentenced to 40 years' imprisonment.

The facts of the case as established by the prosecution and stated by the learned trial judge are that Kakayi Prisicilla was found dead in her house on 7th November, 2011, the appellant was arrested for her murder, indicted and he denied the charges. That a day before her body was discovered, the deceased was planning a journey to Kenya in company of the appellant. The appellant was at the deceased`s house where he usually stayed as the two were herbalists. That they had planned to leave very early. The next day, the deceased`s son found her

house locked but the animals they reared were still inside. In the afternoon, they decided to open the behind door only to find her dead. She had suffered a fractured skull with the brain matter exposed. A post mortem report concluded that she died of hemorrhagic shock due to excessive bleeding. The appellant who had spent a night in the same house was missing. Two days later, he was sighted in Lwakhakha trading Centre and arrested after a chase.

The appellant denied being in the deceased`s house or village that day and night. It was his defence that on the fateful day and night, he was with his sister in Mbale Town helping her with shop keeping. The following day the sister sent him to Lwakhakha trading Centre to shop for goods for sale. That while there he was ambushed by a mob that took him to the police but he was not charged. He contended that he was later charged to frame him up as revenge for the reports he made about villagers who possessed illegal guns.

He was later charged, indicted and he pleaded not guilty. He was convicted of the said murder and sentenced to 40 years imprisonment.

Being dissatisfied by the decision of the learned trial judge, the appellant now appeals under the following grounds;

1. *"The learned trial judge erred in law and fact in dismissing the appellant`s defence of Alibi without any further evidence from the prosecution thus arriving at a wrong decision to convict the accused.*

2. *The learned trial judge erred in law and fact in his assessment, interpretation and application of the law on circumstantial evidence, and there by arriving at wrong decision to convict.*
3. *The learned trial judge erred in law and in fact in sentencing the accused to harsh and excessive sentence in the circumstances of the case*

Representations:

At the hearing, the Appellant was represented by Ms. Ms. Kevin Amujong on State Brief; while Ms. Immaculate Angutuko Chief State Attorney represented the respondent.

Due to the COVID-19 Pandemic restrictions, the appellant was not physically present in court but attended the proceedings via video link to Prison. Both parties sought, and were granted, leave to proceed by way of written submissions which were already on the court record.

Appellant's Submissions:

On ground one, it was submitted for the appellant that the defence pointed out that PW3 did not tell police that the accused was in the home of the deceased 3 times the day before she died. That PW3 Mafukimalayi Partrick told court and police that the appellant had been at the deceased`s house but due to panic caused by his mother's death he did not state to police that he slept in the house with the deceased. That the trial judge believed PW3`s explanation and treated it as minor. Counsel contended that a critical analysis of Exhibit DEX1 the police

statement does not show that PW3 stated that he saw the appellant in the deceased`s home a night before her body was found. That PW3`s statement was recorded immediately yet the learned trial judge never considered the relevance of firsthand information. He referred court to **Obwalatum Francis vs Uganda SCCA No. 30 of 2015** for the proposition that firsthand information often provides a good test by which the truth or accuracy of the later statements can be judged, thus providing a safe guard against later embellishments or the deliberately made up case. Truth will often come out in the first statement taken at the time when recollection is very fresh and there has been no opportunity for consultation

Further, the inconsistencies in the statement of PW3 Mafukimalayi made at police and the evidence he gave in court were not minor as the trial judge put it. That had PW3 seen the accused, why did he eliminate such vital evidence from the statement only to recall it at a time he was giving evidence in court?

The appellant raised a matter that he was being framed for having reported some villagers for having guns and that PW6 Clement Wamalwa did not tell court that the appellant had not reported them. That the prosecution did not disprove this and it did not present more evidence in rebuttal of the same as stipulated in S.76 of the Trial on Indictment Act.

Counsel further submitted that the evidence of DW2 Salifu Margret the appellant`s sister who affirmed the appellant`s alibi of attending the deceased`s burial for around 5-6 minutes does not in any way, disprove the accused`s alibi

on the material day of the alleged murder as the learned trial judge found it to be. That there is nothing wrong to attend a burial to pay condolences and leave the burial. That there is no law specifying the time one should spend at a burial and the analysis on burial in line with the defence of alibi was clearly misplaced as it has no correlation with the alibi of the appellant.

The appellant was arrested by a mob that called him a thief and that later at police he was informed that he was the one who killed the deceased. That there was no need to stretch the Judge`s imagination for it would not be the first time for a mob to attack an innocent person. That this evidence should be weighed against the prosecution witnesses evidence who told court that the accused had slept at the deceased`s home because they had an early journey to Kenya. That if the appellant had planned to go to Kenya with the deceased why then was he still in Uganda when he was arrested after a whole 2 days of discovering the body of the deceased. That if he was indeed guilty; he would have fled to Kenya.

He cited **Matete Sam v Uganda SCCA No.53 of 2001** for the proposition that where an accused person pleads an alibi as a defence, the prosecution must do more than merely place him or her on the scene of the crime. They must disapprove or otherwise discredit the defence of alibi. The mere putting the accused on the scene of crime is not enough.

DW2 Safilu clearly confirmed in evidence, which corroborated DW1, that the appellant had a lock up shop in the village of the alleged murder Buwanunyonyi village which he later sold. That when he separated with his wife, he was all along

staying with DW2 Safilu at the shop premises. That the prosecution merely attempted to place the appellant at the scene of crime and did not in any way discredit the appellant`s alibi. That DW2`s evidence was not discredited and or challenged in anyway by the prosecution yet it was their burden to discharge. That the prosecution had mere statements from 2 witnesses PW4 and PW5 which did not show that the appellant and the deceased were working together, stayed together and had planned to go to Kenya. That the appellant was not placed at the scene of crime in light of his alibi that was not discredited.

On ground two, it was submitted for the appellant that there was no single direct evidence to prove the ingredient that it was the appellant responsible for causing death of the deceased. That the learned trial judge held that the appellant was the last person to be seen with the deceased alive and as such, these are inculpatory facts which are incompatible with the innocence of the accused and are facts incapable of explanation on any other reasonable hypothesis other than guilt. Counsel contended that the learned trial judge disregarded the appellant`s testimony of the nature of the arrest without any other evidence especially without the testimony of the arresting officer. That he never considered the appellant`s alibi as submitted before reaching a finding that the appellant was the last person to be seen with the deceased alive. He cited **Amisi Dhatemwa Alias Waibi v. Uganda CACA NO.23 of 1997** for the proposition that it is very vital before drawing the inference of the accused`s guilt from circumstantial evidence that there is no other co-existing circumstances which would weaken or destroy the inference.

The Alibi was not discredited at all and the fact that the arresting officer did not testify to the circumstances of the arrest of the accused created a weakness in the circumstantial evidence. That had the appellant killed the deceased, he would have proceeded to Kenya as they had agreed with the deceased to travel. That he would not have lingered in Uganda for over two days before his arrest. That all this points to the innocence of the appellant and the circumstantial evidence did not prove beyond reasonable doubt prove that he accused was the one who actually caused the death of the deceased.

On ground 3, it was submitted for the appellant that there were no aggravating circumstances as laid out in paragraph 20 of the Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013.That there was no premeditation that was proved, that the murder was gang related, the appellant is a first time offender, he was of advanced age of 53 years, has young children to take care of, has been in custody for 10 years and he was remorseful. He prayed that the sentence be reduced from 40 years to 10 years inclusive of the 10 years that the appellant has already spent under imprisonment.

In reply to the above submissions, it was submitted for the respondent that whereas there was no direct evidence proving the participation of the appellant, the prosecution relied on corroborated circumstantial evidence of PW3, PW4 and PW5 which destroyed the appellant`s alibi and placed him at the scene of crime. That PW3 stated that the appellant came to the deceased`s home, he greeted him he later left and returned at around 6:00pm. That he stayed there while listening

to radio until about 8:00pm. That the defence challenged his testimony raising contradictions between his testimony and the statement he recorded at police.

Counsel submitted that the alleged discrepancy was explained by PW3 when he stated that he told the police that he saw the appellant at his mother`s place in the morning and evening and he stayed in the house. That he did not tell the police that he had stayed in the house that night. Counsel submitted and invited court to treat the discrepancy as minor and did not point to deliberate untruthfulness since PW3 was in a state of grief at the time of recording the statement. He referred court to **Alfred Tajar vs Uganda (1969) EACA Cr. Appeal No. 167 of 1969**

In addition, counsel submitted that PW4 Wakweika Isaac saw the appellant and the deceased at 8:00pm while the appellant was listening to radio and the deceased preparing tea. That PW5 Makabuli James son to the deceased stated that he saw the appellant enter the deceased`s house after the deceased had requested him to look after her cows as she was going for prayers. That PW5 later left and came back at around 7:30 pm and saw the appellant listening to radio. That the evidence of PW3, PW4 and PW5 overwhelmingly placed the appellant at the scene of crime and proved his participation. That the learned trial judge properly evaluated the defence of alibi against the evidence of the prosecution and found the defence version to be a lie and an afterthought. She cited **Jamada Nzabaikukize v Uganda SCCA No. 1 of 2015** wherein the Supreme Court cited **Bogere Moses v Uganda SCCA No.1 of 1997** on what

amounts to putting the accused person at the scene of crime? 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.

On ground 2, counsel retaliated her earlier submissions on ground one and further contended that circumstantial evidence in law can form the basis for conviction. That the learned trial judge relied on the evidence of PW3, PW4, and PW5 who last saw the deceased alive in company of the appellant and warned himself as well as the assessors on the danger of convicting on circumstantial evidence. That the evidence of PW3, PW4 and PW5 was corroborated by that of PW6. That the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt.

On ground 3, counsel submitted that the appellant was convicted of murder which calls for a death penalty. However, the learned trial judge considered the aggravating and mitigating factors and sentenced him to 40 years after deducting the 3 years he had spent on remand.

He cited **Kiwalabye Bernard v Uganda SCCA NO. 143 of 2001** and **Kyalimpa Edward vs Uganda SCCA No. 10 of 1995** for the proposition that an appropriate sentence is a matter of discretion for 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 in the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence by the trial judge was manifestly so excessive as to amount to injustice.

We have considered the submissions of counsel and the record. As a first appellate Court, we are required to re-appraise the evidence adduced and make our own inferences. **See Rule 30(1) of the Rules of this Court and Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997.**

On ground one, the learned trial judge is faulted for dismissing the appellant`s defence of alibi without any further evidence from the prosecution. That the prosecution evidence did not place the appellant at the scene of crime as they failed to discredit his alibi.

It is trite that where an accused raises an alibi, the prosecution is under duty to place the accused squarely at the scene of crime. Putting an accused at the scene of crime means proof to the required standard that the accused was at the scene of the crime at the material time. To do so 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 was at the scene of crime, and the accused not only denies it, but also adduces evidence showing that the accused was elsewhere at the material time it is incumbent on the court to evaluate both

versions judicially and give reason why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable ***See: Bogere and Anor V Uganda CR. App. No. 1 of 1997***

PW3 Mafukimalayi Partric a son to the deceased testified that on 6/11/11 morning, the appellant went and sat at the deceased`s home. That since he was staying nearby he was able to see the deceased`s home. He stated; "The deceased said she was going for prayers but wanted to talk to the appellant about the treatment of people using local herbs." That the appellant used to treat people together with the deceased and had worked together for 3 months and they could go to Kenya and treat people.

He further testified that as the deceased left for church, she asked the appellant to bring along a "Kanzu" long tunic which they were to take to Kenya. That at 5:00pm the deceased returned from church and the appellant returned at 6:00pm.

He further stated in testimony that; "the deceased asked whether the appellant had brought the kanzu but appellant promised to produce it shortly. I went to my house and the accused left. But at about 7:00pm the appellant returned with his bag. My mother took appellant `s bag in the house." That the appellant came out with the radio and started listening as the deceased prepared tea and super. That the appellant used to stay with his mother from September 2011 to November 2011.

PW4 Wakweika Isaac testified that at about 9:00am, the deceased came to his home and told him that she wanted to go to Kenya but she had asked a person to go and sew a Kanzu but had not returned. That she was going to say farewell to church. That shortly the appellant appeared as he was talking to the deceased who told them that the Kanzu was being made by a tailor. That PW4 left for the burial and when he returned at 8:00pm he found the appellant listening to a radio while the deceased was making tea. He further testified that he passes the deceased`s home before going to his and that his home is only 20 meters away. That the appellant and the deceased used to stay together in the same house and that he believed that they were planning for a journey.

PW5 Makabuli James Johnstone a son to the deceased testified that on 6/11/11 in the morning at about 9:00am the deceased came to his home which is 50 meters away from hers to ask him to look after her cows as she was heading for prayers. That as they were talking, the appellant who also grew up in the same area also came and entered his mother`s house. That later in the evening, after he had changed the cows and given them water, he left for the trading centre to charge his phone and when he returned at around 7:30pm he checked on her mother and he saw the appellant listening to radio and her mother told him that she had taken his share of milk from the cow to his home. That his mother told him that she had a journey to make with the appellant to Kenya. He further testified that two months before her death, the appellant had started sleeping at his mother`s house which fact he had told the LCs. That when they found out

that his mother had died, the appellant had disappeared and that he was later arrested trying to run to Kenya.

PW6 Clement Wamalwa the chairman LC1 of Bunanyama village testified that he was told by PW3 and PW4 that it's the appellant who must have killed the deceased because they were together planning to go to Kenya and that the appellant was missing yet they had been together.

While giving unsworn evidence, the appellant testified that he had left Bunanyama since the groups of persons he had reported as having guns had threatened to burn his family. That since 2010 he was leaving in Lwakhakha were he used to buy goods and send to Mbale. That he was in Lwakhakha when he was arrested by a group who shouted that he was a thief and they took him to police. That a police officer later came and said that he had killed someone. That he had not been in Bunanyama village since 2010 and did not stay with the deceased and she was not his business partner.

In support of the appellant`s alibi that he was never in Bunanyama village his sister DW2, Salifu Margret testified that the appellant was staying with her in November 2011 along Kumi road. That after threats to the appellant`s family when he reported those who had guns, the appellant sold his property in Bunanyama and went to Mbale in February 2010 to do business. That on 8/11/11 when he went to buy goods he did not return and she later heard that he had been arrested from Lwakhakha. That from February 2009 up to his time

of arrest, he was staying with him in the shop premises. That he used to cross to Kenya because goods there were cheaper.

In determining this matter the learned trial judge stated as follows;

"The accused in his evidence stated that while in Lwakhakha trading centre on shopping trip, he was all of the sudden arrested by mob that called him a thief and frog matched him to police. At police, he was informed he was the one that killed the deceased. This defence is also incredible. How a mob would suddenly arrest a person calling him a thief and shortly the police refer to him as the killer stretches my imagination too far. When this defence is assessed with the prosecution evidence regarding the accused`s being seen at the deceased`s house, spending there a night, disappearing the following day and running away into a river before his arrest, I find that the accused and his sister`s version of events is unbelievable. The prosecution evidence regarding his presence in the village that day and night is credible. The fact that he was the last person to be seen with the deceased alive constitutes inculpatory facts which are incompatible with the innocence of the accused. These facts are incapable of explanation on any other reasonable hypothesis other than guilt.

After careful consideration of the evidence for both sides, I am in agreement with the lady and gentleman assessors that the prosecution has not only placed the accused at the scene of crime but also proved through circumstantial evidence that he is the killer.

The defence version can only be a lie and an afterthought. The prosecution has proved the case against the accused beyond reasonable doubt. I find him guilty of murder and convict him accordingly."

From the analysis of the evidence on record, PW3, Mafukimalayi Partric, PW4 Wakweika Isaac and PW5 Makabali James saw the appellant at about 8:00pm with the deceased as they lived in the same homestead. They saw the appellant listening to radio. PW3 and PW5 sons to the deceased testified that their mother told them that she had a journey to Kenya with the appellant. These witnesses saw the appellant at the deceased`s home. PW4 used to pass by the deceased`s home as he goes to his.PW5 testified that when he checked on his mother he was with the appellant in the home. The witnesses further stated that the appellant used to stay with the deceased for about two months before her death.

The evidence was not controverted by the defence during cross examination. The appellant`s and DW2 Salifu`s evidence that the appellant had left Bunayama village in February 2010 and at the time of the murder he was staying with DW2 is tainted with lies. The evidence of PW3, PW4 and PW5 who last saw the appellant with the deceased the night before her death is more believable than that of the appellant and DW2. They were all consistent that they saw the appellant in the deceased`s home listening to the radio and by the time they went to sleep he was still in that home.

The evidence that the appellant had left the deceased`s village in 2010, never stayed with the deceased and he was not her business partner was an afterthought by the defence.

Putting an accused person at the scene of crime means proving to the required standard that the accused was at the scene of crime at the material time. See: ***Abdu Ngobi vs Uganda, SCCA No.10 of 1991 and Livingstone Sikuku vs Uganda SCCA No.33 of 2003***

The evidence of PW3 Mafukimalayi Partric, PW4 Wakweika Isaac and PW5 Makabuli James clearly shows that the appellant was the last person seen with the deceased that night before she was found dead the next morning. This evidence squarely placed the appellant at the scene of crime and discredited the appellant`s alibi.

We agree with the trial judge`s findings that the prosecution`s evidence placed the appellant squarely at the scene of crime and that the appellant`s alibi was tainted with falsehoods and untruthfulness and therefore could not stand.

Ground one fails.

On ground 2, the learned trial Judge is faulted for having failed to assess, interpret and apply the law on circumstantial evidence. We note that the evidence of the prosecution was based on direct and circumstantial evidence as some prosecution witnesses testified to have talked and seen the appellant with the deceased and also that no one saw the appellant committing the offence

respectively. Be that as it may, the law governing circumstantial evidence is well settled. In order to justify an inference of guilt, based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of his guilt. ***See Andrea Obonyo and Others versus R, (1962) E.A. 542***

Ssekandi J.A (as he then was) in his lead judgment in ***Amisi Dhatemwa Alias Waibi vs Uganda; Supreme Court Criminal Appeal No. 23 of 1977,*** had this to say on circumstantial evidence;

> *"It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue accurately; it is no derogation of evidence to say that it is circumstantial, See: R vrs Tailor, Wever and Donovan, 21 Criminal Appeal R 20. However, it is trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See: Teper vs P. (1952) A.C 480 at p 489 See also: Simon Musoke vs R (1958) E.A 715, cited with approval in Yowana Serwadda vs Uganda Cr. Appl. No. 11 of 1977 (U.C.A).*

The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of circumstantial evidence is only as strong as its weakest link."

The Supreme Court reaffirmed the above position of the law in ***Janet Mureeba and 2 others-vs Uganda; Supreme Court Criminal Appeal No. 13 of 2003*** in the following words:

"There are many decided cases which set out tests to be applied in relying on circumstantial evidence. Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused. In R -vs- Kipkering Arap Koske and Another [1949] 16 EACA 135 it was stated that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That statement of the law was approved by the E.A Court of Appeal in Simon Musoke vs R [1958] EA 715."

In ***Bogere Charles vs Uganda; Supreme Court Criminal Appeal No. 10 of 1998***, the Supreme Court referred to a passage in Taylor on Evidence 11th Edition page 74 which states;

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

The court is required to exercise caution when dealing with circumstantial evidence. In ***Teper vs R (2) [1952] AC 480*** the court held that before drawing an inference of the accused's guilt from circumstantial evidence, the court has to be certain that there are no other co-existing circumstances which would weaken or destroy that inference.

From the above analysis, it is evident that the prosecution`s case was purely based on circumstantial evidence since there was/were no eye witnesses. Be that as it may, the said evidence needed to be corroborated with independent evidence connecting the appellant to the commission of the murder which burden the prosecution discharged.

The appellant`s evidence that he was in Lwakhakha to buy goods and he was arrested by a mob on theft allegations and later the police informed him that he was arrested for killing someone aligns with the evidence of the prosecution, this is because he was arrested on 8/11/11 one day after the murder since he disappeared when they found the deceased dead yet he was last seen with her a night before.

As earlier held in ground 1 the appellant was placed at the scene of crime by the prosecution. Even though no witnesses saw the appellant kill the deceased, the evidence that the appellant was the last person seen with the deceased before she was found dead the next day points to no other inference than that it was the appellant who killed the deceased. The deceased told her children PW3 and PW5 that she had a journey with the appellant to Kenya the following day and

the logical conclusion is that by the time PW3, PW4 and PW5 went to sleep still saw the appellant at the deceased and it's believable that he stayed with the deceased that night. In addition, PW5 Makabuli James `s evidence corroborated the evidence of PW3 Mafukimalayi Partric and PW4 Wakweika Isaac.

I find the inconsistency in PW3 `s evidence in court that he did not tell the police in his Police Statement (Exhibit DEX 1) that the appellant stayed and slept in the deceased`s home that night a minor inconsistency which does not go to the root of the prosecution`s case since PW4 and PW5`s circumstantial evidence that the appellant was the person last seen with the deceased in the night overwhelmingly points to his guilt. Even though we disregard PW3`s evidence, the remaining circumstantial evidence is so strong against the appellant. The law is now well settled that inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case, save where there is a perception that they were deliberate untruths. See ***Alfred Tajar Vs. Uganda Eaca Criminal Appeal No. 167 Of 1969*** and ***Sarapio Tinkamalirwe Vs. Uganda Supreme. Court Criminal Appeal No. 27 Of 1989***.

PW3, Mafukimalayi Partric testified and stated that; "I suspect the accused because he was the only one staying in that house and he had disappeared. I never saw accused again until today he was arrested by other people."

During cross examination PW5 Wakweika Isaac testified that they suspected the appellant to be the killer because they found the dead body in the house where the appellant stayed for a night after he was absent.

The evidence of the appellant having gone missing was corroborated by the testimony of PW6 Clement Wamalwa the LC1 chairperson and PW7 Wafula Rashid who saw the appellant on 8/11/11 and testified that he pulled the appellant from the river as he was trapped while trying to cross to Kenya when being pursued by the mob. He further stated that the appellant failed to cross because the river was deep and the water had arisen and he seemed not to know how to swim. That the appellant was a stranger in the area and he was running away. That he was identified by a one Boaz who told him that the appellant had killed a person and they took him to police. PW8 D/CPI Ouma Isaac Milton also stated that the appellant had been arrested trying to escape to Kenya.

The Supreme Court in the case of ***Remegious Kiwanuka vs Uganda Criminal Appeal No. 41 of 1995***, observed that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with innocence of such a person.

On the basis of that authority, we find that the appellant's disappearance from the area of crime provided more corroboration to the other evidence of the prosecution on record on his participation in the offence. The appellant`s

evidence and that of DW2 Safilu that he had been staying in Lwakhakha was untruthful and unbelievable. He only went there after killing the deceased and he was trying to run away.

It is also trite law that an accused person is convicted on the strength of the prosecution case, and not on the weakness of the defence as was held in ***Israel Epuku S/O Achouseu vs R. [1934] EACA 166*** and more recently by the Court of Appeal of Uganda in ***Akol Patrick & Others vs. Uganda; Court of Appeal Criminal Appeal No. 60 of 2002.***

In light of the above evidence, we find that the learned trial judge properly assessed, interpreted and applied the circumstantial evidence and came to the right conclusion that the appellant killed the deceased. The circumstantial evidence was indeed so strong and points to no other inference than the guilt of the appellant. The inculpatory facts are incompatible with his innocence and the co- existing circumstances that the appellant was in Lwakhakha not Bunayama was untenable. We find no reason to fault him in deciding the way he did.

Ground 2 fails.

On ground 3, the learned trial judge is faulted for sentencing the appellant to a harsh and excessive sentence of 40 years' imprisonment. That there were no circumstances aggravating the offence as stipulated in Paragraph 21 of the Constitutional Sentencing Guidelines.

An appellate Court will not interfere with a sentence imposed by a trial court which exercised its discretion during sentencing unless the exercise of the discretion was such that it resulted in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignored to consider an important matter or circumstance which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle. See: ***Kiwalabye Bernard Vs Uganda,*** Supra.

In aggravation, the respondent submitted that the convict was a first time offender, maximum penalty is death, the starting point was 35 years in guideline 20, the injury on the deceased head was gross, there was premeditation, the brain matter poured out, the deceased`s children missed her through the crime and asked for the death penalty. In mitigation, the defence submitted that the appellant was a first time offender, had been on remand for 3 years, he was aged 44 years, requires an opportunity to reform, he was remorseful and had children

In sentencing the appellant, the learned trial judge stated as follows;

"The convict is a first offender who has been on remand for 3 years. He is guilty of murdering the grandmother of his wife. He still denies the charges. This is a constitutional right. I have been asked to sentence him to death. He is aged 44 years. He has asked for lenience. He was in a house with an old woman who had trusted him to do business together. For reasons not clear, he killed her so brutally with single hit that split her brains

The guidelines provide for a starting point of 35 years moving down to 30 or upwards to death. I would be believed to impose a death sentence out this would not teach him much since he would be gone.

Staying in prison to keep thinking about that death is more retributive that death will erase his memory.

He has been on remand for 3 years which I deduct from the sentence. I therefore sentence the convict to 40 years imprisonment."

In our view, it is clear that the learned trial judge took into account both the aggravating and mitigating factors and the period the appellant had spent on remand before sentencing him to 40 years' imprisonment. In line with Guideline 20, there existed circumstances which aggravated the punishment and at the same time there existed mitigating factors. In that regard we would not fault the learned trial judge in deciding the way he did. We are alive to the consistency and uniformity principle.

In ***Mbunya Godfrey vs Uganda Criminal Appeal No.4 of 2011*** *and* ***Ssekitoleko Edward vs Uganda Criminal Appeal No. 76 of 2012*** court held that it is a requirement to maintain consistency in sentencing by taking into consideration the sentences previously imposed by the courts in previous similar cases involving similar facts and circumstances.

In ***Kamya Abdullah & 4 others vs Uganda SC CrApp.24 of 2015*** the Supreme Court emphasised the need to embrace basic sentencing principles of uniformity, consistency and parity as guidelines while sentencing.

We have also looked at the range of sentences imposed in similar offences after considering both aggravating and mitigation factors.

In **Adupa Dickens Vs Uganda, C.A.C.A. No. 267 of 2017**, where this court upheld the sentence of 35 years imprisonment and held that it was neither harsh, nor manifestly excessive to warrant the intervention of the Appellate Court.

In **Semanda Christopher & another versus Uganda, CACA NO.77 OF 2010**, the deceased was assaulted by the appellant and he later died in hospital. They were sentenced to 35 years imprisonment for murder and on appeal, this Court upheld the sentence.

Owing to the above authorities, we are a view that the sentence of 40 years' imprisonment was harsh and excessive in the circumstances and we therefore set it aside.

Section 11 of the Judicature Act Cap 13 places this Court in the same position as the Court which had original jurisdiction to hear the matter. The said section states thus;

> *"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any*

written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated."

We exercise the above powers to sentence the appellant afresh.

With both aggravating and mitigating factors in mind, the 3 years the appellant had spent on remand, the principle of uniformity and consistency and the 10 years the appellant has spent in lawful custody we sentence the appellant to 30 years' imprisonment to run from the date of conviction on 19th September, 2014.

Delivered at ~~Jinja~~ Kampala this 30th day of February 2023.

Elizabeth Musoke

JUSTICE OF APPEAL

Cheborion Barishaki

JUSTICE OF APPEAL

Hellen Obura

JUSTICE OF APPEAL