THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CR-SC-183-2019

UGANDA ………………………………….……...……..PROSECUTOR

VERSUS

A1. SSERUWAGI PHILIP

A2. SSEKAYITA RONALD

A3. SSEKALASA DENIS

A4. BALINDA TADEO

A5. SEBITOSI VIAN

A6. SSEKAYITA ANDREW

A7. NAMUGGA JUSTINE……………………….…..………...ACCUSED

BEFORE HON. JUSTICE VINCENT WAGONA

JUDGMENT

1.0. Introduction

The accused are indicted for murder c/s 188 & 189 of the Penal Code Act. It was alleged that A1. SSERUWAGI PHILIP, A2. SSEKAYITA RONALD, A3. SSEKALASA DENIS, A4. BALINDA TADEO, A5. SEBITOSI VIAN, A6. SSEKAYITA ANDREW, A7. NAMUGGA JUSTINE and another still at large, on the 16th day of February 2019 at Nabuliko Village in Kyegegwa District, murdered Kabatooro Evasta.

2.0. Summary of the Facts

The murder is alleged to have originated from claims that Kabatooro Evasta the deceased had bewitched and killed Phina a biological daughter of A4. BALINDA TADEO and a biological sister of the other accused persons, all being children of A4. A4 was a brother in law of the deceased who was a wife of his brother. The family of A4 had vowed to avenge the death of Phina by killing the deceased. A family meeting held to try and resolve matters did not solve the problem as some of the accused persons maintained a hostile attitude towards the deceased. On the night of the 16th day of February 2019 the deceased was attacked and killed at her home by cutting her with a *panga* and setting her body ablaze whereby the deceased sustained extensive burns. Based on eye witness and other evidence, the accused persons were arrested at different times in different places and charged with the murder.

At the commencement of the trial, each of the accused persons pleaded Not Guilty. A1. SSERUWAGI PHILIP later changed his plea and Pleaded Guilty and was convicted on his own *plea of guilty* and sentenced.

The trial continued in respect of the other accused persons. Each of the accused gave an unsworn statement in their defence and denied the offence. A3 SSEKALASA DENIS, A5 SSEBITOSI VIA and A7 NAMUGGA JUSTINE each raised an **alibi**. A3 said that on the night when the deceased was murdered, he was on duty at St Joseph's Nama Modern S.S in Mityana District where he was employed as a warden. A5 said that since March 2015, he was staying in Namungo LCI village, Namungo Parish, Namungo Sub County, in Mityana District. That in the month of February, 2019, he got a phone call about the death of the deceased

and that A2 had been arrested and they were looking for others. That he got scared and did not go to attend the burial. A7 testified that she was at her work place that is located in front of Mubende Regional Referral Hospital, when she learnt of the death of the deceased.

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3.0. The Burden and Standard of Proof

The burden of proof is always on the prosecution. The prosecution has the duty to prove each of the ingredients of the offence and generally this burden never shifts onto the accused, except where there is a specific statutory provision to the
10 contrary. (see ***Woolmington vs D.P.P. [1935] A.C. 462***, and ***Okethi Okale & Ors. vs Republic [1965] E.A. 555***). This is not one of those cases where the burden of proof shifts to the accused to prove his innocence.

The standard of proof is proof beyond reasonable doubt. All the essential
15 ingredients of the offence are to be proved beyond reasonable doubt. This standard does not mean proof beyond a shadow of doubt. The standard is achieved if having considered all the evidence, there is no possibility that the accused is innocent. In ***Miller vs Minister of Pensions [1947] 2 All E.R. 372*** at page 373 to page 374, Lord Denning stated that:–

20 *"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to*
25 *leave only a remote possibility in his favour, which can be dismissed with a*

sentence: 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; but nothing short of that will suffice."

Evidence is evaluated as a whole. The Court considers evidence of both the
5 prosecution and the defence relating to each of the ingredients before coming to a conclusion. The Court should not consider the prosecution evidence in isolation of the evidence presented on behalf of the accused. In ***Abdu Ngobi vs Uganda, S.C.Cr. Appeal No. 10 of 1991***, the Supreme Court expressed itself as follows, with regard to treatment of evidence:

10 *"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the*
15 *defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged."*

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4.0. The Ingredients Of The Offence

4.1. Murder

On a charge of murder, the Prosecution has to prove the following essential
25 ingredients:

(i) That the death of a human being occurred.

(ii) That the death was caused unlawfully.

(iii) That death was caused with malice aforethought.

(iv) That the accused participated in the crime.

5 **5.0. Representations**

The Prosecution was represented by Ms. Harriet Adubango the Resident Chief State Attorney of Fort portal from the Office of the Director of Public Prosecutions; while the accused were represented by Counsel Ruth Ongom on State Brief.

10 **6.0. The Evidence In This Case**

The parties tendered the Postmortem Report in respect of the deceased under Agreed Facts as Prosecution Exhibit PE1 and the Prosecution called 7 witnesses namely: PW1 SSEMYALO STEPHEN, PW2 NAMUTIMA TEOPISTA, PW3 SSENKOZA GERALD, PW4 KUGANYIRA SAMUEL, PW5 BALYESIMA
15 RICHARD, PW6 NAKATOOGO OLIVIA and PW7 NO. 60671 PC BOGERE ROBERT. Each accused testified in their behalf and gave an unsworn statement.

1. ***Whether death of a human being occurred***

Death may be proved by production of a postmortem report or evidence of
20 witnesses who state that they knew the deceased and attended the burial or saw the dead body.

In this case the prosecution relied on evidence of witnesses and a postmortem report that was admitted during the preliminary hearing (Prosecution Exhibit PE1).

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PW1: SSEMYALO STEPHEN the son of the deceased testified that the deceased was killed on 16th February, 2019. That on Saturday 16th February 2019 he was driving to Kibalinga when he received a telephone call from his wife PW2 NAMUTIMA TEOPISTA who told him that the deceased had been cut and set ablaze. PW1 testified that the deceased died in his car on the way to the hospital. That they continued to the hospital where her death was confirmed and the next day they brought back the body for burial; but that none of the accused persons attended the burial.

PW2: NAMUTIMA TEOPISTA testified that the deceased was taken to Mubende Hospital and later her dead body was returned and buried.

PW3: SSENKOZA GERALD testified that on the 16th February 2019, at about 7.30-8.00PM, he was coming from Nyabuliko Trading Centre when he heard an alarm coming from the home of the deceased and he ran there. The witness said that he continued to the home of the deceased, where he found the deceased had been cut and she was burning; that together with PW1 NAMUTIMA TEOPISTA, they tried to put out the fire. That they rang PW1 SSEMYALO STEPHEN who had a car, and he took her to Mubende Hospital; that when they came back they said the old woman had died.

The defence agrees that this ingredient has been proved. I am satisfied that the Prosecution has proved beyond reasonable doubt that Kabatooro Evasta is dead.

2. ***Whether the death was caused unlawfully***

Unless accidental or authorized by law, homicide is always unlawful. (See

Gusambizi **s/o** ***Wesonge Versus Rep.*** **[*1948*]** ***15 EACA 65***). The Prosecution contends that this was a homicide. The defence of the accused on the other hand is a denial.

5 **PW1: SSEMYALO STEPHEN** testified that on Saturday 16th February 2019, he was driving to Kibalinga when he received a telephone call from his wife PW2 NAMUTIMA TEOPISTA who told him that the deceased had been cut and set ablaze. That he drove back home. That he saw that her fingers had been chopped off, she had many cuts on the head and she had been set ablaze. In cross 10 examination he said that the whole body was burnt, the clothes were burnt and she was naked. That she had been cut severally on the head. That she died in the car on the way to the hospital.

PW2: NAMUTIMA TEOPISTA was the eye witness to the offence. She testified 15 that on the 16th February 2019, she was outside the house with the deceased at about 7:30pm when the deceased was attacked and cut and set ablaze.

PW3: SSENKOZA GERALD testified that on the 16th February 2019, at about 7.30-8.00PM, he was coming from Nyabuliko Trading Centre when he heard an 20 alarm coming from the home of the deceased and he ran there. That he found the deceased had been cut and she was burning; that together with PW1 NAMUTIMA TEOPISTA, they tried to put out the fire. That they rang PW1 SSEMYALO STEPHEN who had a car, and he took her to Mubende Hospital; that when they came back they said the old woman had died.

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PW5: BALYESIMA RICHRD testified that it was on the 16th February 2019 when he heard information that the deceased had been cut, he went there and found the deceased had been taken to the hospital.

5 There is no evidence suggesting that the injuries leading to the death of the deceased were self-inflicted or lawfully caused. The defence does not dispute the proof of this ingredient.

I am satisfied that the Prosecution has proved beyond reasonable doubt that the
10 death of the deceased was caused unlawfully.

3. Whether the death was caused with malice aforethought

The next ingredient for consideration is whether there was malice aforethought. In
15 Criminal Law, malice aforethought is deemed to be established from evidence of circumstances of the intention to cause the death of any person or of the knowledge that the act or omission causing death will probably cause the death of some person (See ***S. 191 Penal Code Act***).

20 In particular, Section 191 of the Penal Code Act provides that ***malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—***

(a) An intention to cause the death of any person, whether such person is the person actually killed or not; or

25 ***(b) Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not,***

although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

The question is whether whoever cut the deceased with a panga and set her body ablaze intended to cause death or knew that the manner and degree of assault would probably cause death.

In order to determine whether there was an intention to cause death or that the person knew that his act will probably cause death, the Court can consider the weapon used, the part of the body targeted, the degree of injury and the conduct of the accused before and after the act. (See ***R. Versus Tubere* s/o *Ochieng* [1945] *EACA* 63**).

If a deadly weapon is used on a person, the intention to cause or knowledge that death would occur is deemed to be established. Under section 286 (3) of the Penal Code Act ***"deadly weapon includes – (a) (i) any instrument made or adapted for shooting, or cutting, and any imitation of such instrument."*** A *panga* is a deadly weapon because it is made or adapted for cutting or stabbing and when used offensively on a person it can cause death ***(See Supreme Court, Kwesimba Vs Uganda SCCA N0. 14/95)***. Failure to produce an exhibit is itself not fatal to the prosecution's case if witnesses who saw the exhibit adequately describe it in Court. (***Kalist Ssebuggwawo vs Uganda SCCA No. 7 of 1987).***

Furthermore, if a vulnerable part of the body is targeted, then the intention to cause death is inferred. The head has been established to be a vulnerable part of the body and injuries deliberately inflicted upon the head have been held to be intended to

cause death or to be accompanied by knowledge that they would probably cause death. (See ***Mwathi vs. Republic [2007]2 EA 334***).

Malice aforethought being a mental element is difficult to prove by direct evidence. In ***Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002 (SC)*** it was held that ***"For a court to infer that an accused killed with malice aforethought it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act."***

What a trial judge has to decide, so far as the mental element of murder is concerned is whether the accused intended to kill. In order to reach that decision the judge is required to have regard to all the relevant circumstances, including what the accused said and did, **[**see ***R v Nedrick (1986) 1 WLR 1025*** *and* ***R v Hancock [1986] 2 WLR 357*****].**

The existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence, **[**see ***Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009 (SC) and Francis Coke vs. Uganda (1992 - 93) HCB 43*****].**

PW1: SSEMYALO STEPHEN testified that the fingers of the deceased had been chopped off, she had many cuts on the head and she had been set ablaze. In cross examination he said that the whole body was burnt, the clothes were burnt and she was naked. That she had been cut severally on the head. That she died in the car on the way to the hospital.

PW2: NAMUTIMA TEOPISTA was the eye witness to the offence. She testified that on the 16th February 2019, she was outside the house with the deceased at about 7:30pm when an assailant came from the side of the kitchen with a *panga* and started cutting the deceased. That later, two of the assailants jointly held and opened a bottle and poured out an inflammable liquid that sparked off a fire.

PW3: SSENKOZA GERALD testified that he found the deceased had been cut and she was burning. **PW4: KUGANYIRA SAMUEL** testified that he found the deceased had been cut and she was in a pool of blood.

In this case the evidence was that the deceased was cut on the head using a *panga* and her body was set ablaze using an inflammable substance poured out from a bottle. The postmortem report showed airway burns and extensive 3rd degree burn wounds on the trunk and chopped right hand fingers. The head is a vulnerable part of the body. The trunk is a vulnerable part of the human body as it extends from the neck to the abdomen and thorax and houses vital body organs such as the lungs and the heart. The question is whether whoever cut the deceased with a *panga* on the head and set her whole body ablaze intended to cause death or knew that the manner and degree of assault would probably cause death. Clearly, death was a natural consequence of the acts of cutting the deceased on the head using a *panga* and setting her body ablaze, that caused the death, and the assailants foresaw death as a natural consequence of their acts and they intended to kill the deceased. The defence does not dispute the proof of this ingredient. I am satisfied that the Prosecution has proved beyond reasonable doubt that the person(s) who caused the death of the deceased did it with malice aforethought; that is, with intention to cause death; or with knowledge that their acts would probably cause death.

4. ***Whether the accused participated in the crime***

This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence.

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Submissions of the Prosecution

It was the submission of the prosecution that the evidence places A2, A3, A4 and A6 at the scene of crime as the perpetrators of the offence. That A3 and A4 while at the scene associated themselves with the acts of A1, A2 and A6 and are therefore caught up by the doctrine of common intention. That A5 and A7 although they were not at the scene are implicated by the doctrine of common intention because there is evidence that they knew and supported the plan to kill the deceased; that the failure by any of the accused to attend the burial of the deceased was not the conduct of innocent persons.

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Submissions of the Defence

It was submitted by the defence that the prosecution relies on the evidence of PW2 NAMUTIMA TEOPISTA who is a single identifying witness under unfavorable conditions because it was at night and she was witnessing a terrifying incident of cutting a person and setting her ablaze. Counsel cited the principles laid down in the cases of ***Nzabaikukize Jamada versus Uganda [2017] UGSC page 30*** citing with approval the case of ***Abdullah Bin Wendo and another vs. R (1953) 20 EACA 583*** where it was held that:

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i) Court must consider the evidence as a whole.

ii) The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.

iii) The court must caution itself before convicting the accused on the evidence of a single identifying witness.

iv) In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailants, the quality of light, and material discrepancies in the description of the accused by the witness.

It was submitted that in the instant case, the strength and actual source (whether from the kitchen or the main house) of the available light remained unknown, and that the distance between the kitchen and main house was not established. It was further submitted that the prosecution evidence did not place A5 SSEBITOSI VIAN and A7 NAMUGGA JUSTINE at the scene of crime. That the evidence of PW3 SSENKOZA GERALD that A6 had told him of the plan by A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A5 SEBITOSI VIAN and A6 SSEKAYITA ANDREW to kill the decease should be treated as a mere rumour. It was submitted that each accused had given an account of their whereabouts at the time of the offence. In conclusion, it was submitted that the participation of the accused had not been sufficiently proved.

Evidence of the Prosecution

PW1: SSEMYALO STEPHEN testified about the motive for killing the deceased. That A4 Balinda Tadeo had a daughter named Phina who fell sick and died and the family of A4 attributed it to witchcraft by the deceased. That A6 SSEKAYITA ANDREW one of the sons of A4 had told the witness that the family
5 believed Phina had been bewitched by the deceased. That to try and resolve the matter, a meeting was convened, attended by A4 BALINDA TADEO and his children, A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A6 SSEKAYITA ANDREW and A7 NAMUGGA JUSTINE. That during the meeting, A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO,
10 and A6 SSEKAYITA ANDREW maintained that the deceased had bewitched Phina. The witness further testified that the deceased subsequently complained to him that although they had met, whenever she met A2 and A3 on the road, they (A2 and A3) would want to knock her. That the deceased lived in fear and told the witness that A2, A3 and A4 were threatening to kill her. The witness further
15 testified that the next time he met A6 and asked A6 why his family had remained with hard hearts even after the meeting and he replied that they all knew who had killed Phina and they would kill that person, meaning the deceased.

PW2: NAMUTIMA TEOPISTA was the eye witness to the offence. She testified
20 that on the 16th day of February 2019, she was outside the house with the deceased at about 7:30pm when an assailant came from the side of the kitchen with a panga. That the assailant came putting on a hat and a rain coat and started cutting the deceased; then his hat fell down and she saw him and identified him as A1 SSERUWAGI PHILIP. That after A1 had started cutting the deceased he was
25 joined by A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO, and A6 SSEKAYITA ANDREW. That A2 SSEKAYITA RONALD and A6 SSEKAYITA ANDREW jointly held and opened a bottle and poured out an

inflammable liquid that sparked off a fire that enabled her to see them clearly. The witness said that her alarm attracted PW3 SSENKOZA GERALD who helped her and they put out the fire. She then rang her husband PW1 SSEMYALO STEPHEN and notified him. The deceased was then taken to Mubende Hospital and later her dead body was returned and buried. That none of the accused attended the burial. The witness testified that she was able to identify the accused persons with the help of security lights at home and the moon was bright; that the incident lasted about 20 minutes. That when A2 SSEKAYITA RONALD and A6 SSEKAYITA ANDREW opened a bottle and poured out a liquid that sparked off a fire, A3 SSEKALASA DENIS and A4 BALINDA TADEO were standing there. In cross examination, the witness stated that she had known the accused persons for about 17 years, from the time she got married in that village; that she identified the accused persons because there was security light and the moon was bright and the accused were persons that she stayed with for a long time and knew them; that of the accused in the dock, at the scene, she identified A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO, and A6 SSEKAYITA ANDREW; that she did not see A5 SEBITOSI VIAN and A7 NAMUGGA JUSTINE; that the bottle that A2 SSEKAYITA RONALD and A6 SSEKAYITA ANDREW held was a big soda bottle; that the others were standing and watching and not holding anything; that after the incident they all walked away. It is recalled that at the time the witness testified, A1 SSERUWAGI PHILIP had already been convicted on his own plea of Guilty and sentenced and he was not in the dock.

PW3: SSENKOZA GERALD testified that in January 2019, he was in Nyabuliko trading centre, when A6 SSEKAYITA ANDREW with whom he used to talk, met and told him that they have been in a meeting as a family and that they have been discussing how to kill the deceased. That A6 told him that those who had attended

the meeting were A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A5 SEBITOSI VIAN and A6 SSEKAYITA ANDREW himself. The witness said that A6 told him that it would not take two months. In cross examination the witness stated that A6 told him these things because they were friends and they used to talk so he managed to tell him about that. **PW3: SSENKOZA GERALD** further testified that on the 16th February, 2019, at about 7.30-8.00PM, he was coming from Nyabuliko Trading Centre when he heard an alarm coming from the home of the deceased and he ran there. That on the way, he met A2 SSEKAYITA RONALD and A3 SSEKALASA DENIS running from the direction of the alarm. In cross examination the witness said he met them coming from the home of the deceased, entering the road as the witness was coming in; that he identified them because he bypassed them; that the distance between them was only 10 meters, and there was moon light and he knew them very well before. The witness said that he continued to the home of the deceased, where he found the deceased had been cut and she was burning.

PW4: KUGANYIRA SAMUEL testified that on 16th February, 2019 at around 7.30PM he was riding his motorcycle, returning home from Nyabuliko Trading Center when he met A4 BALINDA TADEO on the way, about 15 meters away from the home of the deceased, walking very fast, having a walking stick. The witness said that he also heard an alarm and he continued to the home of the deceased where the alarm was coming from; he found the decease had been cut and she was in a pool of blood. The witness said that PW2 NAMUTIMA TEOPISTA was among those he found at the home of the deceased and that PW2 reported that she had recognized A2 SSEKAYITA RONALD, A4 BALINDA TADEO, and A6 SSEKAIYITA ANDREW among the assailants.

PW5: BALYESIMA RICHRD testified that on the 16th February, 2019, between 6.00 and 7.00PM, he was in the valley grazing about 100 meters from the home of the deceased, when he saw A4 BALINDA TADEO walking saying he was looking for his lost cow. The witness said that he later heard information that the deceased had been cut. He went there and found the deceased had been taken to the hospital. In cross examination the witness said that A4 was coming from his (A4's) home neighboring the home of the deceased.

PW6: NAKATOOGO OLIVIA testified that after the burial, some of the accused had run away. That she engaged and worked with police to track A6 SSEKAYITA ANDREW who was arrested in Mityana and A6 led to the arrest of A5 SEBITOSI VIAN in Kyengeza Church in Mityana and A7 NAMUGGA JUSTINE in Mubende.

PW7: NO. 60671 PC BOGERE ROBERT (RETIRED) testified that during the investigations, he participated in phone tracking in this case, leading to the arrest of A5 SEBITOSI VIAN, A6 SSEKAYITA ANDREW and A7 NAMUGGA JUSTINE.

Evidence of the Accused

A2. SSEKAYITA RONALD denied participating in the commission of the crime. He testified that on the 16th day of February, 2019, he was in the trading centre of Nyabuliko in the evening hours when he saw PW1 SSEMYALO STEPHEN driving a car at high speed passing through the trading centre. Later, news circulated that PW1 was taking his mother (the deceased in this case) to the hospital. He also moved to the home of the deceased to find out what had

happened. When PW1 returned, the accused was arrested for this case that he said he does not know.

A3 SSEKALASA DENIS raised an **alibi**. He testified that he was working at St Joseph's Nama Modern S.S Mityana as a Warden and residing at Nama Cell, Nama Ward, Busindi Division, Mityana Municipal Council. That on 16th February 2019, at around 8.00PM, he was at St. Joseph Nama Modern, in class supervising preps when he received a call from his sister A7 NAMUGGA JUSTINE who was in Mubende, informing him of the murder of the deceased. That he later got another phone call from Katusabe Margret giving him the same news, who advised him to stay away as it was being alleged that his family was responsible for the murder. That he went and reported himself to Nama Police Post where the OC advised him not to worry if he was innocent. That on **6th March, 2019**, he was arrested from his place of work at the school.

A4: BALINDA TADEO denied the offence. He testified that the 16th of February 2019 was a weekend, so he moved to Nyabuliko Trading Center to take a bottle of beer, and while there he received news of the death of the deceased. He joined other people and went to the home of the deceased but they were stopped from reaching the home until 9pm when they arrested his son A2 SSEKAYITA RONALD and started beating him then he also went back to his home in fear of being beaten like his son. He said that he did not subscribe to the conduct of his son A1 PHILIP SSERUWAGI and that at the time of the commission of the offence, A1 had been away for over a year without even visiting him.

A5 SSEBITOSI VIAN raised an **alibi**. He testified that since March 2015, he was staying in Namungo LCI, Namungo Parish, Namungo Sub County, Mityana

District. That in the month of February, 2019, he got a phone call about the death of the deceased and that A2 had been arrested and they were looking for others. He got scared and did not go to attend the burial. That in **November 2019** 9 months later, he was in Church at St Kizito Kyengeza Parish, with fellow choir members when he was arrested by the police.

A6 SSEKAYITA ANDREW testified that on the 16th February 2019, he was at Nyabuliko Town when he saw many people running and others were on boda-boda and they were saying that someone had been murdered, and he joined them. On the way they met a car of PW1 SSEMYALO STEPHEN moving at high speed with double indicators. They continued and reached the compound of the deceased where they found police had already arrived and they were told that they are not allowed to approach the scene; that when PW1 SSEMYALO STEPHEN returned, he arrested A2 SSEKAYITA RONALD. That he ran away in fear of being arrested and did not attend the burial. That he was arrested from Kabule in Mityana 9 months later.

A7 NAMUGA JUSTINE raised an **alibi**. She testified that on 16th February 2019, she was at her place of work that was located in front of Mubende Regional Referral Hospital. That it was at around 9.00pm while still at work, when she learnt of the death of the deceased. After some time, in the month of November police came and arrested her.

Defence of Alibi

An alibi is a claim or piece of evidence that one was elsewhere when the criminal offence is alleged to have taken place. A3 SSEKALASA DENIS, A5 SSEBITOSI VIAN and A7 NAMUGGA JUSTINE each raised an alibi. A3 said that on that

night he was on duty at St Joseph's Nama Modern S.S in Mityana District where he was employed as a warden. A5 said that since March 2015, he was staying in Namungo LCI, Namungo Parish, Namungo Sub County, Mityana District. That in the month of February, 2019, he got a phone call about the death of the deceased and that A2 had been arrested and they were looking for others. He got scared and did not go to attend the burial. A7 testified that she was at her work in front of Mubende Regional Referral Hospital, when she learnt of the death of the deceased.

Where an accused raises the defence of **alibi** he or she has no duty to prove it. The duty lies on the prosecution to disprove a defence of alibi and place the accused at the scene of crime as the perpetrator of the offence (**see *Festo Androa Asenua and another v. Uganda, S. C. Criminal Appeal No.1 of 1998*** **and *Cpl. Wasswa and another v. Uganda, S.C. Criminal Appeal No. 49 of 1999*)**.

One of the ways of disproving an alibi is to investigate its genuineness. To provide this opportunity, the accused should raise the alibi at the earliest opportunity. If the accused brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped. The other way of destroying an alibi is for the prosecution to bring evidences that places the accused at the scene of crime as the perpetrator of the offence.

In the case of ***Lt. Jonas Ainomugisha versus Uganda, SCCA No. 19 of 2015,*** the Supreme Court stated as follows:

> ***"One of the ways of disproving an alibi is to investigate its genuiness as was stated in the case of Androa Asenua & Another Vs Uganda (Cr. Appeal No 1 of 1998) [1998] UG SC 23 where the Supreme Court of Uganda cited with***

approval the authority of R Vs Sukha Singh S/O Wazir Singh and Others 1939 (6 EACA) 145 where the Court of Appeal for East Africa observed that:-

"If a person is accused of anything and his defence is an alibi, he should bring forward the alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuiness proceedings will be stopped."

In the same judgment the Supreme Court made the following observation:-

"Before leaving the issue of alibi we would like to point out that in England, evidence in proof of Alibis has since 1967 been largely regulated by Statute. Thus Section 11 of the Criminal Justice Act, 1967 of the United Kingdom provides as follows

"11 (I) on the trial on indictment the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.

2. Without prejudice to the foregoing subsection, on any such trial the defendant shall not without leave of the Court call any other person to give such evidence unless:-
(a) the notice under that subsection includes the name and address of the witness, or if the name and address is not known to the defendant at the

time he gives notice, any information in his possession which might be of material assistance in finding the witness."

It is unnecessary to reproduce here the rest of the provisions of Section 11 of that Act save to say that these provisions basically reflect the view stated by the Court of Appeal for Eastern Africa in the case of R. – v. Sukha Singh(Supra)

We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK Statute cited above, such belated disclosure must go to the credibility of the defence. We would therefore, strongly recommend that a Statutory Provision of similar effect to Section 11 of the United Kingdom Act ought to be made part of our Criminal Justice"

We reiterate the above observation."

In this case, to disprove the defence of alibi, the prosecution relies on the evidence of PW2 NAMUTIMA TEOPISTA and PW3 SSENKOZA GERALD.

PW2 NAMUTIMA TEOPISTA testified that at the scene she identified A1 SSERUWAGI PHILIP, A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS,

A4 BALINDA TADEO, and A6 SSEKAYITA ANDREW; that she did not see A5 SEBITOSI VIAN and A7 NAMUGGA JUSTINE.

PW3: SSENKOZA GERALD testified that when he heard an alarm coming from the home of the deceased home, he ran there. That on the way, he met A2 SSEKAYITA RONALD and A3 SSEKALASA DENIS running from the direction of the alarm. In cross examination the witness said he met A2 and A3 coming from the home of the deceased, entering the road as the witness was coming in; that he identified them because he bypassed them; that the distance between them was only 10 meters, and there was moon light and he knew them very well before. In cross examination the witness said that they were about 5 meters apart.

The eye witness identification evidence tends to destroy the alibi raised by A3 SSEKALASA DENIS but fails to destroy the alibi raised by A5 SEBITOSI VIAN and A7 NAMUGGA JUSTINE.

Evidence of a Single Identifying Witness

In this case the prosecution relies on the evidence of PW2 NAMUTIMA TEOPISTA a single identifying witness in an offence that took place at night. I warned the Assessors, and hereby warn myself, that corroboration is required as a matter of practice when relying on the testimony of a single identifying witness. Such identification evidence should be considered with special caution. The reason for the special caution is that there is a possibility that a witness can be honest and convincing but mistaken. That even a number of such witnesses can all be honest but mistaken. There is need to find other independent evidence confirming the commission of the crime and connecting the accused to the crime.

In the case of ***Jamada Nzabaikukize SCCA No, 01/2015*****,** it was held that:

"The law on identification by a single witness has been laid out in several cases. The leading authority is that of ***Abdullah Bin Wendo and another vs. R (1953) 20 EACA 583.*** *The law was further developed in the authorities of* ***Abdulla Nabulere vs. Uganda Criminal Appeal No.9 of 1978*** *and* ***Bogere Moses vs. Uganda (supra).*** *The principles deduced from these authorities are that-*

- *v) Court must consider the evidence as a whole.*
- *vi) The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.*
- *vii) The court must caution itself before convicting the accused on the evidence of a single identifying witness.*
- *viii) In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailants, the quality of light, and material discrepancies in the description of the accused by the witness."*

Meaning of Corroboration

Corroboration means additional independent evidence connecting the accused to the crime. In ***R. v. Baskerville [1916] 2 K.B 658*****,** it was held that:

> *"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is,*

which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

The EACA adopted the definition in the context of accomplice evidence in ***R v. Manilal Ishwerlal Purohit (1942) 9 EACA 58 (p.61***) as follows:

"The corroboration which should be looked for is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and whilst the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime. Corroboration may be found in the conduct of the accused."

Where a Witness is Truthful and there is No Error in Identification

I can proceed to rely on the evidence of a single identifying witness even without corroboration, if I am satisfied that the witness was truthful and there is no possibility of error in the identification of the perpetrator. **(**See ***Abdala bin Wendo & Anor v. R (1953) 20 EACA 166*****).**

In this regard, I have carefully analyzed the evidence of PW2: NAMUTIMA TEOPISTA who is the single identifying witness to the

crime and also considered the evidence of PW3: SSENKOZA GERALD and PW5: BALYESIMA RICHRD in relation to identification.

PW2: NAMUTIMA TEOPISTA said that after A1 had started cutting the deceased he was joined by A2, SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO, and A6 SSEKAYITA ANDREW. That A2 and A6 jointly held and opened a bottle and poured out a liquid that sparked off a fire that enabled her to see them clearly. The witness testified that she was able to identify the accused persons with the help of security lights at home and the moon was bright; that the incident lasted about 20 minutes. That when A2 and A6 opened a bottle and poured out a liquid that sparked off a fire, A3 and A4 were standing there. In cross examination, the witness stated that she had known the accused for about 17 years, from the time she got married in that village; that she identified the accused persons because there was security light and the moon was bright and the accused were persons that she stayed with for a long time and knew them; that of the accused in the dock, she identified A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO, and A6 SSEKAYITA ANDREW; that she did not see A5 SEBITOSI VIAN and A7 NAMUGGA JUSTINE; that the bottle that A2 and A6 held was a big soda bottle; that the others were standing and watching and not holding anything; that after the incident they all walked away.

PW3: SSENKOZA GERALD testified that on his way to the scene, he met A2 SSEKAYITA RONALD and A3 SSEKALASA DENIS running from the direction of the alarm. In cross examination the witness said he met them coming from the home of the deceased, entering the road as the witness was coming in; that he identified them because he bypassed them; that the distance between them was only 10 meters, and there was moon light and he knew them very well before. In

cross examination he put the distance between them at 5 meters when they bypassed each other.

PW5: BALYESIMA RICHRD testified that he knew the accused persons as his village mates and that on the 16th February, 2019, between 6.00 and 7.00PM, he was in the valley grazing about 100 meters from the home of the deceased, when he saw A4 BALINDA TADEO walking while holding a stick, saying that he was looking for his lost cow. That A4 was coming from the direction of his (A4's) home that neighbours that of the deceased. The witness said that he later heard information that the deceased had been cut. This evidence places A4 in the vicinity of the crime scene immediately prior to the commission of the offence, contrary to the claim of A4 that he was having a beer at Nyabuliko Trading Center.

I am satisfied that the identifying witnesses PW1, PW2 and PW5 were truthful and that there is no possibility of error in their identification. Regarding corroboration, I have considered the following evidence: (a) statements made by the deceased; (b) evidence of motive; (c) evidence of immediate report by PW2; (d) conduct of escaping from arrest and not attending burial.

Evidence of Corroboration:

(a) Statements made by deceased to PW1 regarding the conduct of A2 and A3 towards her

PW1: SSEMYALO STEPHEN testified that the deceased, complained to him subsequent to a family meeting convened to resolve the differences between the families of the accused and the deceased, that although they had met, whenever she met A2 and A3 on the road, they would want to knock her. The witness said that

the deceased lived in fear and told the witness that A2, A3 and A4 were threatening to kill her. That the next time he met A6 and asked A6 why his family had remained with hard hearts even after the meeting and he replied that they all knew who had killed Phina and they would kill that person, meaning the deceased.

Section 30 of the Evidence Act Provides as follows:

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases—

(a)when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question.[Emphasis added]**.**

I find that in the circumstances of this case, the evidence of the complaints made by the deceased to her son PW1: SSEMYALO STEPHEN that whenever she met A2 and A3 on the road, they would want to knock her and that the deceased lived in fear and told the witness that A2, A3 and A4 were threatening to kill her, is relevant.

(b) Evidence of motive:

PW1: SSEMYALO STEPHEN testified about the motive for killing the deceased. That A4 Balinda Tadeo had a daughter named Phina who fell sick and died and the family of A4 attributed it to witchcraft by the deceased. That A6 SSEKAYITA Andrew one of the sons of A4 had told him that the family believed Phina had been bewitched by the deceased. That to try and resolve the matter, a meeting was convened, attended by A4 BALINDA TADEO and his children, A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A6 SSEKAYITA ANDREW and A7 NAMUGGA JUSTINE. That during the meeting, A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO, and A6 SSEKAYITA ANDREW maintained that the deceased had bewitched Phina. The witness further testified that the deceased complained to him that although they had met, whenever she met A2 and A3 on the road, they would want to knock her. That the deceased lived in fear and told the witness that A2, A3 and A4 were threatening to kill her. That the next time he met A6 and asked A6 why his family had remained with hard hearts even after the meeting and he replied that they all knew who had killed Phina and they would kill that person, meaning the deceased

Section 7 of the Evidence Act provides for facts showing motive or preparation; conduct influencing or influenced by a fact in issue or relevant fact and states as follows:

> ***"(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.***
>
> ***(2) The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to that suit or proceeding, or in reference to any fact in issue in the suit or proceeding or relevant to it, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if that conduct influences or is influenced by any fact in issue or***

relevant fact, and whether it was previous or subsequent to the fact in issue or relevant fact.”

In ***John Wanda v. Uganda, Criminal Appeal No. 37 of 1998***, the then Court of Appeal of Uganda stated as follows:

“Though motive is irrelevant in law, in a criminal prosecution except in some special exceptional cases such as, prosecution for Libel if a defence of Fair Comment or qualified privilege is raised, but motive is always useful since a person in his normal faculty would not commit a crime without a reason or motive. See: <u>Godfrey Tinkarnalirwe and another Vs Uganda, Cr. Appeal No. 5 of 1998 (SC) unreported.</u>

In our view, the existence of a motive make it more likely that an accused person did infact commit the offence charged.

Similarly in this case, in my view, the existence of a motive made it more likely that the accused persons would commit and/or committed the offence charged.

(c) <u>Evidence of immediate report by PW2:</u>

PW4: KUGANYIRA SAMUEL testified that PW2 NAMUTIMA TEOPISTA was among those he found at the home of the deceased and that PW2 reported that she had recognized A2 SSEKAYITA RONALD, A4 BALINDA TADEO, and A6 SSEKAIYITA ANDREW among the assailants. This evidence of immediate report implicating the accused demonstrates consistency of the evidence of the witness and is also relevant under Section 156 of the Evidence Act that states as follows: ***In order to corroborate the testimony of a witness, any <u>former statement made by the witness relating to the same fact, at or about the time when the fact</u>***

took place, or before any authority legally competent to investigate the fact, may be proved. [Emphasis added]. I consider it a minor inconsistency attributable to the prevailing traumatic circumstances that PW2 omitted to mention that she had also identified A3. Moreover PW3: SSENKOZA GERALD testified that he met A2 SSEKAYITA RONALD and A3 SSEKALASA DENIS running from the direction of the alarm.

(d) Conduct of escaping from arrest and not attending burial:

The conduct of the accused can provide corroboration. For example if the conduct of the accused indicates a sense of guilt on his part; such as escaping from arrest or running away, it can add strength to the prosecution case and to his responsibility. (**See:** ***Bogere Charles Vs Uganda Crim. Appeal No. 10/98 S.C; Muhamed Mukasa & anor vs. Uganda-Criminal Appeal 27/95 (S.C.); Telesfora Alex & Anor vs. Republic (1963) EA 140*****).** In ***R v. Manilal Ishwerlal Purohit (1942) 9 EACA 58 (p.61***), it was stated that corroboration may be found in the conduct of the accused.

PW6: NAKATOOGO OLIVIA testified that after the burial, some of the accused had run away. That she engaged and worked with police to track A6 SSEKAYITA ANDREW who was arrested in Mityana and A6 led to the arrest of A5 SEBITOSI VIAN in Kyengeza Church in Mityana and A7 NAMUGGA JUSTINE in Mubende. **PW1 SSEMYALO STEPHEN, PW2 NAMUTIMA TEOPISTA** and **PW6 NAKATOOGO OLIVIA** all testified that none of the accused persons attended the burial of the deceased. PW1 stated that the home of the family of the accused was only 30 meters away from the home of the deceased. It should also be recalled that the deceased was the wife of the brother of A4, so the 2 families were close relatives. Apart from A2 who could not have attended the burial because

from the evidence he was arrested immediately, the explanation of the other accused persons is that they feared that they too could be arrested and treated as suspects, following the arrest of A2; at the same time in the case of A5 and A7 each raised an alibi and explained that they stayed away and did not come for burial for fear of being arrested and treated as suspects following on from the arrest of A2.

In the circumstances of this case, given all the incriminating evidence adduced against the accused that has already been discussed, the conduct of A2. SSEKAYITA RONALD, A3. SSEKALASA DENIS, A4. BALINDA TADEO and A6. SSEKAYITA ANDREW in keeping away from the burial of a close relative and neighbor and additionally the conduct of A3 in keeping away from the village following the killing, was not the conduct of innocent people; it is my finding that the failure to attend the burial and the fear of arrest arose from their guilty conscience.

All of the above evidence corroborates the evidence of eye witnesses placing **A2, A3, A4** and **A6** at the scene of crime as the perpetrators of the offence.

The Doctrine of Common Intention

Since the offence involved more than one accused person, I have to determine whether the accused persons shared a common intention. Section 20 of the Penal Code Act that provides for joint offenders in prosecution of common purpose states as follows:

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its***

commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

The word unlawful is defined in the ***Black's Law dictionary*** as a "violation of law, an illegality."

5

In ***No. 441 P.C. Ismail Kisegerwa & No. 8674 P.C. Bukombi, CA Cr. Appeal No. 6/1978,*** the Court of Appeal held as follows:

In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime
10 ***a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of***
15 ***whether the offence committed was murder or manslaughter, it is now settled that an unlawful common intention does not imply a pre—arranged plan — see P —vs— Okute [1941] 8 E.A.C.A. at p.80. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to dissociate himself from the assault. See***
20 ***R —vs— Tabulayenka (supra). It can develop in the course of events though it might not have been present from the start, See Wanjiro Wamiro —vs—R [1955] 22 E.A.C.A. 521 at p.52 quoted with approval in Mungai'a case. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also***
25 ***irrelevant whether the two participated in the commission of the offence see Mutebi's case (supra).***

It is not necessary that there should have been any concerted agreement between the accused persons prior to the attack on the deceased. The common intention may be inferred from their presence, their actions and the omission of any of them to disassociate himself from the attack — see ***R vs- Tabulayenka s/o Kirya and Others [1943] 10 E.A.C.A. 51.*** There are cases where even a person is convicted on the doctrine of common intention despite the fact that he did not participate in the assault, see ***Andrea Mutebi and Anor —vs— Uganda Cr. App. 144/75 E.A.C.A)"***

PW2: NAMUTIMA TEOPISTA testified that when A1 started cutting the deceased he was joined by A2, SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO, and A6 SSEKAYITA ANDREW. That A2 and A6 jointly held and opened a bottle and poured out an inflammable liquid that sparked off a fire that burnt the deceased. In cross examination the witness said that the bottle that A2 and A6 held was a big soda bottle; that the others were standing and watching and not holding anything; that after the incident they all walked away.

In this case, based on the above evidence of PW2, the court infers common intention from their presence, their actions and the omission of any of the accused persons at the scene to disassociate themselves from the attack on the deceased throughout the time of the incident that lasted about 20 minutes, and their walking away together after the commission of the offence.

PW1: SSEMYALO STEPHEN testified that prior to the commission of the offence, during a family meeting to try and resolve the family differences, A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A4 BALINDA TADEO, and

A6 SSEKAYITA ANDREW maintained that the deceased had bewitched Phina. The witness further testified that the deceased complained to him that although they had met, whenever she met A2 and A3 on the road, they would want to knock her. That the next time he met A6 and asked A6 why his family had remained with hard hearts even after the meeting and he replied that they all knew who had killed Phina and they would kill that person, meaning the deceased.

PW3: SSENKOZA GERALD testified that in January 2019, he was in Nyabuliko trading centre, when A6 SSEKAYITA Andrew with whom he used to talk, met and told him that they have been in a meeting as a family and that they have been discussing how to kill the deceased. That A6 told him that those who had attended the meeting were A2 SSEKAYITA RONALD, A3 SSEKALASA DENIS, A5 SEBITOSI VIAN and A6 SSEKAYITA ANDREW himself. The witness said that A6 told him that it would not take two months. In cross examination the witness stated that A6 told him these things because they were friends and they used to talk so he managed to tell him about that.

Section 9 of the Evidence Act provides for the relevance of things said or done by conspirator in reference to common design and states as follows:

> ***"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of those persons in reference to their common intention, after the time when that intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving***

the existence of the conspiracy and for the purpose of showing that any such person was a party to it."

In this case, it is my finding, that the position maintained by **A2, A3, A4** and **A6** during the family meeting that the deceased had bewitched Phina; the statement made by **A6** to PW1 following on from the prior family meeting, that the family of the accused all knew who had killed Phina and they would kill that person, meaning the deceased; coupled with the evidence of **A6** telling PW1 that they had held a family meeting at their home about killing the deceased attended by **A2, A3, A5** and **A6**; are relevant facts against each of them for the purpose of proving the existence of the conspiracy and for the purpose of showing that each of them was a party to the common intention.

It is my finding that the evidence of identification was truthful and free from the possibility of error and it is sufficiently corroborated. The evidence has squarely placed A2. SSEKAYITA RONALD, A3. SSEKALASA DENIS, A4. BALINDA TADEO and A6. SSEKAYITA ANDREW at the scene of crime as the perpetrators of the crime who shared a common intention and the evidence has destroyed any alibi presented by any of them.

The evidence does not place A5 SEBITOSI VIAN and A7 NAMUGGA JUSTINE at the scene of crime and fails to destroy the alibi raised by A5 and A7. The only evidence against A5 is that he was cited by A6 to have attended a family meeting to discuss the killing of the deceased, without more. There was some evidence of telephone communications between some of the accused persons but this evidence adds no value as these are family members who are expected to communicate with

each other. I find the evidence insufficient to sustain a conviction against A5. SEBITOSI VIAN and A7. NAMUGGA JUSTINE.

Conclusion:

5

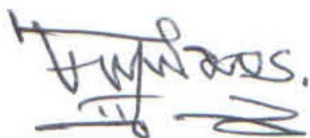
In agreement with the Lady and Gentleman Assessor, I find that the Prosecution has proved each of the ingredients of the offence of Murder in this case beyond reasonable doubt against A2. SSEKAYITA RONALD, A3. SSEKALASA DENIS, A4. BALINDA TADEO and A6. SSEKAYITA ANDREW. I find each of them

10 Guilty of the offence of Murder as indicted and convict each one of them accordingly.

In agreement with the Lady and Gentleman Assessors, I find that the Prosecution has failed to prove the case of Murder beyond reasonable doubt in this case beyond

15 reasonable doubt against in respect of A5. SEBITOSI VIAN and A7. NAMUGGA JUSTINE. I therefore find each of them Not Guilty and acquit each of them accordingly. They should be discharged and set free forthwith unless held on other lawful grounds.

20 **Dated at Fort portal this 23rd day of August 2022.**



Vincent Wagona

High Court Judge

25

SENTENCE AND REASONS FOR SENTENCE

In sentencing the convicts, the following factors have been considered:

5 Under the Penal code act, the maximum punishment for murder is death. I am also guided by the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.

Under Paragraph of the Sentencing Guidelines17, the court may only pass a 10 sentence of death in exceptional circumstances in the "rarest of the rare" cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate. Under Paragraph 18, the "rarest of the rare'' cases include cases where— (a) the court is satisfied that the commission of the offence was planned or meticulously premeditated and executed; (b) the victim was-- (i) a 15 law enforcement officer or a public officer killed during the performance of his or her functions; or (ii) a person who has given or was likely to give material evidence in court proceedings; (c) the death of the victim was caused by the offender while committing or attempting to commit-- (i) murder; (ii) rape; (iii) defilement; (iv) robbery; (v) kidnapping with intent to murder; (vi) terrorism; or 20 (vii) treason; (d) the commission of the offence was caused by a person or group of persons acting in the execution or furtherance of a common purpose or conspiracy; (e) the victim was killed in order to unlawfully remove any body part of the victim or as a result of the unlawful removal of a body part of the victim; or (f) the victim was killed in the act of human sacrifice. I have found no extremely grave 25 circumstances as would to justify the imposition of the death penalty.

Under The Constitution (Sentencing Guidelines For Courts Of Judicature) (Practice) Directions, 2013, the sentencing starting point for murder is 35 years and the sentencing range is from 30 years' imprisonment up to death sentence.

5 Under Paragraph 19 regarding the sentencing ranges in capital offences: (1) The court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence; (2) In a cases where a sentence of death is prescribed as the Maximum sentence for an offence, the court shall, consider the factors in paragraphs 20 and 21 to determine
10 the sentence in accordance with the sentencing range.

Under Paragraph 20, in considering imposing a sentence of death, the court shall take into account— (a) the degree of injury or harm; (b) the part of the victim's body where harm or injury was occasioned; (c) sustained or repeated injury or
15 harm to the victim; (d) the degree of meticulous pre-meditation or planning; (e) use and nature of the weapon; (f) whether the offender deliberately caused loss of life in the course of the commission of another grave offence; (g) whether the offender deliberately targeted and caused death of a vulnerable victim; (h) whether the offender was part of a group or gang and the role of the offender in the group, gang
20 or commission of the crime; (i) whether the offence was motivated by, or demonstrated hostility based on the victim's age, gender, disability or other discriminating characteristic; (j) whether the offence was committed against a vulnerable person or member of a community like a pregnant woman, child or person of advanced age; (k) whether the offence was committed in the presence of
25 another person like a child or spouse of the victim; (l) whether there was gratuitous degradation of the victim like multiple incidents of harm or injury or sexual abuse; (m) whether there was any attempt to conceal or dispose of evidence; (n) whether

there was an abuse of power or a position of trust; (o) whether there were previous incidents of violence or threats to the victim; (p) the impact of the crime on the victim's family, relatives or the community; or (q) any other factor as the court may consider relevant.

Under Paragraph 21, in considering imposing a sentence of death, the court shall take into account the following mitigating factors— (a) lack of premeditation; (b) a subordinate or lesser role in a group or gang involved in the commission of the offence; (c) mental disorder or disability linked to the commission of the offence; (d) some element of self-defense; (e) plea of guilt; (f) the fact that the offender is a first offender with no previous conviction or no relevant or recent conviction; (g) the fact that there was a single or isolated act or omission occasioning fatal injury; (h) injury less serious in the context of the offence; (i) remorsefulness of the offender; (j) some element of provocation; (k) whether the offender pleaded guilty; (l) advanced or youthful age of the offender; (m) family responsibilities; (n) some element of intoxication; or (o) any other factor the court considers relevant.
Under paragraph 23 Imprisonment for life is the second gravest punishment next to the sentence of death. Under paragraph 24 in capital offences, the court shall consider imposing a sentence of imprisonment for life where the circumstances of the offence do not justify a sentence of death. In determining whether the circumstances of an offence or offender justify imposing a death sentence or imprisonment for life, court shall consider the factors aggravating or mitigating a death sentence.

The sentencing guidelines have to be applied bearing in mind past precedents of courts in decisions where the facts have a resemblance to the case under trial (see *Ninsiima v. Uganda Crim. C.A Criminal Appeal No. 180 of 2010*). The case

law demonstrates that the Supreme Court has in more recent times tended to reduce sentences that are above or in the range of the sentencing starting point set by the Sentencing Guidelines:

5 **<u>Cases that involved a Plea of Guilty</u>:**

In ***Tom Sande alias Hussein Sadam v Uganda CACA No. 127 of 2009***, the appellant was sentenced to **<u>18 years'</u>** imprisonment on his own plea of guilty to the offence of murder. Court of Appeal upheld the sentence. The Court of Appeal
10 observed that the sentencing Judge had noted as follows:

"<u>Sentence and reasons for the sentence:</u>

> "***Before passing the sentence against the convict, the following factors are put into consideration:***
>
> ***a) The case of Attorney General vs. Kigula Susan & 417***
> 15 ***others, Constitutional Appeal No. 3 of 2006, which case the death penalty/sentence not mandatory. The Court to conduct the mitigation process before sentencing.***
>
> ***b) All submissions of both counsels for the parties in mitigation.***
>
> 20 ***c) The convict pleaded guilty; hence he did not waste the Court's time and resources. He is pleading guilty is a sign of repentant and being remorseful.***
>
> ***d) The convict is a young man who could be given an opportunity to live a better and reformed life given the***
> 25 ***chance.***

e) ***There was loss of life of the deceased in cold blood. And such conduct of the convict should not be treated with the kind gloves.***

f) ***<u>The convict has been on remand for a period of 2 years and 3 months which period is considered when passing.</u>***

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Considering the above factors, I do not deem it necessary to pass a death sentence against the convict. Accordingly, the convict is sentenced to 18 (eighteen) years imprisonment in prison". In this case it means that the convict was to serve **<u>18 years</u>** after deducting **<u>2 years and 3 months</u>** already spent on remand.

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In ***Anguyo Robert v Uganda Court of Appeal at Arua CA No. 48 of 2009***, the appellant was convicted of murder on his plea of guilty, he was sentenced to 20 years of imprisonment. He had used a hammer to assault the deceased on the head. On appeal, upon finding that the remand period of **<u>1 year and 7 months</u>** was not taken into consideration, court imposed a sentence of **<u>18 years</u>'** imprisonment after deducting the period spent on remand.

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In ***Sebuliba Siraji*** *v.* ***Uuganda, Court Of Appeal Criminal Appeal No. 0319 of 2009,*** the accused had waited for the deceased with a panga hidden in a kavera (polythene bag) and when the deceased opened his vehicle, the appellant attacked him and cut him with a panga on his head, neck and hand. At trial the appellant pleaded guilty and the learned trial Judge convicted and sentenced him to <u>life imprisonment</u>. The Court of Appeal upheld the conviction and sentence.

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<u>Cases that involved a full trial</u>:

In ***Ssekawoya Blasio v. Uganda SCCA 24/2014*** the Supreme Court upheld concurrent ***life imprisonment*** terms for murder of 3 children aged 12, 10, and 8 years respectively.

5 In ***Rwalinda John v. Uganda SCCA 3/2015*** the Supreme Court upheld a sentence of ***life imprisonment*** in a case of murder. The Supreme Court observed that the trial Court had considered the aggravating and mitigating factors like having been a first offender and took into account the one year and three month she spent on remand, the age of 67 years and prayer for 10 leniency. That the trial Judge considered the seriousness of the offence, the death of a **toddler**, the way the murder was carried out which culminated in the death among others.

In ***Mulingade Zyedi v. Uganda, CA No. 39 of 2013***, a case of murder and simple robbery where the High Court had sentenced the accused to **45** years imprisonment 15 the Court of Appeal held as follows: ***"In the circumstances of the case, considering the authorities above cited and taking into account all the mitigating and aggravating factors, as well as the 1 year and 11 months that the appellant spent on remand, we sentence the appellant as follows:***

1. ***On count 1 of Murder, we consider a sentence of 32 years imprisonment*** 20 ***appropriate. However, we deduct the 1 year and 11 months spent on remand. The appellant will therefore serve a sentence of 30 years and 1 month imprisonment.***
2. ***On count 2 of Simple Robbery, we consider a sentence of 8 years imprisonment appropriate. However, we deduct the 1 year and 11 months*** 25 **spent on remand".** The appellant will therefore serve a sentence of 6 years and 1 month imprisonment.

In ***Aharikundira Yusitina v. Uganda SCCA 27/2015***, the Supreme Court substituted a death sentence with a sentence of ***30 years' imprisonment*** in a case where the appellant had murdered her husband and his throat, arms and legs had been cut. The arms had been severed from the shoulders and the legs were missing; after observing that the appellant was a first offender with no previous criminal record, was of advanced age, did not bother court on second appeal regarding her conviction, and displayed remorsefulness; and she was the surviving spouse and mother of six children. The Supreme Court observed as follows:

> **"Further in a recent case of *Mbunya Godfrey Versus Uganda, Supreme Court Criminal Appeal No. 04 of 2011***, the appellant murdered his wife in cold blood and court while dealing with sentence observed that**;**
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> *'With greatest respect to the two courts below, we are of the view that the death sentence should be passed in very grave and rare circumstances because of its finality. When a death sentence is executed, the appellant has no chance to reform and /or to reconcile with the community. We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing... "*

In ***Ndyomugenyi Patrick v. Uganda SCCA 57/2016***, the Supreme Court maintained a sentence of ***32 years' imprisonment***. The appellant was convicted of murder contrary to Sections 188 and 189 of the Penal Code Act by the High Court at Mbarara and was sentenced to suffer death. Pursuant to the Supreme Court decision in ***Attorney General Vs Suzan Kigula and 417 Ors Constitutional Appeal No.03 of 2006***, this case was referred back to the High Court for mitigation of sentence only. On re-sentencing the High Court substituted the death sentence with a term of imprisonment of 32 years. The appellant appealed against the

subsequent sentence to the Court of Appeal. The Court of Appeal upheld the sentence and dismissed the appeal hence this appeal. The Sentencing Judge had considered the following factors:

"The convict is a first offender with no previous record of conviction. He is a family man with six children aged between twelve and twenty three years. He has been in touch with his family and they are ready to accept him back. His counsel submitted that the convict initiated a reconciliation process with the deceased's family in a letter written on 1/12/2011. The deceased's relatives responded in a letter of 12/2/2012 and accepted to forgive him. The local council executives of his area attest to his good conduct in a letter of 3/10/2011. He committed the offence at twenty eight years which falls within the bracket of a youthful age as defined by the Sentencing Directions 2013. He is living with HIV and there is a medical certificate on record to that effect. The Pre-sentence and social inquiry report on the court record indicated that he was aged twenty eight years at the time he committed the offence. He pursued various courses while in prison in the area of theology, HIV/AIDS counselling, peacemaking among others. The report of the head teacher indicated that the convict is on the process of self rehabilitation, reformation and transformation. I consider the foregoing to be factors mitigating a sentence of death under clauses 21(f)(i)(l)(m) & (o) of the Sentencing Directions, 2013.

……………………, ***In my opinion, in view of the highlighted mitigating factors, but mindful of the grave nature of the offence and the aggravating factors, if the trial court had heard the mitigation, and if the death penalty had not been mandatory at the time of conviction, a custodial sentence of thirty two years would be appropriate in the circumstances. Accordingly the death sentence on the conviction for the offence of murder is***

substituted by a custodial sentence of thirty two years. I note that the convict has already served close to twelve years in custody. This period should be deducted from the custodial sentence."

5 In ***Hon. Akbar Hussein Godi Vs Uganda***, Criminal Appeal no. 62/2011, the Court of Appeal upheld a sentence of ***25 years imprisonment*** against the appellant who murdered his wife. The appeal to the Supreme Court (SCCA No. 3 of 2013) that was also dismissed was only against conviction.

10 In the present case the Prosecution proposed a death sentence inviting court to consider the gravity of the offence of murder whose maximum sentence is death; the gruesome manner of the commission of the offence; that the deceased being a daughter in law of A4 deserved his protection but was instead mercilessly murdered in cold blood; that the accused persons in avenging the death of Phina by 15 killing the deceased, had taken the law into their own hands and acted with impunity; that the crime was premeditated and meticulously executed.

The Defence proposed a sentence of 20 years submitting that a death sentence would be too harsh and would not serve the purpose of reform and rehabilitation; 20 that A2 being 35 years old, A3 at 29 years and A6 at 23 years are young persons who can reform and be good citizens, while A4 being of advanced age of 55 years old also deserves leniency; A2 was arrested on 16/2/2019, A3 on 6/3/2019, A4 on 7/3/2019 and A6 on 20/11/2019, they have all been in custody for over 3 years.

25 In **allocutus**: A2 pleaded that he has family responsibilities involving taking care of his 4 young children aged 11, 9, 7 and 4 years and their mother; that the children

have since dropped out of school; and that he suffers from a heart condition, but he did not provide medical evidence. A3 pleaded for mercy on the grounds that he is sickly with peptic ulcers; he is a single parent with responsibility to care for his young child who has since dropped out of school; that his desire is to go back to school. A6 said that his has leadership responsibilities in the society as a clan leader; that he has a disability in his left hand; that he is sickly and weak; and that he has 6 young children at home to care for and their mother has since ran away from home. A6 said the court should determine the matter.

After considering all the factors, the case brings out the following aggravating factors: the degree of injury or harm where the postmortem report revealed extensive 3rd degree burns on the trunk and chopped fingers; the part of the victim's body where harm or injury was occasioned, basically the whole body; the degree of meticulous pre-meditation or planning involving a meeting; use and nature of the weapon being a panga and an inflammable substance to burn the body; the offenders deliberately targeted and caused death of a vulnerable victim, an elderly woman of 50 years; the offenders acted as a group where A2 and A6 played a leading role by burning the body of the deceased using an inflammable substance; the offence was motivated by demonstrated hostility based on discriminating characteristics of branding the deceased a witch; and the offence was committed in the presence of PW2 the deceased's daughter in law; and there was degradation of the victim in burning her body.

The following mitigating factors feature in the case: the fact that the offenders are first offenders with no previous conviction; advanced age of A4 and youthful age of A2, A3 and A6; family responsibilities of the offenders; and all the factors raised in the **allocutus** of each convict.

In this case the aggravating factors far outweigh the mitigating factors.

Under Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. I observe that:

(1) A2 was arrested on 16/2/2019 and has been in custody for 3 years, 6 months, 8 days.

(2) A3 was arrested on 6/3/2019 and has been in custody for 3 years, 5 months and 18 days.

(3) A4 was arrested on 7/3/2019 and has been in custody for 3 years, 5 months and 17 days.

(4) A6 was arrested on 20/11/2019 and has been in custody for 2 years, 9 months and 4 days.

After considering the totality of the circumstances of this case I consider a sentence of **30 years imprisonment** to be appropriate to the culpability of each of the convicts in this case. After deducting the period that each of the convicts has already spent in custody from the date of arrest, each of the convicts will now serve a sentence of imprisonment with effect from today as follows:

(1) A2. SSEKAYITA RONALD, 26 YEARS, 5 MONTHS AND 22 DAYS.

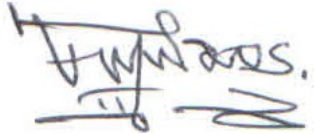
(2) A3. SSEKALASA DENIS, 26 YEARS, 6 MONTHS AND 12 DAYS.

(3) A4. BALINDA TADEO, 26 YEARS, 6 MONTHS AND 13 DAYS.

(4) A6. SSEKAYITA ANDREW, 27 YEARS, 2 MONTHS AND 26 DAYS.

The convicts are advised that each one of them has a right of appeal against both conviction and sentence, within a period of fourteen days.

Dated at Fort portal this 24th day of August 2022.



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Vincent Wagona

High Court Judge