THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 0194 OF 2020

(Coram: Obura, Bamugemereire & Madrama, JJA)

WABOMBA NAMONYO alias MUSAMALI} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale in Criminal Session Case No 146 of 2018 before Byaruhanga, J delivered on 17th September, 2020)

JUDGMENT OF COURT

The Appellant and 6 others were charged with murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the indictment were that the appellant, Musamali James, Khaukha George, Masaaka Abel, Namugongo Rogers, Namonyo Bernard and Walubengo Anthony and others at large on the 3rd of November 2017 at Bwiri Village, in Namisindwa District, unlawfully caused the death of Kimono Elizabeth with malice aforethought.

The accused persons were tried and A2, A3, A4, A5, A6 and A7 were acquitted while the appellant who was tried as A1 was convicted and sentenced to life imprisonment.

The facts accepted by the trial judge where that during a night in November 2017 at 8 PM, the deceased who had come to visit her mother in Kololo village, was shot and fatally wounded by unknown assailants. The family of the appellant was immediately suspected to be behind the murder of the deceased because of a feud that existed between the family of the appellant and that of the deceased arising from a land wrangle originating from a transaction where the deceased had purchased the land of the appellant but the appellant refused to execute a sale agreement in favour of the deceased. The wrangle had reached exploding dimensions to the extent that the two families referred to each

other as witches and that the accused persons had made threats of killing members of the family of the deceased and threatened the deceased too, before she was brutally murdered.

The learned trial judge found that upon hearing the gunshots and learning of the murder of the deceased, everybody got concerned and appeared at the scene. The appellant however opted to disappear. He claimed that he had not known about the death of the deceased. The learned trial judge found that the conduct of the appellant unlike that of his son A4 of disappearance from the area of the crime was a fact from which one could infer guilt. He found that the disappearance from the area soon after the incident may be corroborative evidence that he committed the offence. This added to the evidence of the sniffer dog and pointed to the appellant as one of the killers of the deceased. He also took into account the stormy relationship between the family of the deceased and that of the appellant and the evidence of reported threats to kill members of the deceased family including the deceased arising from a land wrangle. The deceased had come to visit her mother and to attend to the settlement of the land wrangle she had with the appellant. It is from this event that threats to kill her and other members of her family were made. The trial judge found that the threats in question stem from the motive and as such there was sufficient corroborative evidence pointing to the appellant since he was at the centre of the wrangle. He also discussed and found that the dying declaration of the deceased was capable of corroborating the sniffer dog evidence as it also pointed to the appellant as being one of the murderers. He further considered contradictions in the alibi of the appellant and concluded that the totality of the evidence put the appellant at the scene of the crime in that he participated in the murder of the deceased. In agreement with the assessors, the learned trial judge found the appellant guilty of the murder of the deceased whereupon he sentenced the appellant to life imprisonment.

The appellant was aggrieved by his conviction and sentence and appealed to this court on two grounds namely:

1. The learned trial judge erred in law and fact when he failed to evaluate the evidence on record thus holding that the

prosecution had proved beyond reasonable doubt that the appellant participated in the commission of the murder.

2. That the learned trial judge erred in law and fact when he passed a sentence of life imprisonment which was harsh and excessive in the circumstances.

The appellant prayed that this court be pleased to allow the appeal and quash his conviction and in the alternative vary the sentence.

At the hearing of the appeal, the appellant was represented by learned counsel Mr Mooli Allan while the respondent was represented by the learned Chief State Attorney Ms Angutoko Immaculate. The court was addressed in written submissions.

Submissions of the appellant's counsel.

Ground 1.

The appellant's counsel submitted that the burden is on the prosecution to prove beyond reasonable doubt that there was death of a person, that the death was unlawful, that the death was caused by malice aforethought and finally the participation of the accused person in the commission of the offence. While the appellant's counsel conceded that the first three ingredients of the offence had been approved, the last one of the participation of the accused person in the commission of the offence had not been proved.

He submitted that the learned trial judge failed to evaluate the evidence on record when he arrived at the conclusion that the prosecution had proved participation of the accused person in the commission of the offence. The case hinged on circumstantial evidence as there was no direct eye witness when the murder by shooting of the deceased took place. With regard to the evidence of PW1, he stated that on 3rd November 2017 he was in his home and it was around 8 PM when he heard gunshots from the direction of his mother's home. People made an alarm and when he responded he found the deceased lying in a pool of blood between the main house of his mother and the kitchen. Further he testified that the deceased was still breathing though she had been shot through the lower left head aside and the chin through the eye. A vehicle was organised to

take the deceased to the health centre where she was later pronounced dead. The appellant and his family had disappeared on the night of the death. The police came and cordoned off the spot where the deceased had been shot and thereafter they went to the appellant's home because they suspected them due to conflict over land. PW1 testified that a threat had been made by Rogers to a brother of the deceased and that the second threat was made to the mother of the deceased and she managed to identify the voice as that of Abel and that it is his sister who informed him about these threats.

The appellant's counsel submitted that to the contrary and during cross examination PW1 stated that the threats were made to him.

Secondly PW2 Jane Wamatsaba stated that the appellant had occupied his land and that they were standing outside and she heard them saying that they had gone but would come back and kill the deceased with a gun. Later on she told court that she went to report at the police station that people came and were threatening to kill them. PW2 in evidence in chief testified that when the deceased came to make a phone call at around 9 PM, she was shot and the people who shot her took off and that they knew the people as the appellant and his children.

In cross examination, she testified that the deceased was unconscious when she was taken to hospital. As to what the assailants were putting on, she stated that they were putting on a trouser and shirts which people ordinarily wear.

PW3 on the other hand testified that he knows the appellant who is his uncle. He testified that it was around 7 PM when his sister called Mariam called the deceased's phone but the network was not clear. That is when the deceased moved out and he heard her making noise. When he got out he saw three people but recognised Masake Abel and he could not recognise the others.

The appellant's counsel submitted that from the evidence of the three witnesses above, it is clear that none of the witnesses saw the assailants at the time the shooting took place. Further it is clear that the basis for suspecting the appellant as the culprit was the conflict over land and the alleged threats. He submitted that in the circumstances, it will be the

evidence implicating the appellant in the commission of the offence such as the dying declaration, dog evidence, alleged prior threats and the conduct of the appellant if that evidence is credible which it is not.

The appellant's counsel submitted that in a bid to rely on a dying declaration, the prosecution led evidence of PW 4 Dr Joseph Otuku who testified that on 3rd November 2017 at around 8 PM, he was notified of a lady in the emergency unit and he responded to the call. He found the deceased called Elizabeth Mary. That he managed to talk to her and she disclosed that Stephen shot her and that they shot her to take her estate and thereafter she bled to death. Further PW 4 testified that by the time the deceased was brought to the hospital, she was too anaemic to survive.

Counsel compared this evidence with that of PW1 who was at the scene before the deceased was taken to the hospital and in particular stated that he tried to talk to the deceased but the words could not come out well because of her injuries. In cross examination PW2 testified that by the time the deceased was taken to hospital, she was unconscious. The appellant's counsel relied on **Mibulo Edward vs Uganda; Supreme Court Criminal Appeal No 17 of 1995** for the proposition that a dying declaration must be received with caution because the test of cross examination may be wholly wanting and particulars of violence may have occurred under circumstances of confusion and surprise. Further particular caution must be exercised when an attack takes place in the dark and when identification of the assailant is usually more difficult than in daylight. The fact that the deceased told different persons that the appellant was the assailant is no guarantee of accuracy. Further it is generally unsafe to base conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration.

In the premises, the appellant's counsel submitted that the learned trial judge took cognizance of the requirement for caution before relying on the dying declaration allegedly made by PW4. There however arises a doubt as to whether there was such a dying declaration because both PW1 and PW2 who immediately responded to the circumstances testified that by the time the deceased was taken to hospital, she could not talk.

Further with regard to the sniffer dog evidence led by the prosecution, PW 6 AIP Okello James who was attached to the canine unit in Mbale gave evidence that was inadmissible for purposes of sustaining a conviction. He joined the police force in 2007 and trained at Kabalya police training School Masindi. He testified that the dog Sgt Roger is a female was born on 15th of January 2009 and that it has a 100% sense of smell and has an efficiency of 99%. Counsel submitted that in **Masereka Richard Kalyoma vs Uganda; Court of Appeal Criminal Appeal No. 257 of 2015**, the court set out six principles regarding admissibility and reliance on sniffer dogs evidence as follows:

1. The evidence must be treated with utmost care (caution) by the court and given the full sort of explanation by the prosecution.
2. There must be material before the court establishing the experience and qualification of the dog handler.
3. The reputation, skill and training of the tracker dog is required to be proved before the court.
4. The circumstances relating to the actual training must be demonstrated. Preservation of the scene is crucial and the trail must not be more stale.
5. The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the training. This reservation apart, he is free to describe the behaviour of the dog and give expert opinion as to the inferences which might properly be drawn from the particular actions of the dog.
6. Court should direct its attention to the conclusion which is minded to reach on the basis of the tracker evidence and the peril of too quickly coming to that conclusion from material not subject to the truth eliciting process of cross examination.

In the premises, in **Masereka Richard Kalyoma v Uganda** (supra) counsel submitted that the Supreme Court elaborated that it is essential that the training and experience of the dog handler and his association with the dog in question, be established. Secondly, there must be established in evidence the nature of training, skill and performance of the dog in question with regard to the particular subject at hand whether it is

tracking sense, drugs or whatever specialised skills the dog allegedly possesses so as to establish its credentials and skills.

That in the instant case before the court, PW 6 did not lead any evidence in respect to the credentials attributed to the dog in the form of skill and statistics of successful prosecutions attributed to the dog to assess its efficiency. PW 6 was not the person who trained the dog in question.

The appellant's counsel submitted that the sniffer dogs evidence relied on by the judge as corroborative evidence was in the circumstances inadmissible on the ground that the dog trainer did not give evidence and neither was material evidence led to prove the efficiency of the dog apart from merely alleging that its efficiency was 99%.

With regard to the evidence of a prior threats by the appellant, the appellant's counsel submitted that the evidence of previous threats was not attributed or made by the appellant to the deceased. PW1 testified that the first was by Rogers to his brother Kuloba Richard. Secondly the second instance of threat was by Abel and that the mother identified him by voice. The evidence of PW1 is clear and the learned trial judge took the evidence of the previous threat as evidence with probative value deriving at the conclusion that the appellant was the perpetrator and it was inappropriate in the circumstances to consider threats made by other persons, to convict the appellant.

Further mindful of the legal position and the conduct of an accused person before or after the offence in question might sometimes be used to give insights as to whether the appellant participated in the commission of the crime, the appellant justified the reasons why he had to leave his place as he had been attacked by the relatives of the deceased on suspicion that he was the murderer. He also denied making phone calls in the printout as the co-accused persons were relatives and were communicating to each other. The appellant's counsel submitted that the phone printout only established that there was communication with the appellant and the co-accused but it does not disclose the content of the communication and ought not to be used to infer guilt.

The appellant further testified that he made reports to the police about destruction of his property and he was arrested by the police when he

came to follow up the matter of the destroyed property. He contended that such conduct is not inconsistent with the innocence of the appellant. Finally, counsel submitted that had the learned trial judge given due consideration to the sniffer dog evidence and the evidence of previous threats, he would have attached less evidential value to it and would have arrived at a different verdict.

The appellants counsel relied on **Kooky Sharma and Another vs Uganda; Supreme Court Criminal Appeal No. 44 of 2000** for the proposition that an accused person could be convicted on the strength of the prosecution evidence and not on the weakness of his or her defence. In the premises, learned counsel for the appellant prayed that the court evaluates the evidence and finds that the prosecution did not prove the ingredient of participation beyond reasonable doubt and to quash the conviction, set aside the sentence and acquit the convict accordingly.

Ground 2.

The appellant's counsel submitted that had the learned trial judge properly considered the mitigating factors, he would have arrived at a lesser sentence than the sentence of life imprisonment. Counsel submitted that in mitigation, the appellant had pleaded that he was an old man aged 62 years of age and had been on remand for two years and nine months upon which the learned trial judge stated that the aggravating factors outweighed the mitigating factors. Counsel submitted that for purposes of uniformity in sentencing, the court should consider **Manige Lamu vs Uganda; Court of Appeal Criminal Appeal No. 384 of 2017** where the appellant had been convicted and sentenced to 44 years' imprisonment and 10 months only after being convicted of murder and this was reduced to 20 years' imprisonment. Further in **Tusingwire Samuel Vs Uganda [2016] 53**, the Court of Appeal found that the sentence of life imprisonment against the appellant for the offence of murder was harsh and manifestly excessive and reduced it to 30 years' imprisonment. Counsel also relied on **Atiku Lino vs Uganda [2016]** Court of Appeal decision where the appellant had been convicted of murder and sentenced to life imprisonment. On appeal in this court reduced the sentence to 20 years' imprisonment.

In the premises, the appellant's counsel proposed that the court be pleased to reduce the sentence from life imprisonment to 30 years' imprisonment in the circumstances. He prayed that this court allows the appeal and quashes the conviction and sentence of the appellant or in the alternative reduce the sentence from life imprisonment to 30 years' imprisonment as would be appropriate in the circumstances.

Submissions of the respondent's counsel.

Respondent's counsel objected to ground one of the appeal under the provisions of rule 66 (2) of the Judicature (Court of Appeal Rules) Directions, on the ground that it is not concise, is argumentative, is a narrative and falls short of pointing out the specific point of law or fact that the trial judge is being faulted for. She relied on **Sseremba Dennis vs Uganda Court of Appeal Criminal Appeal No 480 of 2017** where this court struck out two grounds of appeal for offending rule 66. The ground of appeal was "the learned trial judge erred in law and fact when he failed to properly and adequately evaluate the evidence before him as a whole thereby arriving at a wrong conclusion." In **Ntirenganya Joseph vs Uganda; Court of Appeal Criminal Appeal No. 109 of 2017** where this court struck out a similar ground which read as follows: "the learned trial judge erred in law and fact when he failed to evaluate the evidence as a whole thereby reaching a wrong conclusion". In the circumstances she invited this court to strike out the first ground of appeal.

Without prejudice, the respondent's counsel addressed the court on ground 1 of the appeal and submitted that the learned trial judge properly evaluated the evidence as a whole and in particular the evidence of participation which was the only ingredient contested and came to the correct conclusion that the prosecution proved its case against the appellant beyond reasonable doubt.

The respondent's counsel submitted that the prosecution relied on direct and very strong circumstantial evidence. In the evidence of PW2, the mother of the deceased, the day the deceased was killed, she identified the appellant and two others who came to threaten them at around 8 PM and they said they would kill her over the piece of land. She was in the company of the deceased when the threat to kill was made and she was

able to recognise the appellant. It may turn out that this may not have happened on the fateful night that the deceased was killed, it only proves that the appellant was identified by PW2 in the company of the deceased, threatening to kill three members of the family. The evidence of threats was further adduced by PW 5, a police officer testified that before the murder and on 9th April 2017, Mr. Nanongo David (PW1) came reported a case of threatening violence at Lwakhaka police station under a given reference. He reported that the appellant, his son Abel Masaba and Rogers threatened to kill him, and the mother and the deceased.

PW 8 testified about the evidence of a printout from the phone exchanges between the suspects for the month of October 2017 from which he testified that on 21st October 2017 the appellant was in constant communication with people the identified by PW 3. The communication was between A5 and his father A1 at around midnight. PW2 mentions the appellant and his sons as the people she identified. PW1 testified that a number of threats were made to the family and these threats were reported whereupon a reconciliatory meeting was organised but the appellant's family did not turn up and it was barely 2 weeks later after the threats that the deceased was murdered.

The respondent's counsel submitted that evidence of past threats is admissible under section 30 (a) of the Evidence Act. The threats were within the approximate time within which the deceased was murdered and the mode of execution was synonymous with the one issued in the threats. Further in **Waihi and another vs Uganda (1968) EA 278,** it was held that evidence of a prior threat or an announced intention to kill is always admissible evidence against the person accused of murder but its probative value varies greatly. Regard must be had to the manner in which the threat is uttered, whether it is spoken bitterly or impulsively in sudden anger or jokingly and the reason for the threat, if given and the length of time between the threat and the killing are material matters for consideration. See also **Mureeba Janet & another vs Uganda SCCA No. 13 of 2003**. The respondents counsel submitted that the mode in which the murder was committed was consistent with the described threats because the deceased was shot with a gun.

With regard to the dying declaration, counsel supported the finding of PW4, the Doctor who was attached to Magale hospital to receive the deceased at the Emergency Ward. This was to the effect that she was at home and one Steven shot her. He also testified that the deceased told him that he has (son) called Stephen who grew up in her household that Stephen and his family want land. Counsel also relied on the evidence adduced by the appellant on this issue.

With regard to the evidence of sniffer dogs, this was corroborated evidence and the dog handler PW6 testified that the dog led him to a big house, a permanent building and stopped at the door and sat down and upon inquiring from the LC 1 about the ownership of the house, he was informed that the house belonged to the appellant. PW 6 broke the padlock and accessed the house and the dog entered into the bedroom and sat on a mattress. Further she submitted that the learned trial judge was alive to the principles in receiving evidence of sniffer dogs. She submitted that the evidence satisfied the requirements of canine evidence that was corroborated by the other evidence.

Further the respondent's counsel relied on the conduct of the appellant whereby it was proved by PW1, PW2, PW5 and PW6 that the appellant disappeared from his home after the murder.

The respondents counsel further submitted that all the above pieces of evidence place the appellant at the scene of crime and irresistibly points to nothing but the guilt of the appellant. Secondly that the inculpatory facts are incompatible with the innocence of the appellant and incapable of any other explanation other than that of guilt as stated in **Simon Musoke vs R (1958) EA 715**. She submitted that there are no other coexisting circumstances which destroy the inference of guilt and not even the alibi because the alibi was destroyed. She invited this court to find that the trial judge properly evaluated the evidence as a whole and arrived at the correct finding that the appellant participated in the murder of the deceased beyond reasonable doubt.

Ground 2.

With regard to the severity of sentence, counsel submitted that sentence is at the discretion of the trial judge and an appellate court will not

normally interfere with the sentence imposed by the trial court unless the trial court acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in light of the circumstances (see **Kiwalabye Bernard vs Uganda SCCA No 143 of 2001** and **Blasio Ssekawooya vs Uganda; Supreme Court Criminal Appeal No 107 of 2009**. Counsel further relied on **Kyalimpa Edward vs Uganda SCCA No 10 of 1995**).

The respondent's counsel supported the conclusions of the learned trial judge with regard to the mitigating and aggravating factors. Further, he took into account the two years and nine months that the appellant had spent on remand whereupon he sentenced him to life imprisonment. She submitted that the sentence is legal and the learned trial judge took into consideration both the mitigating and aggravating factors and imposed a sentence within the ranges of sentences prescribed by law and which is consistent with sentences dispensed by the Court of Appeal and the Supreme Court. These included **Magezi Gad vs Uganda SCCA No 17 of 2014** where the appellant was convicted of murder and sentenced to imprisonment for life and his appeal against sentence was dismissed. A further appeal to the Supreme Court was equally dismissed. In **Ssekawoya Blasio vs Uganda SCCA No. 24 of 2014**, the appellant was convicted of three counts of murder of his biological children and sentenced to life imprisonment on each count. The Court of Appeal dismissed his appeal against conviction and sentence and the Supreme Court confirmed the decision of the Court of Appeal. In **Sebuliba Siraji vs Uganda Court of Appeal Criminal Appeal No. 572 of 2005** the appellant was convicted on his own plea of guilty for the offence of murder and this court upheld a sentence of life imprisonment.

In the premises, the respondent's counsel submitted that the decision of the lower court be maintained and the appeal be dismissed.

Resolution of appeal.

We have carefully considered the appellant's appeal, the submissions of counsel as well as the law. This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction and we are required to re-evaluate the evidence by subjecting it to fresh scrutiny keeping in

mind that we did not have the advantage of seeing and hearing the witnesses testify and should make due allowance for that (See **Pandya v R [1957] EA 336, Selle and Another vs Associated Motor Boat Company [1968] EA 123** and **Kifamunte Henry vs Uganda; SCCA No. 10 of 1997**). The duty of this court is also set out under rule 30 of the rules of this court to the effect that in an appeal from the decision of the High Court in the exercise of its original jurisdiction, this court may reappraise the evidence and draw its own inferences of fact.

The respondent's counsel objected to the appeal on the ground that it offends rule 66 (2) of the Judicature (Court of Appeal Rules) Directions for being narrative, argumentative and not concise up. Rule 66 (2) of the rules of this court provides that:

> 66. Memorandum of appeal.
>
> (1) ....
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> (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.

We have carefully considered ground one of the appeal and it does not have any arguments or narratives and clearly the point of law was that prosecution had not proved beyond reasonable doubt that the appellant participated in the commission of the matter. Clearly the ground of appeal shows that the evaluation of evidence which was alleged as not properly done was in relation to participation of the appellant. In the precedents relied upon by the respondent's counsel, there was a general averment that the trial judge erred in law and fact in not evaluating the evidence and coming to a wrong conclusion. However, the appellant's case, it is clearly specified that the learned trial judge erred in law and in fact when he failed to evaluate the evidence on record by holding that the case had been proved beyond reasonable doubt that the appellant participated in the commission of the murder. Clearly, the drafting may not be of the best quality but the point of the ground of appeal is discernible from the ground as an appeal against the finding on

participation of the appellant in the murder, and participation is an ingredient of the offence. It follows that sufficient notice has been given to the respondent and to the court as to what ground of objection the appellant had against the decision. Clearly the ground is against the finding that the appellant participated in the murder. The rest is a matter of the weight of evidence on the circumstantial evidences relied on though each thread of evidence could form a specific ground of appeal such as *inter alia* whether there was a dying declaration, whether the appellant was identified and whether the appellant threatened the deceased and family prior to the murder. The issue of evidence on participation is apparent from the submissions of both counsel directing the court to consider the evidence of participation and therefore ground 1 generally discloses that the grievance of the appellant is the sufficiency of evidence of participation to sustain a conviction. We in the premises, overrule the preliminary objection and will consider ground 1 of the appeal on the merits.

It is not in dispute that the evidence relied on by the prosecution is circumstantial evidence as nobody saw the appellant point a gun at the deceased and pull the trigger. The circumstantial evidence relied on was considered by the trial judge when he found that there was sufficient evidence of threats to kill the deceased, the evidence of sniffer dogs as demonstrated by the dog handler, the fact of a land dispute existing between the appellant's family and the deceased, a dying declaration and the conduct of the appellant immediately after the offence was committed in that he disappeared from the scene of the crime and did not attend the burial.

We have independently of the trial judge's conclusions, considered the circumstantial evidence afresh. PW1 David Nanongo Wakoko testified that he grew up with the appellant in the same family. This is because his father took the appellant as a child without a father and they grew up in the same home. There was evidence of a conflict between the family of the appellant and his family relating to land and secondly it was alleged by the appellant's family that the family of the deceased was bewitching their family. A meeting was scheduled for reconciliation of these two families on 10th November but the appellant did not turn up. On 3rd

November 2017 after the meeting did not take off, he was at home at around at 8 PM with some of the relatives who had come for the meeting when they heard a gunshot. The shot came from the direction of his mother's home and they heard people making alarms thereafter. Following the gun shot, some folks dashed to the home and found the deceased in the compound between the main house and the kitchen and she was lying in a pool of blood. He checked her and described the injuries she suffered. He also stated that he talked to the people who were at home at the time of the attack. He organised a vehicle and took her to hospital whereupon she was pronounced dead. However, on further prompting PW1 testified that he did not go to the health centre and remained at home. He noted that the accused persons disappeared at the time of the incident. They did not participate and disappeared from their homes and ran away. PW1 was clear that they suspected the family of the appellants.

He testified that there was a threat of violence made on 9th April 2017 which was reported and in that matter Musamali Stephen, Abel Masaaka and Rogers Namugongo attacked the family over a piece of land. They had come with the pangas and spears. Secondly they made verbal threats. Rogers threatened to kill his brother Kuloba Richard. The second threat was made on 20th of October 2017 and it was reported to the LC 1 Kololo village. He then reported the case to the police. In that case his mother was attacked at night by people who came on motorcycles and they attempted to break into a house but failed to do so. After that failed, they made verbal threats from outside. The threat was that they would kill three people in the home namely the deceased, her daughter one Elizabeth Kimono and son Nanongo David. He testified that his mother was able to identify the voice of Abel. He further testified that the home of the appellant, had been vacated and they had packed and taken everything including the cattle. In cross examination, PW1 testified that he tried to talk to the deceased but her words could not come out on account of her injuries therefore she was not audible.

In his cross examination testimony, PW1 testified that the appellant's home had been attacked by people and at the material time, he was with the police and not with the people who attacked them. In his cross

examination testimony, he confirmed that the police responded to the incident of shooting about 30 minutes later. He escorted the police to the home of the first appellant and the other accused persons.

Further PW2 Wamatsaba Jane aged 90 years and blind at the time of the hearing testified that the appellant used to stay with her and he did his schooling from her home until he qualified as a teacher. It was her daughter Elizabeth Kimono who was murdered. She testified that on the day of the murder, some people came to them and threatened to kill them and on her being prompted as to who these people were, she stated that it was Abel and the appellant. That they wanted to kill them because of land. It was at around 8 PM. The appellant came and said that they had occupied his land and on being further prompted she testified that at the time of the death of the deceased, the family of the appellant did not come.

PW2 testified about the circumstances of the shooting and stated that; the assailants found the deceased in the sitting-room when she was making a phone call to her child in Mbale when she was shot. She heard a gunshot and started telling her grandson that they were killing her daughter with a gun. It was around 9 PM in the evening. On whether she saw the people, she testified that they took off but she knew them and it was Abel and the rest. On further prompting she testified that it was the appellant and his children and one of them was Abel. She further testified that she saw them standing in a raised place near their house and they said that they would come back and kill the three of them.

PW2 further testified that the appellant had sold his piece of land to her daughter (the deceased) and later on she asked for the sale agreement for the land but the appellant refused to give her a copy of the agreement. We have further considered the cross examination testimony of PW2 who testified inter alia that the deceased was unconscious before she was carried to the hospital and died from the hospital. Further she clarified that the deceased was in the sitting-room while making a phone call to her child in Mbale and they were having supper she was shot from outside (when she was outside). They came and shot and after shooting they went away." PW2 was extensively cross examined as to whether she was able to identify the appellant but only stated that she knew who they

were. On being asked whether she suspected the appellant and his sons because she heard them threaten to kill the three of them and she stated as follows:

> "yes and then secondly, they disappeared and were not seen any more so I knew they were the ones who had killed her.

She was emphatic that on that night, they had come earlier and threatened to kill them and came back and that is when they shot the deceased.

From the above two testimonies, no one saw who had shot the deceased.

PW3 Kuloba Isaac testified and on the question of participation when prompted as to what he saw stated as follows:

> PW3: it was evening at 7:30 PM, we were in the house, it was me, my grandmother and my late mother. My sister called Mary called my late mother but the network was not clear and then she had to move out. When she went outside, she did not stand for even three minutes, we heard her making noise. Upon hearing the noise, I got outside. When I got out I saw three people. The persons I saw, that person I knew clearly.
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> Mr. Aliwaala Kizito: Who was that?
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> PW3: Masake Abel
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> Mr. Aliwaala Kizito: What about the others?
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> PW3: I didn't know them very well.

The above testimony remained the same even after cross examination.

PW 4 Dr Joseph Otuko mainly testified about a dying declaration. He attended to the deceased when she was brought St Elizabeth Hospital Magale, Namisindwa (the hospital). He examined the deceased and found that she was in her fifties. He also interacted with people who brought the deceased to the hospital. His testimony about what they told him as to the motive for the shooting is hearsay. What is material being that he testified that she managed to say that on the fateful night, she was at home and one Stephen shot her. He asked her why she told him. She reportedly said:

> "I have a relative. "son" called Stephen who grew up in my household."

Then PW4 further testified that "*Apparently they shot her so that they could take her estate, her inheritance.*" Cross examination as to the ability of the deceased to talk at the time the doctor examined, he maintained that she could talk and soon after talking, she died.

PW5 No. 18869 D/Sgt Nambulawe Maisala got information about the shooting on 3 November 2017. When he went to the scene, they cordoned off the scene of the crime as it was at night. They instructed another officer to take the body from the hospital to Mbale mortuary for post-mortem. They went back to the scene the following day and a dog handler AIP Okello was brought. Particularly, he testified as follows:

> "so when they came, Nanongo the brother to the deceased showed us how the victim left the house and went in the corner to receive a call and where the assailants got her in the corner and took her behind the house just between the kitchen and the main house and shot her from there. So the dog handler introduced a dog to the scene and it moved through the plantation."

Further PW5 stated that the dog went up to the home of the appellant about 400 metres away and the home was found deserted. The home was locked and thereafter broken into in the presence of local council officials. PW5 stated that before the murder on the 9th of April 2017 Mr. Nanongo David came and reported a case of threatening violence to Lwakhaka police station alleging that the appellant, his son Abel Masake and Rogers were threatening to kill him, the deceased and her mother (PW2). The suspects were summoned by police but did not turn up. They received a letter from Manafwa police station asking for the file and they sent it. Again on the 23rd of October 2017, they received another complaint from the deceased that the appellant, Abel Masake and Rogers threatened to kill them. The trio had gone to their home at night, knocked the door and threatened to kill any of the three family members that is PW2 Wamasaba Jane, Nanongo Rogers and Kimono Elizabeth (the deceased). The case was registered as SD 10/23/10/2017. The matter was still under investigation by police when the deceased was murdered.

In his cross examination testimony, PW 5 stated that some people picked the victim from the scene but this only interfered with the scene of crime to an extent but did not interfere with the scent that was followed by the dog in the plantation.

PW6 AIP Okello James testified about the sniffer dog. He introduced the dog at the scene of the crime and it picked a scent where it had smelled for the marks on the ground whereupon it went to the house of the appellant. The door was locked and there was nobody at home. In the presence of the local council officials, the door was broken into. This is what he stated:

> I called one policeman of Namisindwa to bring the gun and we break the padlock and see whether this dog will enter the house or not. He brought the gun, we broke the padlock, I opened the door and the dog entered up to the bedroom and sat in the bedroom on the mattress which had no mattress cover which was on the wooden bed. I called people who were around to come and witness. Former regional CID SP Kirya Bernard came in and witnessed, the chairman 1 LC 3 Bumoni sub County Nambesha Elias also witnessed where the dog had sat and I told Regional CID SP Kiirya Bennett to conduct some search if maybe something connected to the gun could be recovered or not. I pulled the dog outside and he did a search in the house with the LC 3 Bumoni but no exhibit connected to the gun was recovered.

In his earlier explanation of the behaviour of sniffer dogs, PW6 stated that it moves while smelling the ground and also putting the nose in the air because the scent remains on the ground and the air. Then it moves up to where the scent is very much loaded and it will stop there and usually the scent is very much loaded on the body of the person and where the person stays.

The trial judge considered the evidence of the sniffer dog behaviour and accepted the evidence of PW 6, the dog handler which he found had not been damaged through cross-examination. He also considered the evidence of the training and familiarity of the witness with the dog. Secondly, the learned trial judge cautioned himself about the danger of reliance on such evidence and therefore sought corroborative evidence. He considered the disappearance of the appellant after the murder as corroborative evidence against the alibi of the appellant that he went to check on his sick mother at the material time. He found that the appellant admitted that in the morning of the incident between 7.00 and 8.00 a.m. the police had come to the home of the appellant but he had left. We find that this is linked to the case of threatening violence which had been reported against the appellant and his family members.

Further, the trial judge did not believe the testimony of the appellant that he did not know about the murder of the deceased or the shooting. We take note of the fact that two witnesses established that the home of the appellant was about 400 metres away from that of the deceased. Further, the trial judge considered the conduct of the appellant immediately after the murder together with the history of the conflict between the appellant's family and that of the deceased. Within this, the learned trial judge considered the threats which we have set out above from the testimony of PW 5 as well as the earlier witnesses namely PW1 and PW2.

Last but not least, the trial judge considered the alleged dying declaration of the deceased according to the testimony of PW3. Further the learned trial judge agreed with the assessors and convicted the appellant based on the circumstantial evidence referred to above.

Going back to the grounds of appeal that the trial judge failed to the evidence on record on the question of participation of the appellant; we find that the learned trial judge considered all the evidence adduced and did not fail to evaluate this evidence. Further he cautioned himself about relying on the evidence of sniffer dogs and considered several threads of evidence that we have outlined above. The question is whether the circumstantial evidence that he relied on was sufficient. It was not just the dying declaration on its own, the sniffer dog evidence alone, the disappearance of the appellant, with each thread standing on its own. The threads of evidence included the threats of the appellant's family to kill members of the deceased family, the disappearance of the appellant and the other factors and evidence which was not considered on its own but in combination with each other. Further we have considered the fact that the appellant's family disappeared from the scene. It could be inferred that they feared for their lives but the facts indicate that the homes of the appellant's family were attacked afterwards and particularly the home of the appellant was found to be locked when the police initially went with the sniffer dog. The learned trial judge found no evidence against other members of the appellant's family and instead used the corroborative evidence of the sniffer dog evidence together with the other factors that one of the assailants of the deceased moved through the plantation to the home of the appellant.

In the circumstances, we do not need to consider the dying declaration. The dying declaration was suspect because the evidence of PW1 and PW2 about the state of the deceased made it unlikely that she could say anything. Further, the doctor who testified about the dying declaration has interacted with relatives of the deceased and listened to their stories about the suspects. We have however considered the sniffer dog evidence but not separately. We have considered it in combination with the totality of all the threads of evidence pointing to the appellant and the question is whether it satisfies the test in **Simoni Musoke vs R (1958] EA 715** where the East African Court of Appeal stated that:

> The learned judge did not expressly direct himself that, in a case depending exclusively upon circumstantial evidence, he 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. As it is put in Taylor on Evidence (11th Edn.), p. 74–
>
> > "The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."
>
> There is also the further principle, which in view of the doubt as to how long the appellant remained at the funeral ceremony on the night of January 18, 1958, is particularly relevant to the first count, and which was stated in the judgment of the Privy Council in Teper v. R. (2), [1952] A.C. 480 at p. 489 as follows:
>
> > "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."

We have not found other coexisting circumstances which would weaken or destroy the impressions made on the learned trial judge about the circumstantial evidence pointing to the guilt of the appellant. From the typed testimonies, we have reached the same conclusions and find that the totality of the circumstantial evidence puts the appellant at the scene of the crime and at the centre of the land conflict manifested inter alia by threats to kill the deceased. In the premises, we uphold the conviction of the appellant.

Ground 2 of appeal:

That the learned trial judge erred in law and fact when he passed a sentence of life imprisonment which was harsh and excessive in the circumstances.

Its trite law that an appropriate sentence is a matter for the discretion of the sentencing judge which discretion is exercised after taking into account the peculiar facts of each case. The court will not normally interfere with the discretion of the sentencing judge unless the sentence passed is illegal or unless the court is satisfied that the sentence imposed was manifestly excessive or so low as to amount to an injustice. In **Ogalo s/o Owoura vs R (1954) 21 E.A.C.A 270**. In **Ogalo s/o Owoura v R (1954) 21 EACA 270** the East African Court of Appeal held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.

In **Bashasha Sharif vs Uganda; SCCA No 82 of 2018** the Supreme Court held that an appellate court will not interfere with the exercise of discretion by a trial judge in sentencing unless there was failure to exercise the discretion, or a failure to take into account a material consideration or the taking into account of immaterial considerations and an error in principle was made.

The learned trial judge in sentencing stated as follows:

> The accused is an old man aged 62 years and has been on remand since December 2017 and therefore he has spent 2 years and nine months on remand. The offence was committed under circumstances of greed over land. There had been a land wrangle between the deceased and A1 and this wrangle had eventually sacked in the entire family of A1. A1 was brought up in the family of the deceased. He is therefore a relative but greed pushed him to the level of committing this heinous offence. The act of the convict led to the arrest and suffering of the rest of the accused persons who were later found not guilty of the offence charged and acquitted.

> The offence carries a maximum sentence of death. This court is not for that sentence but it is mindful of its duty to send a signal to other would-be offenders of murder that it does not pay to hold the law in one's hands as A1 did. The land wrangle in question could be settled by the local authorities and courts of law as is this case, such a process had commenced.
>
> In the circumstances of this case, I find the aggravating factors outweighed the mitigating factors. The deceased was brutally shot and murdered in cold blood. Her death itself must have created a trauma that is still haunting PW3 and PW2, the mother. Bearing in mind the convict has spent 2 years and 9 months on remand and therefore, as per his entitlement, I take that period into account and sentence A1 to life imprisonment. Right of appeal explained.

Clearly, the learned trial judge took into account the mitigating and aggravating factors though he did not consider the fact that the appellant had no previous record of conviction.

Accordingly, we have additionally considered, the fact that the appellant was a first time offender, there being no record of previous conviction, that the appellant is aged over 62 years and the period he spent in pre-trial remand before his conviction. In a sentence of life imprisonment, court is not obliged to apply article 23 (8) of the Constitution as life imprisonment is an indeterminate sentence.

We have further considered some precedents. In **Karisa Moses v Uganda SCCA No. 23 of 2016 (2019) UGSC 21**, the appellant was aged 22 years at the time of the offence and was convicted for murder of his grandfather. The fact that he was a first time offender, was aged 22 years and was remorseful were considered and the Supreme Court confirmed a sentence of life imprisonment. In Kaddu v Uganda [2019] UGSC 19 (22nd August 2019), the appellant was convicted of murder and sentenced to death. The Court of appeal reduced the sentence to life imprisonment. On further appeal to the Supreme Court, the Supreme Court considered the facts and upheld the sentence. The appellant has walked to the deceased home and hacked him with a panga. Further in **Rwalinda John v Uganda [2017] UGSC 38 (6 Oct 2017),** the appellant was convicted of murder of a toddler and sentenced to life imprisonment. The Court of Appeal upheld the sentence. The Supreme Court found that the facts that the appellant was a first offender in that he had no previous record of conviction, was aged 67 years, was guilty of murder of a toddler, the sentence of life imprisonment was not harsh or excessive and confirmed the sentence.

In the circumstances, we find that a sentence of life imprisonment imposed on the appellant was an appropriate sentence and the learned trial judge though he did not state that he had considered the fact that the appellant was a first offender, imposed an appropriate sentence in the circumstances. We accordingly find no merit to this ground of appeal.

In the premises, the we dismiss the appellant's appeal for the reasons we have outlined above.

Dated at Mbale the 19th day of June 2023

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal