

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA**

CRIMINAL APPEAL NO. 50 OF 2015

(Coram: Katureebe, CJ; Arach-Amoko; Mwangusya; Mwondha; Tibatemwa-Ekirikubinza; JJ.S.C)

Between

1. Turyahabwe Ezra
2. Byarugaba Patrick
3. Atwongeirwe Boaz
4. Samuel Tumusiime
5. Akampa Babari
6. Bamutabarire Sereverio
7. Akankwasa L
8. Oshabire Dick
9. Byaruhanga Sio
10. Byamukama Ernest
11. Rwanyizire Samuel
12. Mwesigwa Peter
13. Twongeirwe George

..... Appellants

And

Uganda Respondent

[Appeal arising from the judgment delivered by the Court of Appeal, at Kampala on the 16th December, 2014 before Opio Aweri, Bossa, and Kakuru, JA]

JUDGMENT OF THE COURT

The appellants were indicted on one Count of Murder contrary to Sections 188 and 189 of the Penal Code Act and two Counts of Aggravated Robbery contrary to Sections 285 and 286 (2) of the Penal Code Act. In the first count the allegation was that on the 24th November, 2007 at Buhumuriro village Rukungiri District they murdered **Narohoza Richard**. In the second count it was alleged that on the same day they had robbed **Nayebare Alex** of an assortment of goods and immediately before or immediately after the said Robbery used deadly weapons to wit, pangas, spears and axes. In the third count the Robbery was committed against **Izidoro Bayenda**.

The background to the case as found in the testimony of the three witnesses brought by the prosecution is as follows:-

PW1 Kyasimire Beatrice is the sister of the late Narohoza Richard. She testified that on 24/11/2007 at about 8:00 a.m. She was at home together with the deceased and their sick mother. The deceased got out of the house but returned immediately telling them that their home was under siege. Their sick mother told them to leave the house. PW1 and the deceased got out. On reaching outside they found the area Trading Centre Chairman among the crowd. She identified A1 Turyahabwe Ezra as the said Trading Centre Chairman. Among the mob she was able to

recognize and identify Byarugaba (A2), Turyamureba (A3), Tumusiime Samuel (A6), and the rest of the accused.

Byarugaba (A2) ordered one Richard (not in court) to grab the deceased, which he did. The deceased was tied kandoya (arms behind his back). The mob set on the deceased and beat him up. Then the group moved to the house of Ainembabazi a brother to the deceased and vandalized it. They moved to another house in the compound and did the same. All the houses in the homestead were vandalized and others set on fire and deroofed. Next, the mob went and destroyed the banana plantation. Atwongyeirwe Boaz (A4) told her to remove her sick mother from the house which was then set on fire. Later the Police arrived at the scene and fired into the air to disperse the mob to no avail. The mob attacked the Police and the Police fled for their lives. Later in the day, another group of Police came to the scene. The Police took a statement from the deceased and advised them to go to the Gombolora Headquarters for safety. The Police then left the scene. When the Police left, the mob regrouped and went back to the scene.

The witness ran uphill but the deceased was too weak to run. From where she was hiding nearby, she heard one Lamu (not in Court) tell the deceased that his days were numbered. This Lamu and Bamutabarire Sereverio (A8) then dragged the deceased on

the ground. A1 hit the deceased on the thigh with a panga. The deceased cried out and crawled into the banana plantation.

From there A2 grabbed him and ordered that she too (the witness) be arrested. One Kapesa (not in court) chased her but she was able to flee and ran to the nearby Police Post where she reported what was going on. To her surprise, she was told that Policemen were not prepared to risk their lives with the mob. She spent the night at the Police post with her father who had also run there for safety. The following morning when they went back they found the dead body of Narohoza Richard in a potato garden near their home.

Jennifer Kehoda appeared as PW2. She is the sister-in-law of the deceased Narohoza Richard. She testified that she knew all the accused before the court. On that fateful morning of the 24th of November 2007, she was at home. While there, she heard whistles blowing and horns and drums sounding. The home of Izidoro her father-in-law was under attack. Among the mob, she was able to identify all the accused persons. The mob drafted her into their force and told her she was not to leave. She went along with the mob as the mob moved from place to place. The mob was in her estimation more than 200 persons. The mob was demolishing and vandalizing whatever they saw at the home of Izidoro. She then saw her brother-in-law now deceased tied up. Later Byarugaba Sio (A11) untied him. The mob afterwards

compelled her to take them to Kahoko where the animals of Izidoro were in the field grazing.

The animals were cut down, banana plantations destroyed and houses set on fire or deroofed. She was advised to leave lest the mob switched their anger on her. She went back to her home. At about 11.30 a.m. the mob left the home of Izidoro. At about 1.00 p.m., Police from Rukungiri Police Station arrived at the scene. Narohoza, now deceased, made a statement to the Police after which the Police left. At about 6.00 pm. the mob came back. She ran to the deceased and informed him. She hid herself in the nearby bush. She then saw the deceased being dragged along. In the lead were Turyahabwe (A1) and Byarugaba (A2). The deceased was being beaten. A3 who is a brother to the deceased pleaded with the mob to spare his brother but in vain. The mob followed the deceased into the banana plantation where he had crawled. After the mob had left she went and spent the night with one Alice.

PW3 D/AIP Turyagumisiriza, a Police Officer was at the material time attached to Rukungiri Police Station. On the morning of 25.11.07 a report was received at Rukungiri Police Station that a murder had been committed the previous day. He together with the O.C. CID and other officers went to Kahoko to the reported scene of the murder.

About a quarter of a kilometre away from the scene they found a group of people roasting beef. The police managed to arrest some

of the revellers and all the accused before the court were part of that group.

The body of the deceased was recovered from the scene and taken to Kisiizi Hospital where a post-mortem examination was performed by Dr. Mugwanya. He found deep cut wounds on the forehead and right parietal area, right forearm, right hand, right elbow, right thigh, right side of the neck, trachea and cut Carotid artery. The cause of death was haemorrhagic shock (blood loss) due to cut right carotid artery.

We set down the defences of all the accused person, who, save for A2 and A3 pleaded alibi.

A1 Turyahabwe Ezra, aged 45 years testified that on 24.11.2007 between 7:30 a.m. and midday he was attending a health Society Branch meeting at Kisizi. After the meeting he went to his shop which he opened for business till evening. He denied having been part of the mob that attacked the home of Izidoro during which the deceased was killed.

A.2 Byarugaba Patrick aged 53 years was area chairman Buhumuro. He testified that on 24.07.2007 at 9:00 a.m. he left his home for the trading centre from where he heard of the attack on Izidoro's home. He headed for Izidoro's home where he saw a crowd which was destroying property. He ran to the police Post to report but found that the police was already aware of what was going on. He was arrested on 27.11.2007 when the son of the

deceased one Twinamatsiko identified him as one of those who had killed the deceased.

A.3 Turyamureba aged 38 years a brother of the deceased who testified that on 24/11/2007 he was at Nyarurambi Trading Centre where he met A.1, A.2, Tumusiime Samuel (A.6) Mwesigwa Peter (A.14) Bamutabarire (A.8.) Boaz and others who assaulted him and told that he was from a family of thieves. He was led to his home while being beaten. The destruction of the property was in his presence but he did not participate in the assault of the deceased because he was himself a prisoner.

A4 Atwongeirwe Boaz aged 20 years testified that he was a student and on 24.11.2007 he was in Muhijo cell, Kashambya, Kabale District and not at Kahoko, Nyakishenyi, Rukungiri the scene of the crime.

A.5 Nuwamanya Roland aged 24 years testified that on 24.11.2007 he was attending a church service which he left in the evening. He stated that on 25.11.2007 he was arrested at a hill where he had gone to monitor what was happening. He was identified by PW1 and PW2 as one of those who had been at Izidoro's home whereas not.

A.6 Samuel Tumusiime aged 60 years testified that he was a security guard at Kisizi Hospital and that on 24.11.2007 he was on duty from morning up 1:30 a.m. and only went to the home of Izidoro when he saw an inferno.

A.7 Akampa Babari aged 28 years testified that he was a school pupil and on 24.11.2007 he was attending to his sick mother at Kisizi Hospital and did not know what happened at the home of Izidoro.

A.8 Bamutabarire Sereverio aged 45 years testified that on 24.11.2007 he was at Nyamishanje where he had gone to collect a cow that had strayed there. He stated that never went to the home of Izidoro on 24.11.2007 but he was arrested on 25.11.2007 when he was proceeding there to commiserate with them on the death of the deceased.

A.9 Akankwasa L. aged 33 years testified that on 24.11.2007 he was at Kisizi Hospital where his brother had been admitted. He was arrested on 25/11/2007 on his way from Kisizi Hospital. He knew nothing about the killing of the deceased.

A 10 Oshabire Dick aged 26 years testified that on 24.11.2007 he had gone to Kisizi Hospital to see a patient. He was arrested on 25.11.2007 from Nyabubare Trading Centre and taken to a Police Vehicle where he found others also under arrest.

A.11 Byaruhanga Sio aged 45 years testified that on 24.11.2007 he was at his home up to 1: 00 p.m. when went to attend a feast at Kyibale from where he was told as to what had happened back home. He was arrested on 25.11.2007 at 9:00 a.m. and taken to Narushanje in a Police vehicle

A.12 Byamukama Ernest, aged 23 years, school boy of Nyakashenyi High School who testified that on 24.11.2007 he was at school. He was arrested on 25.11.2007 on his way from Kehoko and taken to the Police where he was informed that he was a suspect in a case of murder.

A.13 Rwanyizire Samuel aged 60 years testified that on 24.11.2007 he was seriously sick at the home of one, Byabashaija. He never left the home of Byabashaija till his arrest on 27.11.2007 by military Police from Mbarara.

A.14 Mwesigwa Peter aged 62 years testified that he does not know what happened at the home of Izidoro. He was arrested on 27.11.2007 at Nyamurambi cell where he had gone to bake his bricks.

A.15 Twongeirwe George aged 35 years testified that on 24.11.2007 he spent the whole day at his home and only learned of the death of the deceased on Radio. He was arrested on 30.11.2007 at Nyarurambi and taken to Mbarara from where he was taken to Rukungiri on 04.12.2007.

Originally nineteen persons were indicted for the above offences. At the commencement of the trial the case against A.10 Nahabwe Benet and A.12 Turyabitunga Nicholas had abated because both of them had died in prison. The charges against A.5 Roland Nuwamanya and A.16 Tumusiime Agnes were withdrawn but for

some unexplained reason Roland Nuwamanya remained on the indictment and was tried.

Erikanciro Turyamureba was acquitted by the High Court while Roland Nuwamanya was acquitted by the Court of Appeal on realising that he had been erroneously tried and convicted. The acquittal of A3 at the High Court and that of A5 at the Court Appeal means that the numbering of the remaining thirteen appellants changed except for A.1 Turyahabwe Ezra and A.2 Byarugaba Patrick.

The appellants were convicted on the Count of murder and sentenced to life imprisonment. They were acquitted on the two counts of Aggravated Robbery. They appealed to the Court of Appeal against the conviction and sentence and raised the following grounds:-

1. The learned trial Judge erred in convicting and sentencing the appellants A.7, A.9, A10, A.11, A.13, when there was no evidence against them by the prosecution and A.5 when charges had been withdrawn against him by Court.
2. The learned trial Judge erred by relying on the evidence of PW1 (Beatrice Kyansiime) on identification of the assailants when she had moved up the hill, away from the home when the attackers returned to victim's home.
3. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record as a whole and

relied on the evidence of PW1 and PW2 on identification of the attackers which was full of inconsistencies.

4. The learned trial Judge erred in holding that the offence of murder was committed when malice aforethought an essential ingredient of the case of murder was not proved by the prosecution.
5. The learned trial Judge erred in holding that the alibi set up by the appellants crumbled when it had not been disproved by the prosecution evidence.
6. The learned trial Judge erred in law and fact when he relied on the uncorroborated evidence of A.3 Turyamureeba, an accomplice in convicting and sentencing the appellants.
7. The learned trial Judge erred in law and fact in his interpretation and application of well-established law regarding common intention and erroneously convicted the appellants and sentenced them to life imprisonment for the offence of murder.

The Court of Appeal dismissed the appeal and upheld both the conviction and the sentence of life imprisonment. They appeal to this Court on the following grounds:-

1. That the learned Justices of Court of Appeal erred in law and fact in failing to re-evaluate the evidence of the Appellant (sic) Court and as a result came to a wrong conclusion.

2. That the learned Justices of Court of Appeal erred in law and fact in imposing an illegal, harsh and excessive sentence of life imprisonment.

All the appellants were represented by Mr. Muwonge Emmanuel on a State brief while the respondent was represented by Ms Akello Florence Owingi, Principal State Attorney.

In his submission Mr. Muwonge faulted the Court of Appeal for failure to re-evaluate the evidence and come up with its own inferences on all issues of fact and law as they are required to do under Rule 30 (i) of the Judicature Act (Court of Appeal Rules). According to him both the High Court and the Court of Appeal relied on the uncorroborated and contradictory evidence of PW1 Kyasimire Beatrice, who apart from mentioning only a few of the accused persons in Court bundled the rest together instead of identifying each one of them. Counsel further submitted that the prevailing conditions did not favour correct identification of the participants in the crim because the witness was scared for her life and that she ran to the hills to hide. Both Courts failed to assess the factors favouring correct identification against those that rendered it difficult before coming to the conclusion that the appellants had participated in the killing of the deceased. He also faulted the High Court and the Court of Appeal for relying on the evidence of A.3 who was trying to exonerate himself to corroborate the evidence of PW1 and PW2

On the alibi raised by each of the appellants Mr. Muwonge complained that instead of considering the cases of the appellants as individuals they were tried as a mob and this had occasioned a miscarriage of Justice.

On ground two Counsel submitted that the two Courts below imposed an illegal, harsh and excessive sentence of life imprisonment. He argued that the two Courts below acted on wrong principles and overlooked some material factors and that this warrants interference by this Court. He submitted that both Courts never took into account mitigating factors including the fact that all the appellants were first offenders, that some were very elderly as well as the level or degree of participation in the commission of offence which was different.

Counsel for the respondent supported the conviction of the appellants arguing that the High Court had properly evaluated the evidence on record which in turn was re-evaluated by the Court of Appeal which came to its own conclusion that all the appellants had been properly identified at the scene of crime. She submitted that the evidence of PW1 and PW2 was corroborated by that of A3, a brother of the deceased who was present throughout the period the appellants attacked the deceased whom they killed during an attack where property was also destroyed.

On sentence Counsel for the respondent submitted that the issue of sentence was never raised in the Court of Appeal and

according to Section 11 of the Judicature Act it cannot be raised in the Supreme Court. According to her, entertaining the issue on sentence would mean faulting the learned Justices of Appeal on a matter they did not adjudicate upon.

It is now settled that this Court as a second appellate Court does not have the duty to re-evaluate evidence unless it has been shown that the first appellate Court did not re-evaluate the evidence on record. In the case of **Areet Sam vs Uganda Supreme Court Criminal Appeal No. 20 of 2005** the Supreme Court made the following observation:-

“We also agree with Counsel for the respondent that it is trite law that as a second appellate Court we are not expected to re-evaluate the evidence or question the concurrent findings of facts by the High Court and the Court of Appeal. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong on findings of fact, this Court is obliged to do so and ensure that justice is properly and truly served.”

In order to determine whether or not both the High Court and the Court of Appeal properly evaluated and re-evaluated the evidence adduced by the prosecution before coming to the conclusion that all the appellants participated in the murder of the deceased it is compelling to analyse the evidence of the two witnesses who claim to have identified them.

The first witness, Kyasimire Beatrice (PW1) testified as follows:-

“I know all the accused. They are all from my village. I knew Naruhoza Richard. He was my brother. He was killed. This was on 24.11.2007. On 24.11.2007 at about 8:00 a.m. I was with my mother and another child. Naruhoza got out and returned almost immediately and said we had been surrounded. Then my mother told us to leave her alone. I went out with him this time and outside was the LC1 chairman now A.1 leading these people. This is Byarugaba now A.2. This Byarugaba threw a stone on top of Izidora Bayenda’s house. This was my father. Naruhoza asked him why he was throwing stones at our father’s house. Byarugaba told Edward son of Katemba to arrest Naruhoza Richard. Edward grabbed Naruhoza and Byarugaba tied Naruhoza with his hands behind (Kandoya). Turyahabwe now A.1 hit Naruhoza on the thigh. The rest of the group set on Naruhoza and beat him up. The group was composed of A.3 the grandson of Rwambuka Samwiri now A.6 identified all these people now before the Court among those who were beating Naruhoza.”

Later on in her testimony she mentioned A.4 who called her to remove her sick mother from the house before it was set on fire and A.6 who stopped the group from entering the house of Kasaija but instead proceed to the hill where the family’s animals

were grazing. So the only persons PW1 mentioned were A.1, A.2, A.3, (who was later acquitted) Edward son of Katemba who was not indicted, the grandson of Rwambuka whose identity cannot be ascertained, A.4, A.6 and A.8. A.6 and A.8 were seen by PW1 dragging the deceased while he was being assaulted by A.1 and A.2. Both PW1 and PW2 estimated the crowd that went on rampage to destroy property and kill the deceased to be two hundred.

According to the Police Officer who arrested the appellants over fifty people were rounded up in connection with the offence. He relied on the statement of PW1 to screen those who participated in the commission of the offence from those who were rounded up without evidence of participation. Although PW1 picked out over twenty people from those who had been rounded up only nineteen were charged in Court. During the testimony of PW1 and PW2 only a few of the accused persons were named by the two witnesses instead of identifying and naming all of them as PW1 had done in her Police Statement. It was necessary to name all the accused persons in the dock because some of them had not been named by PW1 in her Police Statement which had been exhibited. Those named in Court by PW1 were Turyahabwe Ezra (A.1) Byarugaba Patrick (A.2), Turyamureeba E. (A.3) Atwongeirwe Boaz (A.4) Samuel Tumusiime (A.6) and Bamutabarire Severio (A.8).

Of the appellants now before the Court PW1 did not mention Akampa Babari who was A.7 now appellant No.5, Akankwasa L. who was A9 now appellant No.7 Oshabire Dick who was A.10 now appellant No.8, Byaruhanga Sio who was A11 now appellant No.9, Byamukama Ernest who was A.12 now appellant No. 10, Rwanyizire Samuel who was A.13 now appellant No.11, Mwesigwa Peter who was A.14 now appellant No.12 and Twongeirwe George who was A.15 now appellant No 13 in her statement to the Police made on 25.11.2007 and yet D/IP Turyamusinza David (P.W.3) who carried out the arrest relied on her statement to charge the nineteen people as some of these that had participated in the murder of the deceased. The significance of this evidence is that if PW1 did not mention some of these appellants in her statement to the Police there was no basis for charging them let alone arresting them.

The second witness, Jennifer Kehoda (PW2) testified that she went to the home of Izidoro her father in law when she heard commotion from the direction of the home. She found a mob which she estimated to be about two hundred people destroying property. She was forced to move with the crowd as they went about the destruction of the property already described in this judgment. On her part she specifically mentions Turyahabwe Ezra, Byarugaba LC1 Chairman, Tumusiime Stanley, Silverino, Roland (A.4) Mwesigwa (A.14) and Nuwabiine (A.15). She testified that contrary to PW1's assertion that A.3 had participated in the

assault of the deceased and the destruction of property he himself had been beaten when he tried to plead with the crowd who were beating up the deceased.

At the time of the trial A.4 was Atwongeirwe Boaz and not Roland, A. 15 was Twongeirwe George and not Nuwabiine. She too, did not specifically mention A.7 Akampa Babari now appellant No.5, A.9 Akankwasa Edwin now appellant No.7, A.10 Oshabire Dick now appellant No.8, A.11 Byaruhanga Sio now appellant No. 9, A.12 Byamukama Ernest now appellant No.10, A.13 Rwanyizire Samuel now appellant No.11 and A.15 Twongeirwe George now appellant No.13. She mentioned A.14 Peter Mwesigwa who was not mentioned by P.W.1 on whose identification the Police relied to charge the appellants. It is not clear whether Akankwasa L. mentioned by the same witness is the same as Akankwasa Edwin the appellant before the Court because the initial does not reflect the name Edwin. It should also be observed that Nuwabiine who was described as A.15 does not exist.

The evidence of PW3 was that on 25.11.2007 he went to the scene where he found about fifty people roasting meat. He rounded up these people and nineteen of them were identified by PW1 as having participated in the assault of the deceased and destruction of property. As already observed there are people who were charged that were not named by PW1 in her statement. The arresting officer did not explain their inclusion on the charge of murder since there was no other witness that implicated them.

In our view it was not enough for the eye witnesses to identify a few of the accused persons in the dock and then generalise about the participation of the rest in the commission of the offence. Each of the accused persons should have been specifically identified as participants in the commission of the offence. A.3 is a good example because while PW1 testified that he had participated PW2 testified that although he was present he was not a participant in the commission of the offence but himself a victim. In a crowd of over two hundred people as estimated by PW2 mere presence may not be enough to establish the participation in the murder of the deceased and in our view appellants Nos. 5, 7, 8, 9, 10, 11, 12 and 13 who were not mentioned by PW1 in her Police statement cannot be said to have participated in the killing of the deceased. Neither the High Court nor the Court of Appeal subjected the evidence of PW1 and PW2 to such scrutiny that would leave no doubt of their participation in the commission of the offence. Instead of generalising the identity of the accused persons in the dock each one of them should have been pin pointed in order to establish whether or not he played any role. This is especially so when A.3 who was acquitted and PW2 testified that they were forced to move with the mob as they went about the destruction of property. PW2 estimated the crowd to be two hundred and not all the two hundred persons participated in the assault of the deceased. Some of them might have been overcome by curiosity and moved

along with the crowd as mere spectators seeing what was happening.

Having found insufficient proof of the participation of Akampa Babari (appellant No.5), Akankwasa Edwin (appellant No.7), Oshabire Dick (appellant No.8), Byaruhanga Sio (appellant No.9), Byamukama Ernest (appellant No.10), Rwanyizire Samuel (appellant No.11) Mwesigwa Peter (appellant No.12) and Twongeirwe George (appellant No.13) their convictions are quashed and sentences set aside.

As to the rest of the appellants their Counsel complained that their alibis were not evaluated before they were rejected. He submitted that both Courts only evaluated the prosecution version of the case and accepted it without evaluating the defence version of the case which in his view was erroneous.

The trial Judge set out the alibis of each of the accused persons which he rejected. He stated as follows:-

“All the accused persons pleaded alibi. The law on alibi is clear. It is idle to add to the acres of paper and streams of ink that have been devoted to its discussion. I had two eye witnesses before me.

I subjected their demeanour while in the witness box to meticulous and anxious examination bearing in mind their close relationship to the deceased. I must say without

the slightest hesitation that I found them to be witness of truth. They had more than ample time to see and closely observe what was going on and who was who in the mob. I rule out any possibility nay any probability of an honest but mistaken identity. All the accused were ably and honestly identified by the two women witness. Their alibi crumbles like a house of cards. Save that of A.3 who admitted being at, the scene as a prisoner of the mob.”

The Court of Appeal had this to say:-

“We have already stated that we agree with the learned trial Judge, that the appellants were all positively identified by PW1 and PW2.

In addition PW3’s evidence corroborates that of PW1 and PW2 and squarely puts the appellants at the scene of crime. To that extent the prosecution disproved the defence of alibi set out by each of the accused.”

The appellants’ Counsel faulted the High Court and Court of Appeal for failure to subject each of the appellant’s alibi to scrutiny before holding that they had been disproved by the prosecution. In order to determine whether or not the two Courts below misdirected themselves on the evaluation of the defences of alibi we seek guidance from the case of **Bogere Moses and**

Anor Vs Uganda SCCA No. 1 of 1997 where it was stated by this Court as follows:-

“The passage cited earlier in this judgment shows that the learned trial Judge held the defences of alibi to be unsustainable because, “through the evidence of the four eyewitnesses the accused had been put at the scene of crime.” What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the Court must not base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable. In the instant case we have found it difficult to avoid the conclusion that the learned trial Judge considered and accepted the prosecution evidence alone, and then rejected the defence summarily simply because he had accepted the

prosecution evidence. That was in our view a misdirection. Accordingly we hold, with due respect, that the Court of Appeal erred in law in upholding that decision of the trial Court, which had been arrived at pursuant to a misdirection." (underlining for emphasis)

In our view neither the High Court nor the Court of Appeal complied with the above requirement. They fell into the error of accepting the prosecution version of the case without weighing it against the defence version before rejecting the alibis. This calls for re-evaluation of the case in line with the case of **Areet Sam Vs Uganda** (Supra) in order to determine as to whether or not the prosecution disproved the alibis raised by the appellants.

Turyahabwe Ezra (appellant No.1) testified that on the day in question he was attending a meeting at Kisiizi Hospital where he spent the whole day.

The testimony of PW1 was that the appellant who was the Trading Centre Chairman was among the crowd who attacked their home and killed her brother. PW2 also testified that she saw the deceased being dragged and beaten and the appellant was in the lead together with Byarugaba (appellant No.2).

Byarugaba Patrick (appellant No.2) testified that he went to the scene and witnessed the destruction of property which he reported to the Police. The testimony of PW1 was that the appellant was part of the mob which attacked their home and

PW2 testified that when the deceased was being dragged and beaten the appellant and Turyahabwe Ezra (appellant No.1) were in the lead.

Atwongeirwe Boaz (appellant No.3) testified that he was a student and at the time of the incident he was in Kabale and not Rukungiri District. He stated that he went to Nyakisenyi on 25.11.2007 where he was arrested. PW1 testified that this appellant was part of the mob and he is the one who told her to remove the sick mother from the house before it was set on fire.

Samuel Tumusiime (appellant No. 4) testified that 24.11.2007 he was on duty at Kisiizi Hospital where he worked as a security guard. At about 9:00a.m. and he saw fire at the home of Izidoro. He proceeded home. During cross examination he stated

“There was drumming. I also went there. I believe Kahoda and Kasiime saw me because I was there.” This in effect places him at the scene and confirms the testimony of PW1 and PW2 who testified that he was part of the crowd that participated in the killing of the deceased and destruction of property.

Bamutabarire Sereverio (appellant No. 6) testified that on 24.11.2007 he was Nyarushanje where he had gone to collect a cow that had strayed there. He denied having gone to the home of Izidoro on 24.11.2007 but was arrested on 25.11.2007 on his way there to commiserate with them on the death of the

deceased. The evidence of PW3 on the arrest of the appellants was that he found them feasting. It is, therefore, not correct to say that he was on his way to the home of Izidoro to commiserate with them on the death of the deceased. The appellant was one of those people pinpointed by PW1 from those that had been rounded up and PW2 mentioned him in her testimony as having been part of the crowd that killed the deceased and destroyed property.

After weighing the appellant's defence of alibi against the prosecution version we believe that these appellants were placed at the scene. As rightly pointed out by both Courts below the incident took place in broad daylight from 8:00 a.m. to 6:00p.m. and both PW1 and PW2 knew the appellants very well and could not have mistaken them for anybody else among the crowd. With the help of PW1 the Police officer who rounded up the suspects was able to screen those who had participated in the commission of the crime from those who had not.

On sentence Counsel's submission that the two Courts below imposed an illegal, harsh and excessive sentence of life imprisonment mixes issues of illegality and severity of sentence. Unfortunately he did not demonstrate how a life sentence is an illegal sentence. It is not. The maximum sentence for the offence of murder is death and for the wanton manner the appellants killed the deceased they could have faced the death penalty.

On the issue of mitigation of sentence Counsel submitted that the Courts below did not consider mitigating factors which were that the appellants were first offenders, very elderly and there was varied degree of participation.

In the first place as rightly pointed out by Counsel for the respondent the appellants never raised the issue of severity of sentence at the Court of Appeal and the Court cannot be faulted for not considering it.

Secondly, unless the sentence is illegal which it is not or manifestly excessive this Court would not interfere with it. In the circumstances of this case the manner in which the appellants committed such a heinous crime would render the fact they were first offenders of little relevance. Only A.5 Samuel Tumusiime who gave his age as 60 years is of advanced age. We would not consider the advanced age of this appellant a mitigating factor because he should have had a restraining influence on the younger appellants instead of joining them in the commission of the heinous crime.

In conclusion we have looked at the entire case before arriving at the conclusion that the remaining appellants participated in the killing of the deceased. We were constrained to do a re-evaluation of the evidence because although the Court of Appeal did a revaluation it was not adequate to address the participation of all the appellant in the commission of the offence. As a

practice when a trial Court is faced with a multitude of accused persons as was in this case each of them should be properly identified in the dock instead of generalisation. It was for this reason that this Court found some of the appellants were not identified with the killing of the deceased although they might have been present.

In the result the appeals of appellants No. 1, 2, 3, 4, and 6 against both conviction and sentence are dismissed.

On the other hand the appeals of appellants No. 5, 7, 8, 9, 10, 11, 12, and 13 to are allowed.

Dated this18TH day ofMAY.....2018

Katureebe, Chief Justice
Justice Supreme Court

Arach-Amoko, JSC
Justice Supreme Court

Mwangusya, JSC
Justice Supreme Court

Mwondha, JSC
Justice Supreme Court

Tibatemwa-Ekirikubinza, JSC
Justice Supreme Court