

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT MOROTO
CRIMINAL SESSIONS CASE No. 0052 OF 2015

UGANDA **PROSECUTOR**

5 **VERSUS**

A1.LOCHOMIN LOWOSIT }
A2. LDU LOTYANG LOKURE alias APALODEWA } **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 26th day of March 2015 at Lobok village, Kikipurat Parish, Lorengechora sub-county in Napak District murdered one Lochan Juliana.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that the deceased and the first accused were involved in a wrangle over land situate at
15 Lobok village on which the deceased was constructing a new building. The deceased had purchased the plot of land from a third party yet the first accused claimed it as his on account of it having belonged to his ancestors. Two or so days before his death, the deceased had received a death threat from the first accused, which threat he reported to the police at Kathile sub-county. On the 26th March 2015 during the late morning or early afternoon hours, P.W.3 Lokwang
20 Clement, a son of the deceased, saw the first accused in the company of the second accused. The second accused was carrying a gun. Both accused passed by him at the home of the deceased as P.W.3 washed his clothes in preparation for his return to boarding school the following day. They did not to talk to him. P.W.4 Dida Gabriel too saw the second accused within the trading
25 centre carrying a gun. Later in the evening at around 7.00 pm, while the deceased and the two witnesses were in the deceased's shop, an armed man suddenly emerged and fired two bullets through the space between the door and the hinges hitting the deceased on the head and killing him instantly. P.W.3 immediately escaped into the rear room while the assassin turned and pointed the gun at P.W.4 who then pleaded for his life. The assassin ordered him into the rear room from where he later escaped after the assassin had left the scene shortly thereafter. The

following morning the two witnesses returned to the scene to find the deceased already dead. The case was reported to the police and a post mortem examination of the body was done at the scene. During the burial, the two witnesses learnt that the first accused had reported himself to the police at Kathile and he later implicated the second accused who too reported himself to the police at Kathile. Both denied any participation in the murder.

Since both accused in this case pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each of them beyond reasonable doubt. The burden does not shift to the accused persons and the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in their respective defences, (see *Ssekitoleko v. Uganda* [1967] EA 531). The accused do not have any obligation to prove their innocence. By their plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which they are charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure their conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

At the close of the prosecution case, the only evidence led against the first accused was that he had issued a threat against the deceased two days or so before his death. On the day the deceased died, the first accused was seen at the trading centre and within the vicinity of the home of the deceased in the company of the second accused who was carrying a gun. The deceased was shot dead that evening and the first accused reported himself to the police the following day under unclear circumstances.

Section 73 of *The Trial on Indictments Act* required this court, at the close of the prosecution case, to determine whether or not the evidence adduced has established a *prima facie* case against both accused. It is only if a *prima facie* case had been made out against both accused that they would be put to their defence. Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v. R*

[1960] E.A. 184 and *Kadiri Kyanju and Others v. Uganda* [1974] HCB 215). A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v. R.* [1957] EA 332). The evidence adduced at
5 that stage, should have been sufficient to require the two accused to offer an explanation, lest they ran the risk of being convicted. Although the prosecution at that stage was not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence, a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. A
10 *prima facie* case will not be established where there has been no evidence to prove an essential ingredient in the alleged offence (see *Uganda v. Alfred Ateu* [1974] HCB 179).

In the instant case, unlike the second accused against whom there was evidence placing him at the scene of crime, the evidence against the first accused was purely circumstantial. It is settled
15 law that in a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction, that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for
20 the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. In light of the weak circumstantial evidence adduced in this case, there are multiple reasonable hypotheses that can be raised that are compatible with the innocence of the accused, such as it having been a mere coincidence that he was in the company of the second accused earlier in the day.

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There being no direct, circumstantial or other cogent evidence implicating or showing to a reasonable degree of moral certainty that the first accused participated in committing the offence, I formed the opinion that if the first accused chose to remain silent in his defence, this court would not have evidence sufficient to convict him for the murder of the deceased. I therefore
30 found that no *prima facie* case had been made out requiring the first accused to be put on his defence. I accordingly, found the first accused not guilty, acquitted him of the offence of Murder

c/s 188 and 189 of the *Penal Code Act* and directed that he should be set free forthwith unless he was lawfully held on other charges.

For the second accused to be convicted of the offence of Murder, the prosecution had to prove
5 each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

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Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In the instant case there is the post mortem report dated 20th May 2014 prepared by P.W.1 Dr. Ochaya Acoli Emmanuel a Clinical Officer and the in-Charge of Kathile Health Centre III, which was admitted
15 during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by a one Lonya Marchello as that of Lokiel Ignatius. The report is corroborated by the testimony of P.W.3 Lokwang Clement, a son of the deceased, who was present when his father, the deceased, was shot twice in the head, he saw his body at the scene the following morning, and attended his funeral. P.W.4 Dida Gabriel, stated that he knew the deceased as a catechist and as an uncle to
20 his mother. He was present when the deceased was shot twice in the head, saw his body at the scene the following morning, and attended his funeral. In his defence, the accused said he came to know about the death only when he had been implicated by his co-accused and summoned to Kathile Police Station where he was arrested and required to record a statement. Defence Counsel did not contest this element. Having considered the evidence as a whole, and in
25 agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Lokiel Ignatius is dead.

The prosecution had to prove further that the death of Lokiel Ignatius was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been
30 caused unlawfully unless it was accidental or it was authorized by law (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). According to P.W.1 who conducted the autopsy, he established the cause of death as “brain injury due to the destruction of the brain tissues by bullets.” Exhibit

P.Ex.1 dated 20th May 2014 contains the details of his other findings which include the fact that the “body was found in his shop. He was lying on his back, neck extended, left arm flexed, left leg flexed while the right arm and leg extended, head resting on a stool...blood had splashed on the wall and some on the floor near his head, clothes intact though stained with blood. Found two
5 cartridges near the door but outside the house. The body had stiffened, abdomen distended, eyes and mouth open. Entry and exit wound on his head. Two wounds, i.e. entry wound small on the right side of the head, just behind the right ear and exit wound on the left side of the head slightly above the right ear but large. Abdomen had already distended. No marks of violence. Left upper and lower limbs flexed, right upper and lower limbs extended. Had already stiffened. No marks
10 of violence. Abdomen was not opened. Two cartridges recovered at the scene.” In his general observations he stated that "he was murdered using a gun as the wounds are similar to a gunshot wound and cartridges recovered."

P.W.3 Lokwang Clement who was present at the scene when his father died stated that he saw an
15 assailant fire two gunshots at his father, his father collapsed onto the ground and he saw blood coming from the deceased before he fled from the scene. When he returned to the scene the following morning, he found the body of his father in a pool of blood and the mouth was open. P.W.4 Dida Gabriel, stated that he was present when the deceased was shot twice on the side of the head and died at the scene. The following morning he returned to the scene and he saw the
20 body of the deceased still at the scene. In his defence, the accused did not offer any evidence on this element. Defence Counsel too did not contest this element. The evidence generally rules out a natural, suicidal or accidental death. Having ruled out a natural, suicidal or accidental death, I find that Lokiel Ignatius’ death was a homicide. Not having found any lawful justification for the gun shots that caused his death, I agree with the assessors that the prosecution has proved beyond
25 reasonable doubt that his death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is defined by section 191 of the *Penal Code Act* as either an intention to cause death of a person or knowledge that the act causing death will probably cause
30 the death of some person. The question is whether whoever assaulted the deceased intended to

cause death or knew that the manner and degree of assault would probably cause death. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

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knew that the manner and degree of assault would probably cause death. There is no direct
evidence of intention. Malice aforethought is a mental element that is difficult to prove by direct
evidence. Intention is based only on circumstantial evidence. Malice aforethought is a mental
10 element that is difficult to prove by direct evidence.

The court considers the nature of the weapon used, the manner in which it was applied, the part
of the body of the victim that was targeted and the impact. The weapon used in this case was a
gun as evidenced by the two cartridges which were recovered from the scene. The manner in
15 which it was applied was by firing multiple fatal shots and the part of the body of the victim that
was targeted was the head, which is a vulnerable part of the body. P.W.1 who conducted the
autopsy established the cause of death as “brain injury due to the destruction of the brain tissues
by bullets.” The accused did not offer any evidence on this element. Although there is no direct
evidence of intention, it can be deduced from the circumstantial evidence of the injuries inflicted
20 on the deceased. Defence Counsel did not contest this element. Despite the absence of direct
evidence of intention, on basis of the circumstantial evidence, I find, in agreement with the
assessors that malice aforethought can be inferred from use of a deadly weapon (a gun), on a
vulnerable part of the body (the head), inflicting brain injury through destruction of the brain
tissues by bullets, leading to the eventual death. The prosecution has consequently proved
25 beyond reasonable doubt that Lokiel Ignatius' death was caused with malice aforethought.

Lastly, there should be credible direct or circumstantial evidence placing the accused at the scene
of the crime as an active participant in the commission of the offence. The accused denied any
participation. He testified that on 19th May 2014 he was on night guard duties at the kraal of
30 Lokwakapel at Kamcharkol where he reported at 8.00 pm. He spent the night there and the
following morning he returned to the barracks where he participated in a parade. After the parade

some of the LDUs went out to dig and he began cooking food and beans while playing cards with his colleagues. At around 10.00 am he received a phone call from their commander at Kathile Headquarters summoning him and a one Ariong to go to Kathile. The two of them went there and arrived at 1.00 pm. He always kept his gun at his house. He had never been to Nariamaoi village which is about 15 kilometres from the barracks. He was told that one of his colleagues, Lochomin, had been arrested and that while he was in police custody he mentioned the name of the second accused. He did not know Lochomin before and came to know him only when they were in the cells. When he reported to Kathile he was arrested because it was alleged he had killed someone. At the time he was arrested, he was wearing a plain army green uniform, a pair of trousers and sandals. He denied having killed the deceased.

To disprove his defence, the prosecution relied on the testimony of the two eyewitnesses, P.W.3 and P.W.4. This being evidence of visual and audio identification which took place at night, the question to be determined is whether the identifying witnesses were able to recognise the accused and his actions. In circumstances of this nature, the court is required to first warn itself of likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967] EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused. This court is keenly alive to the fact that an eyewitness may be genuinely mistaken in his or her identification of the accused. This is further exacerbated by the fact that a mistaken witness could be a convincing one.

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P.W.3 Lokwang Clement Vincent testified that he knew the accused Lotyang as an LDU. On the fateful day, he had seen the accused intermittently right from the morning up to sunset wearing a checked mainly green sheet. He was wearing a pair of shorts in army colours. At around midday, the accused had found him washing clothes. He never talked to him and went away. In the evening, the accused suddenly appeared outside the shop, dressed in a sheet across the shoulder and a pair of shorts. He was holding a rifle. The second accused was the only one with that type

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of sheet. He had not seen that kind of sheet with anyone else. He was not scared when he saw the accused with the gun because he knew him. As his father stood behind the front door to the shop asking him whether he had washed his clothes and was ready for school, the accused raised the gun shoulder high and fired two shots at his father. The witness jumped backwards into the rear
5 room. It is after the accused fired the two shots that he was scared and jumped into the room behind. There were three bulbs providing light inside the shop. They provided light up to three meters outside the shop. The accused stood at the door when he shot and by aid of that light he was able to recognise him.

10 P.W.4 Dida Gabriel testified that he had known the accused since he joined LDU in 2008. On the fateful day, he had seen the accused at the Trading Centre at around 8.00 am. He was putting on a sheet and a pair of shorts and he was the only one at the Centre with a gun. He saw him again at 4.00 pm as he returned from the field. He was still dressed the same way. It was past 7.00 pm almost coming to 8.00 pm when he saw him after he had shot the deceased. He was standing
15 outside the door, about one metre from the door and he recognised him as the second accused. He was tall and was putting on a pair of shorts and a sheet across his shoulder. The pair of shorts was visible from the level of the knee. He had tied the sheet around the waist. It was green in colour. The pair of shorts was green too. It had white and brown colours in it too. Immediately after shooting the deceased, he turned and pointed the gun at this witness. He only identified him
20 by his height. The witness raised his hands pleading for mercy. He saw the face of the accused when he was about to shoot him. The accused ordered him to enter the residential room and he then recognised his voice because he used to talk to him on those occasions when he came to the shop to buy "Kicks" Waragi in sachets, although he did not come frequently. There was torchlight inside the shop. They had used old dry cells and connected them to a small torch bulb
25 fixed onto the wall. It lit the entire shop. Its light was not extending outside the shop. He told the police the assailant was tall but he did not know his name. He only knew him as an LDU. He made the statement at the scene of crime on 20th May 2014 but the police were in a hurry and thus he did not mention that the assailant was an LDU.

30 In his final submissions, counsel for the accused assailed the testimony of the two witnesses as unreliable on grounds that in their respective police statements, exhibits D. Ex. 1 and D. Ex. 2,

none of the two witnesses mentioned the accused by name nor by description as an LDU or other distinctive features. P.W.3 in his police statement described the assailant as; "a man armed came stealthily and stood at the door way and shot my father Lokiel Ignatius." On his part, P.W.4. stated that "a man came armed putting on a sheet and stood at the door pointing the gun at us." In making a dock identification of the accused, the prosecution contends that the two witnesses 5 deposed something else for the first time in court which is not stated by them when their statements were recorded by the police during course of investigation. A material contradiction between the court version of a witness and his or her previous statement made to the police, merits careful consideration in determining whether the witness is truthful and reliance could be placed on his or her evidence. Statements made by the prosecution witnesses before the 10 investigating officer being earliest statements made by them with reference to the facts of the occurrence are valuable material for testing the veracity of the witnesses examined in Court, with particular reference to those statements, which happen to be at variance with their earlier statements. But the statements made during police investigation are not substantive evidence.

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According to section 40 (1) of *The Trial on Indictments Act*, every witness in a criminal case before the High Court is to be examined upon oath. It follows that a statement recorded by the police during the investigation cannot be considered as substantive evidence, i.e., as evidence of facts stated therein as such statements are not made during trial, not given on oath, nor they are 20 tested by cross-examination. However, according to section 154 (c) of *The Evidence Act*, the credit of a witness may be impeached by proof of former statements inconsistent with any part of his or her evidence which is liable to be contradicted. It follows therefore that although a witness' statement to the police is inadmissible as substantive evidence, it may be used to confront the witness with contradictions when such witness is examined regarding those contradictions. The 25 prosecution also can, with the permission of the Court, use such statements to contradict or confront hostile witnesses. A previous statement used to contradict a witness does not become a substantive evidence but merely serves the purpose of throwing doubt on the veracity of the witness. Under no circumstances can such statements be used for the purpose of corroboration or as substantive evidence. The reason for the prohibition of the use of the statements made to the 30 police during the course of the investigation for that purpose is that the police cannot be trusted for recording the statements correctly as they are often taken down in a haphazard manner,

sometimes in the midst of a crowd and confusion, when witnesses are still in a state of shock, other emotional disturbances or similar circumstances in which omissions or inaccuracies are bound to occur. It is for that reason that it is now well established that where a police statement is used to impeach the credibility of a witness and such statement is proved to be contradictory to his or her testimony, the court will always prefer the witness' evidence which is tested by cross-examination (see *Chemonges Fred v. Uganda, S. C. Criminal Appeal No. 12 of 2001*).

According to section 27A (5) of *The Police Act* as amended in 2006, a police officer not below the rank of assistant inspector of police making an investigation into an offence may, in writing require the attendance before him or her of any person whom he or she has reason to believe has any knowledge which will assist in the investigation and record any statement made to him or her under that section. Similarly under Regulation 3 of *The Evidence (Statements to Police Officers) Rules, S.I 6-1*, a police officer in the course of investigations may question any person, whether suspected or not, from whom he or she thinks he or she may obtain useful information. Any part of such statements which have been reduced to writing may in certain limited circumstances under section 154 (c) of *The Evidence Act*, be used to contradict the witness who made it. The limitations are (i) only the statement of a prosecution witness can be used; (ii) only if it has been reduced to writing; (iii) any part of the statement recorded can be used; such part must be duly proved; (iv) it must be a contradiction of the evidence of the witness as given in court; (v) it can be used only after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction.

Generally speaking, it is insufficient for counsel for the accused to merely require the witness to confirm if he or she signed the statement recorded by the police. It should also be ascertained whether the statement was read back to the witness and he or she confirmed it to be correct before appending his or her thumbprint or signature. In the instant case, while under re-examination, P.W.3 stated that he did not read the police statement before he signed it and neither was it read back to him before he signed it. During his cross-examination, P.W.4 was never asked whether the statement was read back to him and he confirmed it to be correct before appending his signature. In effect both statements were not proved to be an accurate recording of

what any of the two witnesses told the police. Without such proof, the statements are deprived of the capacity to be used as a basis for impeaching the credit of either witness.

On the other hand, in case a witness testifies before the court that a certain fact existed without
5 having stated the same before police, a conflict arises between the testimony before the court and
the statement made before the police. This may be a contradiction or an omission but a bare
omission cannot be a contradiction. If the statement before the police officer, and the statement
made in testimony before the court are so inconsistent or irreconcilable with each other, that both
10 of them cannot co-exist, then it may be said that one contradicts the other. Therefore a statement
made before the police can be used to contradict the testimony of such a witness before the court.
That contradiction or an omission is to be tested by the Court whether it is a material or not. If it
is a material omission, it amounts to a material contradiction.

Proving omissions and contradictions in a criminal trial is one of the modes of impeaching the
15 credibility of a witness. An omission to state a fact or circumstance, in the police statement may
amount to a contradiction if the same appears to be significant and otherwise relevant having
regard to the context in which such omission occurs. Whether any omission amounts to a
contradiction in the particular context is a question of fact. That notwithstanding, innocuous
omissions will ordinarily be inconsequential. Minor discrepancies or improvement will not
20 necessarily demolish the credibility of the testimony. Trivial discrepancies, as is well known,
should be ignored. However, the Court may disbelieve the evidence of the witness, if there are
improvements in the testimony of such witness made over his or her statement to the police, to
cover up or fill omissions which cannot be explained as having arisen from the circumstances
which prevailed at the time the statement was recorded, especially where the statement was
25 recorded in a calm and controlled environment.

Although statements made soon after the incident are generally considered to be more accurate
because they are made when the memory is still fresh, the court must however, consider as well
the fact that oral accounts based on recollection of events which occurred under traumatising
30 situations are susceptible to the unreliability, lapses and fallibility of human memory even when
it is made soon after the incident. In the instant case, both police statements are indicated as

having been recorded on 20th May 2014 at 10:54 am yet the offence had been committed on 19th May 2014 at 6.55 pm, according to P.W.3 or 7.15 pm, according to P.W.4. This was barely twelve hours after such an occurrence that must have been traumatising to the two witnesses considering that P.W.3 had only a few hours before witnessed his father murdered in his presence and P.W.4 had the same killer gun pointed at him moments after that murder. The statements were recorded not in the more serene environment of a police station but at the scene, bound to be chaotic at the time by virtue of the violent nature of the death. Considering those circumstances and the numerous grammatical errors contained in the statements, suggestive of the possibility that they were recorded by an unskilled investigator, the police cannot be trusted as having recorded the statements correctly. Omissions or inaccuracies were inevitable. It is for those reasons that I am inclined to follow the decision in *Chemonges Fred v. Uganda, S. C. Criminal Appeal No. 12 of 2001* by preferring the witnesses' testimony in court, which was tested by cross-examination, to the contents of their police statements.

Defence counsel further pointed out contradictions in the testimony of both witnesses regarding the assailant's attire, the number of light bulbs in the shop at the time, the extent to which they provided light to areas outside the shop, and the sequence of events after the shots were fired. Merely because there are contradictions or inconsistencies in evidence it is not sufficient to impair the credit of the witnesses. Even honest and truthful witnesses may differ in some details unrelated to the main incident because the power of observation, retention and reproduction differ with individuals. So then when the evidence is discrepant or exaggerated allowance has to be made for the idiosyncrasies of the class from which the witnesses are drawn, their powers of observation, strength of memory and facility of description with a discount for possible bias or prejudice. Psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection.

It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence, but the quality that matters. What the court has to consider is whether because of the discrepancies, contradictions and omissions identified, the veracity of the witness is affected. It

is for the Court to consider whether the contradictions are sufficient to discredit the evidence of witnesses. Where the contradictions are not material, and the witness is neither shown to be having animus with the accused, the witness should not be branded as liar for such discrepancy. Small omissions in statements given by witness before the police or court do not justify a finding
5 that the witnesses concerned are liars. Material omissions in testimony of prosecution witness if not explained raise various doubts. The credibility of a witness will not stand impeached by merely bringing on record the contradiction. It will have further to be shown that the statement made by the witness before the Court is not only contradictory to that made by him in his police statement but also that it is a deliberate attempt to change or improve on the original statement to
10 the prejudice of the accused. If the Court finds that despite the discrepancies, omissions and contradictions, the witness emerges as a truthful witness whose evidence has a ring of truth, the Court can accept the testimonies of such a witness. Merely because a more graphic account is given by the witnesses than that which they gave to the police, is no ground to discard their evidence.

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Discrepancies which are due to normal errors of perception or observation should not be given importance although errors due to lapse of memory may be given due allowance. Discrepancies which do not shake the basic version of the prosecution case will be considered minor and may be disregarded unless they point to deliberate untruthfulness. The Court by calling into aid its
20 vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. If there are improvements in the testimony of such witness made over his or her statement to the police, to cover up or fill omissions which cannot be explained as having arisen from the circumstances which prevailed at the time the statement was recorded, the evidence may be disbelieved. Otherwise when a doubt
25 arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

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The evidence of identification in this case is essentially in-court or "dock" identification of the accused made by both witnesses. Evidence given by a witness identifying an accused as the person whom he or she saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him or her for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused. It has accordingly become established practice for a witness who has not, by reason of previous knowledge or association, become familiar with the appearance of the accused, to be asked to identify the accused at the earliest possible opportunity after the event more commonly by way of an identification parade. Such evidence is, in practice, given not only by the person who made the identification but also by persons who saw it made as evidence is given of that act of identification. This is because dock identification by a witness who has not, by reason of previous knowledge or association, become familiar with the appearance of the accused, is generally regarded as the most problematic of all forms of visual identification. The reasons for this were explained in *Davies and Cody v. The King* [1937] HCA 27; (1937) 57 CLR 170, at pp 181-182. In particular there is the danger that the witness will too readily come to believe, without any true recollection, that the man or woman charged is the one whom he or she had previously seen, particularly if his or her own memory has become dim and there is some resemblance between the two. The circumstances in court compel the witness to identify the accused in the dock. When a witness is shown a single person and he or she knows that that person is suspected of or charged with the crime, his or her natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his or her own recollection when he or she is asked whether he or she can identify that person. This tendency will be greatly increased if the witness is shown the person actually in the dock charged with the very crime in question.

Alone, and without a prior form of out-of-court identification, in-court or "dock" identification is generally held to be of little probative value, although still admissible. I have considered extensively the fallibility of dock identification. However in the instant case, both identifying witnesses testified that by reason of previous knowledge or association stretching as far back as the year 2008, they became familiar with the appearance of the accused and that he was an LDU

although they did not know his name. In the circumstances, the "dock" identification reinforces the prior identification, which serves as the primary means of identification evidence in the case. I keenly observed both witnesses as they testified in court. I have closely scrutinised the omissions in their police statement, of facts that emerged during their testimony. Having seen the
5 accused in the dock for the first time almost four years after they last saw him at the scene, they had the opportunity to embellish their recollection with many more distinctive features in the facial and other physical attributes in the appearance of the accused. They never attempted to materially change or improve that recollection. I have not found any evidence of a deliberate attempt to change or improve on the original statements to the prejudice of the accused. It was
10 not demonstrated that any of the two witness had animus with the accused. Witnesses driven by animus would be highly motivated to add embellishment to their version, at least for the fear of their testimony being rejected by the Court. There was no suggestion that the physical appearance of the accused had materially changed between the time of the offence and the time of the trial. Their recognition and description of the accused is further corroborated by the
15 observations made by P.W.2 a Psychiatric Clinical Officer who examined the accused on 27th May 2014, eight days following the commission of the offence, who in his report exhibit P. Ex. 3 noted that the accused was "dressed in army uniform and a short." Curiously, during the trial, the accused was dressed in an army pair of shorts with camouflage green, white and brown colours, more or less as described by both witnesses.

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I have considered the tests to be applied in the process of ruling out the possibility of error or mistake in the testimony of the two eyewitnesses. As regards familiarity, both P.W.3 and P.W.4 had for over six years known the accused as an LDU and an intermittent customer at the shop. In terms of proximity, each of them was less than five metres from the accused at the time he fired
25 the shots. As regards duration, in the case of P.W.3 he saw the accused arrive at the shop and was able to take in his attire and the fact that he was carrying a gun because he recognised him as a person he knew and one who did not pose any immediate threat. Panic only set in after the accused had fired the shots. He therefore had ample time to recognise the accused. As regards P.W.4 he neither saw the accused approach nor at the time he fired the shots. He only saw him
30 when immediately thereafter he turned round and pointed the gun at him. In the circumstances, the recognition took place under a state of panic as the witness pleaded for his life. However, his

visual identification is coupled with audio identification because the accused spoke to him as he ordered him to retreat into the rear room. Considering prior familiarity, I am satisfied that in the circumstances, each of the witnesses had ample opportunity to recognise the accused. Lastly, there was torchlight from one bulb (according to P.W.4) and three bulbs (according to P.W.3). I
5 find this discrepancy to relate only to the number of sources of light as opposed to the type of source or the existence of any light at all at the scene at the material time. It is a discrepancy on detail arising from the passage of time rather than the substance of availability of light sufficient enough for each of the witnesses to have seen and recognised the accused. Having considered the evidence as a whole, I have not found any possibility of mistaken identification by any of the
10 identifying witnesses. His alibi has been effectively disproved by prosecution evidence placing him at the scene of crime as the perpetrator of the offence.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find the second accused guilty and convict him
15 accordingly for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Moroto this 30th day of September, 2017.

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Stephen Mubiru
Judge.
30th September, 2017.

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