THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.62 OF 2011

(Original High Court at Mukono Criminal Session Case No.0257 of 2010)

HON. AKBAR HUSSEIN GODI ::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA ::RESPONDENT

CORAM: HON. LADY JUSTICE C.K. BYAMUGISHA, AG.DCJ

HON. MR. JUSTICE S.B.K. KAVUMA, JA

HON. MR. JUSTICE REMMY KASULE, JA.

JUDGEMENT

This is an appeal by Akbar Hussein Godi, hereinafter referred to as **"the appellant"**, against a conviction for murder contrary to **Sections 188 and 189 of the Penal Code Act.** He was sentenced to 25 years imprisonment by the High Court (Lawrence Gidudu, J.)

Background:

The facts of the case, as found by the trial court, are that the deceased Rehema Caesar Nasur, was the wife of the appellant having got married to her on 15.12.2007. At marriage, the appellant was 21 and the deceased 19 years old.

After their marriage, the appellant, a university graduate in law took to politics becoming an elected Member of Parliament for Arua Municipality constituency. The deceased continued to pursue her studies in senior six at Kakungulu Memorial School, Kibuli. Both resided in their matrimonial home at Bwebajja along Kampala – Entebbe Road, Wakiso District.

Soon after the marriage, the appellant and the deceased began to have discord as husband and wife. The deceased complained to her relatives and friends that the appellant was beating her up and threatening to shoot her with a gun. The appellant, on his part, complained that the deceased was returning home late after her school hours falsely claiming to have been staying at her parent's home at Martin Road, Old Kampala. Appellant suspected that the deceased was seeing other men besides him.

The discord escalated, leading the deceased to separate from the appellant. She moved to her parent's home at Martin Road, and later to Nana Hostel, near the Law Development Centre, Makerere. At the hostel, she stayed with two female Tanzanian student friends. She also left Kakungulu Memorial School, Kibuli, and joined Old Kampala Secondary School.

The appellant now and then telephoned the deceased quarrelling and at one time physically confronted her at Nana Hostel. The deceased continued to complain that the appellant was threatening to do harm to her. She stopped responding to the appellant's incessant telephone calls. For a number of days the appellant dtelephoned to the two sisters of the deceased

appealing to each one of them to persuade the deceased to respond to his (appellant's) telephone calls.

The two sisters appealed to the deceased to respond to the appellant's telephone calls. In the evening of 04.12.2008 at Martin Road, at the house of the deceased's father and step mother, the deceased, after responding to a telephone call apparently from the appellant, was seen dressing up and then left, explaining to her two sisters that she was going out for dinner with someone, whose particulars she did not disclose to the two sisters.

Later, in the night of 04.12.08 at Lukojjo village, Mukono District, the deceased was found dead having been shot with a gun. A post mortem was performed on the deceased's body before the same was buried in Arua at the home of the appellant, her husband.

The appellant was subsequently arrested, charged, tried and convicted of the murder of the deceased and sentenced to 25 years imprisonment. Hence this appeal.

Legal Representation

Learned Counsel Henry Kunya represented the appellant while Joan Kagezi, Senior Principal State Attorney, was for the respondent.

Grounds of appeal:

The appeal is based on four grounds. Both Counsel first dealt with grounds 1 and 4 together. They then dealt with grounds 3 and 2, each separately. This Court shall also follow the same order.

Grounds 1 and 4:

Ground 1:

That the learned trial judge erred in law and fact when he convicted the appellant on the basis of unsatisfactory circumstantial evidence.

and

Ground 4:

That the learned trial judge erred in law and fact when he failed to adequately evaluate all the material evidence adduced at trial and hence reached an erroneous decision which resulted into a miscarriage of justice.

Submissions of appellant's Counsel on Grounds 1 and 4:

The appellant's counsel submitted that the trial judge failed to properly evaluate and consider the evidence of prosecution witnesses PW3 (Henry Tamale), PW4 (Lwanga Muhamood), PW6 (Nakavuma Margaret), PW11 (Kamya Lameka Salongo), PW15 (Nakanwagi Harriet) and PW17 (Rashid Gitta)as to the commission of the offence.

The evidence of each of these witnesses was that when the deceased was killed, there was little light and fear had gripped

everyone due to gunshots with the result that the killer and the particulars of the motor vehicle at the crime scene were never clearly identified. Had the trial Judge properly appreciated this, counsel contended, he would not have concluded that the appellant is the one who murdered the deceased.

Counsel submitted that no evidence was adduced of the appellant threatening to kill the deceased on the day the crime was committed. No one saw the appellant or heard his name being called out as the deceased was being murdered. PW1 (Bizu Rashida), PW2 (Cisse Nasur), both sisters of the deceased, and PW25 (Khadija Nasur) the deceased's step mother never reported to police that the appellant was threatening to kill or harm the deceased. According to PW25, whatever misunderstandings existed between the deceased and appellant were expected and normal in a marriage. According to PW8 (D/IP Opendi Osuma Benson), the only report to police was that the appellant had unlawfully taken a telephone of the deceased's friend. There was no credible evidence of the appellant threatening the deceased. PW9 (Bukenya Grace), security officer at Nana Hostels, denied knowledge that the appellant was sending life-threatening messages to the deceased.

As to the telephone calls, PW26 (Samuel Lugesera) the MTN security officer's evidence did not conclusively place the appellant in Mukono when and where the deceased was killed.

As to the appellant's pistol, PW23 (Robinah Kirinya), the ballistic expert, introduced other guns into her scientific examination which were not part of the investigations thus

rendering her examination report evidence unreliable. Further, she did not strip the pistol to ascertain when the same was last fired. Her evidence also showed that the bullet retrieved from the deceased's body was longer than the rest of the bullets she tested. These factors also rendered her evidence not credible.

The evidence pertaining to shoes was too unreliable. The appellant had disowned them and also not being of his size. They were picked from the appellant's home in his absence and after his arrest. DW2, (Adiga Habib), had also confirmed in court that the shoes did not belong to the appellant. Given the fact that the deceased's shoes found at the crime scene had not been examined for comparison purposes and also the fact that PW28 (Ocom Justus Mike), the Government analyst, had no specialized qualifications to carry out soil examination of soil samples, the evidence relating to shoes was incapable of proving the prosecution case beyond reasonable doubt.

So too was the evidence of the appellant's motor-vehicle, Toyota RAV 4 Registration No.UAJ 455J. The same had not been identified at the scene of crime on 04.12.2008 at 10:00p.m – 11:00p.m. PW14, (Andrew Kizimula Mubiru), the forensic scientist, found no evidence of the said motor-vehicle being in contact with PW4's motor-cycle Bajaj Boxer Registration Number UDJ 534T.

As to the assertion by the prosecution that the appellant was restless and did not contact the relatives of the deceased after the death had occurred, this was mere speculation by the trial Judge and had no evidence value.

Relying on **Mureeba Janet & 2 Others Vs Uganda: Criminal Appeal No.15/2003 (SC) and Bogere Moses and Another Vs Uganda: Criminal Appeal No.1 of 1997 (SC)**, Counsel prayed that the appeal be allowed and the appellant be acquitted.

Submissions of respondent's Counsel on grounds 1 and 4:

The respondent's counsel submitted that the trial judge properly evaluated the evidence and came to the right conclusion of convicting the appellant of the murder of the deceased.

He had evaluated the evidence of PW3, PW4, PW6, PW11 and PW15, and that of the appellant and his witness DW2 before rightly coming to the conclusion that the circumstantial evidence put the appellant at the crime scene.

As to threats, the trial judge reviewed all the relevant evidence and noted that the deceased had mentioned them to her sisters PW1, PW2, the step mother, PW25 and PW9 Bukenya Grace, the Nana Hostel security officer, who indeed advised the deceased to report the threats to the police.

The trial Judge considered the telephone print-outs, and concluded that the appellant and the deceased communicated by telephone with each other at Karo House, Wandegeya, at about 6:00p.m., and later at 10:00p.m – 11:00p.m on 04.12.2008 the day the deceased was killed. The print-outs also showed the appellant was traced by the Nakawa telephone masts to have been in an area which was within a 30 kilometres radius, which

included the scene of crime area at Lukojjo, Mukono. This was relevant circumstantial evidence.

The judge also rightly concluded that since the expert evidence showed that the bullet cartridges from the crime scene had been fired from the appellant's pistol, of which the appellant was in possession and control at all material time, which evidence had not been controverted, this placed the appellant and his pistol at the crime scene. The expert's evidence also showed that the bullet found in the deceased's body was fired from the same type of pistol like that of the appellant.

The evidence of the shoes, the soil on them and that from the scene of crime was carefully considered by the trial judge, before reaching the conclusion that the expert witness, PW28, was a competent witness and that the finding that the soil on the shoes was similar to that from the scene of crime was sound and credible. The trial Judge was therefore correct to find, on the evidence before him, that the shoes were those of the appellant from his Bwebajja home.

Regarding the appellant's conduct before and after the death, the judge evaluated the evidence and concluded that the appellant attempted to cover his traces so that the use of his gun and ammunitions would not be linked to the murder. Thus appellant had a premeditated intention to kill the deceased.

Resolution by court of grounds 1 and 4.

This Court, as the first appellate court, is vested by **Rule 30 (1) (a)** of its Rules, with powers to re-appraise the evidence that was adduced at the trial and to draw therefrom inferences of fact bearing in mind that the Court had no opportunity to judge the demeanour of witnesses at the trial. See also: **PANDYA VS R [1957] EA 336.**

Ruwala Vs R [1957] EA 570.

Kifamunte Henry Vs Uganda

Criminal Appeal No.10 of 1997(SC).

In **Bogere and Another Vs Uganda, Uganda Supreme Court Criminal Appeal No.1 of 1997: [1998] KALR 1,** the Supreme Court reiterated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind. In doing so the appellate court has bear in mind that it did not have the opportunity to observe the demeanour of witnesses at the trial, which opportunity the trial judge had. Failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law.

This court shall carry out this duty while determining this appeal starting with the resolution of grounds 1 and 4.

In his judgement the learned trial judge reached the conclusion that:

“On the basis of the several pieces of circumstantial evidence I have discussed above, I find that the prosecution has proved the case against the accused beyond reasonable doubt. I find him guilty of murder C/SS 188 and 189 PCA and I convict him accordingly”.

Thus the appellant was convicted on circumstantial evidence. We appreciate this evidence to be in the nature of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing the existence of the facts required to be proved, is admissible as making the facts in issue probable by reason of its connection with or in relation to them. It is evidence, at times, regarded to be of a higher probative value than direct evidence, which may be perjured or mistaken. A Kenyan court has noted that:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensidird examination, is capable of proving a preposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”. See: **High Court of Kenya at Nairobi Criminal Case No.55 of 2006: Republic Vs Thomas Gilbert Chocmo Ndeley.**

Though a decision of the High Court of Kenya, we find the enunciation of the principle as regards the application of circumstantial evidence in the words of the above quotation very appropriate and as representing the position of the law on circumstantial evidence even in Uganda.

Therefore in our evaluating the whole evidence adduced at trial, as the first appellate court, it will be our duty to determine whether or not, on the basis of the circumstantial evidence that was adduced at trial, the learned trial judge was justified to conclude that the prosecution had discharged the burden of proving beyond reasonable doubt that it was the appellant who murdered the deceased Rehema Caesar Nasur.

We shall also bear it in mind that the duty to prove the said guilt of the appellant beyond reasonable doubt lay on the prosecution throughout the trial and that the appellant did not have the burden to establish his innocence of the charge of the murder of the deceased.

Further, it was the duty of the trial judge and it is the duty of this court, on reviewing all the evidence that was adduced, to resolve any doubt in favour of the appellant.

The pieces of circumstantial evidence considered by the trial judge consisted of threats, phone calls, the pistol, the pair of shoes and the conduct of the appellant prior, during and after the deceased's murder. We shall deal with each piece of this evidence, subjecting the evidence adduced at trial to a fresh re-appraisal and scrutiny, though not necessarily in the order the learned trial judge dealt with the same in his judgement.

We also observe that though the trial judge mentioned the appellant's motor-vehicle Toyota RAV 4 registration No.UAJ 455J as one of the pieces of circumstantial evidence, he did not rely on

this piece of evidence in convicting the appellant of the murder of the deceased. However the evidence relating to the said motor-vehicle has been submitted upon on appeal, and as such we shall also deal with it and draw our conclusions on the same.

We have, as the first appellate court, subjected all the evidence adduced at the trial to a fresh re-appraisal with a view to determining whether or not the learned trial judge came to the right conclusion, and if not, for us to draw our own inferences and conclusions.

We have noted from Exhibit P11, the post mortem report on the deceased dated 10.12.08, and the testimony of PW7, Dr. Sylvester Onzivua, the pathologist who prepared Exhibit P11, that the deceased's body had bullet entry wounds on the left infra-orbital, below the left eye, on the left upper arm, below the left axial (armpit), an exit wound through the right ear, and an exit wound on the left upper arm on the inner aspect. The left rib and left lungs were torn and the left facial bone was fractured by a bullet. So too was the roof of the mouth and the right side facial born. The deceased died of excessive bleeding from the torn lungs due to gunshot wounds. One bullet that had entered through the arm, torn the lungs and settled in the back was recovered from the body. The entry wounds were caused by two bullets. Nobody had opened the body of the deceased before PW7 carried out the post mortem.

This evidence, not controverted by the defence, established beyond reasonable doubt that the deceased was fired at with a gun and she died of gunshot wounds.

In his evidence on affirmation, the appellant admitted that he possessed a pistol having acquired the same from Karegeya on 06.08.08 as per exhibit P9. He was in possession and control of the said pistol on 04.12.08 when the deceased was killed.

PW3, Henry Tamale, of Lukojjo where the deceased was killed saw on 04.12.2008 at about 11:00p.m a man shoot a lady almost on the verandah, two metres away from this witness's house. The same killer-man then pulled the shot woman by her legs towards the main road and left her by the kiosk of one Kateregga. Thereafter the witness heard a second gunshot.

PW4, Lwanga Muhamood, a boda boda rider, whose motor-cycle Bajaj Boxer No.UDJ 534T collided with the motor-vehicle apparently being used by the killer(s) heard a gunshot at Lukojjo on 04.12.08 at about 10:00p.m – 11:00p.m..

PW5 Nakanwagi Harriet, area parish chief, PW6: Nakavuma Margaret, PW11 Kamya Lameck Ssalongo and PW17 Rashid Gitta who was being carried on a motor-cycle boda boda by PW11, all who happened to be in the area of Lukojjo near the scene of crime, heard two gunshots, one after the other on that same day, time and place at Lukojjo.

PW12 D/AIP Bwekwaso John, of Mukono Police station, went to the murder scene on 05.12.08 at 8:00a.m and recovered 2 empty cartridges of a pistol and a live ammunition.

The appellant's pistol, the spent cartridges, the bullet from the deceased's body and the live bullet from the murder scene were

properly submitted by Police to the Government Analytical Laboratory, Wandegeya, Kampala, for analytical examination.

According to PW23, Robinah Kirinya, the Government Analyst in ballistics, the two spent cartridge cases were fired from the appellant's pistol. The pistol was also found to have been bearing signs of discharge and was capable of discharging ammunition. The ballistic analyst could not state with scientific accuracy when this pistol last discharged ammunition.

As to the fired bullet recovered from the deceased's body PW23's Report stated:

> **"Hence the evidence bullet and test bullets bear similar class characteristics. This implies that they were all fired from the same type of pistol or pistols.**
>
> **It is further observed that the evidence bullet is longer than the test bullets and it bears an indented ring which is not the case with the test bullets. Parts of the metal jacket of the evidence bullet exhibit 21 are fitted which interferes with rifling impressions.**
>
> **Comparing the rifling marks impressions on the evidence bullet exhibit 21 with those on test fired ones from ammunition exhibits 5,9,13 and TBA, TBB and TBC using a comparison microscope, some similarities were observed. However, the evidence was not sufficient for a definite opinion."**

The learned trial judge dealt with the evidence of the report of the ballistic expert in detail. He, in our view, properly addressed himself to the law as regards evidence of an expert. An expert's evidence is considered together with other relevant facts in reaching a final decision in the case. Expert evidence of a scientific nature is persuasive, if not controverted, in assisting the court to reach its own opinion and decision on the matter, the subject of such evidence: See: **Shah Vs Shah (2003) EA 290.**

Counsel for the appellant invited us, like he did with the trial judge at the trial stage, to put little value on the ballistic expert's evidence because this expert had not stated her qualifications and experience that qualified her to be a ballistic expert.

We, like the trial judge did, are not inclined to accept this submission. PW23 produced a written report which she signed and clearly indicated that she was a Government Analyst (Ballistics) of the Government Analytical Laboratory; Wandegeya. She explained at the start of her evidence that:

> **"I examine, test and analyse exhibits and samples recovered in cases involving fire arms and ammunitions. ……I received exhibits on 11th December, 2008 with a request from D/SP V.O. Aisu. I carried tests upon the requests. I made a report of my findings. I wish to refer to my report."**

The same expert witness was subjected to detailed cross-examination by defence Counsel Kabega. She was not, questioned or required to explain what qualified her to be a

Government Analyst in ballistics. It was never put to her that she does not have the necessary qualifications, experience and expertise to be an analyst in ballistics. She answered all questions, whether scientific or otherwise, properly and convincingly.

The law, on failure to cross-examine a witness has been well settled. Though an accused has no duty to prove his innocence, he/she must by cross examination challenge the evidence of the prosecution that implicates him/her in the commission of the crime. All prosecution witnesses must be cross-examined according to **Section 72 of the Trial on Indictments Act.** Failure to cross-examine a witness on a particular matter leads to the inference that the evidence of that witness on that matter is accepted as being true.

As was started by their Lordships of the Supreme Court in **James Sawo-abiri and Another Vs Uganda Criminal Appeal No.5 of 1990, (SC),**

> **"An omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue"**

Given the position of the law as set out above, we find that the learned trial judge made the correct decision when he held that:

> **".....the evidence of PW23 will be considered together with other pieces of evidence assembled**

from the 30 prosecution witnesses and an appropriate conclusion drawn therefrom."

We only hasten to add that PW23's evidence, like any other evidence, must be considered by court in totality with all the evidence adduced by the prosecution and that of the defence. We have so re-apprais the said evidence.

Our re-appraisal of the evidence shows that shortly before the deceased died, on 04.12.08 at 10:00p.m – 11:00p.m, there was a struggle between her and a male assailant. Two gunshots were heard and the following day two bullet cartridges were recovered from the scene where the deceased's body was lying with gunshot wounds. The cartridges were, on examination by the ballistic expert, found to have been fired from a pistol that the appellant owned and was in his possession and control on 04.12.08, when the deceased was killed. The said pistol had discharged some gun powder, though the exact period when it was fired could not be established by the ballistic analyst. In the absence of a plausible explanation on the part of the appellant, this evidence put the appellant's pistol and hence himself who had it in his possession, control and use to the scene of the crime, where the deceased was killed. So too is the evidence, that an examination of the bullet recovered from the deceased's body showed some similarities in rifling marks impressions like those fired from the appellant's pistol, even though the analyst could not be of a definite opinion.

In **Supreme Court Criminal Appeals Nos. 48 and 49 of 1999 No.RA 78064 CPL Wasswa & Another Vs Uganda,** their

Lordships, in appreciating the evidence that had been adduced at trial in the High Court, observed:

> **"We would observe in passing that the necessary linkage, could have been provided that way, or better still, by expert evidence that the spent cartridges allegedly collected by the police from the scene of crime, were fired from the gun found in possession of Cpl. Wasswa."**

In this particular case the linkage, in our considered view, is and was established by PW23's evidence. We find that the learned trial judge was right to conclude that:

> **"I accept her report, the effect of which is that the spent cartridges found at the scene of the murder are linked to the accused's pistol after being subjected to microscopic comparisons and examining the imprints on the cartridges."**

The learned trial judge also considered in detail the evidence of the pair of shoes which PW21, SP/CID Aisu Victor, testified he recovered from the appellant's house at Bwebajja on 16.12.08 in the presence of DW2 Adiga Habib.

It was submitted for the appellant that the evidence that the soil found on this pair of shoes matched the soil from the scene of crime, where the deceased was killed and where the deceased's body was found, should be regarded as unreliable because PW28, Ocen Justine Mike, the Government soil analyst, had no requisite

qualifications to analyse the soil samples and reach the conclusions as are contained in exhibit P22.

Further, appellant's counsel submitted, the pair of shoes had been collected in the absence of the appellant, who had denied being the owner thereof and that, at any rate, they were of a larger size than his. DW2, Adiga Habib, a friend of the appellant, who was present at the time the shoes were collected from the appellant's house, had also denied in his evidence in court that these were the shoes collected from the appellant's house.

According to the appellant's Counsel, the police had failed to clearly show the exact spot where they had collected the soil sample at the crime scene. They had also failed to explain why the deceased's shoes found at the crime scene had also not been examined. Accordingly, appellant's Counsel submitted, that Exhibit P22 as a piece of evidence, had no value. Indeed, the soil itself that had been the subject of examination and analysis, had not been physically exhibited in court.

In re-appraising this evidence we note that PW28 explained that he had worked as a government analyst for 16 years. He held both BSC and MSC in Food Science and Technology from Makerere University. He had certificates in Forensic Science, Applied Food Analysis and Instrumentation Technologies in Analysis. Under cross-examination, he freely admitted that he was an authority in food science, and that he had no qualifications in soil science as a pure science. He however explained in re-examination that the study and practice of food science starts

from the seed and this involves basic chemistry in soil and crop science and therefore on the basis of that he was qualified and competent to carry out the analysis he carried out. He had also done forensic science whereby the knowledge one has is related to crime.

This witness clearly and in detail answered and explained all the questions that were put to him by defence Counsel as to how he carried out the examination and analysis of the soil samples to reach the conclusion that the soil found on the pair of shoes from the appellant's house matched and was the same soil as the soil from the scene of crime.

The learned trial judge, after considering the qualifications, the way the questions were answered and explanations given, found PW28 to be a credible and competent witness. The Judge accepted the finding that the soil sample got from the exhibited shoes matched in both mineral and chemical profile, the soil that had been got from the spot where the deceased's body lay.

The learned trial judge considered the fact that the pair of shoes on being recovered from the appellant's house at Bwebajja on 16.12.08 were clearly stated in a search certificate, Exhibit P14 as **"One pair of Black Shoes size 42".** The search certificate was signed by those who witnessed the search, including Adiga Habib, DW2, Daniel Kyewalyanga, the LCI Chairman of the area, Kizza John Bosco, SPC and Jamal Abdallah. The officers who carried out the search were SP Kyomukama James, PW16, SP Aisu Victor, PW22, and Mubinda Julius.

PW16 explained how the shoes were recovered at the applicant's house and how the soil sample for comparison purposes was obtained from the same scene of crime. He was not broken down in cross-examination in his evidence on this point. PW22 asserted that DW2 confirmed to him on 16.12.2008 at the appellant's Bwebajja home, that the shoes in question recovered from the appellant's house belonged to the appellant and that DW2 signed the search certificate in the presence of PW22. He too was not broken down in cross-examination on this aspect of his evidence.

In his defence the appellant denied that the shoes were his. They were size 42 while his size is 39. DW2, a teacher for Advanced School Certificate (HSC), a relative and friend of the appellant for 18 years, acknowledged that he had signed the search certificates in respect of both the first and second searches of the appellant's house at Bwebajja. He could not recall the items the Police took as a result of the search. On being shown the second search certificate DW2 stated that the Police took a black pair of shoes with shoe laces which was dirty and dusty. On being shown the shoes, DW2 denied that these were the shoes. The trial Judge observed, at this juncture, that the dramatic recovery of memory by DW2 to be certain that these were not the shoes, when all along, the same witness had claimed loss and lapse of memory of other matters, smacked of DW2 lying so as to protect the appellant. It was also a lie for DW2 to deny that it was not him who had confirmed to the police that the shoes belonged to the appellant.

We have subjected to fresh scrutiny the evidence of PW16, PW22, that of the appellant and his witness DW2. We find that the trial judge came to the right conclusion when he rejected the evidence of appellant and DW2 and believed that of PW16 and PW22 that the shoes were found at the house of the appellant on 16.12.08 and that DW2 confirmed and even signed the second search certificate on the basis that the shoes belonged to the appellant. No other witness, other than DW2, amongst those who signed the search certificate and thus witnessed the recovery of the shoes on 16.12.08, testified that the shoes exhibited were not the ones recovered from the appellant's house on that date. The judge was also right to reject the assertion that the shoes did not belong to the appellant simply because they were of a bigger size 42 than the one of 39 the appellant claimed to be his size. At any rate, the mere fact that the size was larger than the normal size he claimed to be his, could not per se, make it an impossibility for the appellant to put them on.

The evidence adduced clearly proved that the soil sample was obtained from the scene of crime where the deceased's body was found and therefore where her killers moved. The mere fact that the soil sample was not with the witness PW28 when he was testifying does not mean that the sample did not exist. Had the defence wanted the same to be physically produced they should have made the necessary application to court. They did not do so.

The trial judge also considered in detail both the prosecution and defence evidence adduced in respect of telephone calls on 04.12.08 when the deceased was killed.

The trial judge analysed the evidence of PW1 and PW2 deceased's sisters, that the appellant made calls to each one of them on 04.12.08 urging them to appeal to the deceased to pick his (appellant's) calls. At about 6:00p.m, of that day, the appellant rang to the deceased, after which the deceased dressed up, told both PW1 and PW2 that she was going out for dinner. She did not disclose who was taking her out for dinner. The deceased never returned. At about 10:00p.m-11:00p.m on that day she was killed at Lukojjo, Mukono District.

The judge carefully and properly, in our view, considered the appellant's evidence on this point. The trial judge considered the fact that appellant denied having made a telephone call to or taking out the deceased or meeting her, at all, in the evening of 04.12.08 and appellant's explanation that he had only spoken by phone to the deceased earlier on that day, only after one Nasira, a deceased's friend, had called him about the lost phone. The appellant had rung to deny being in possession of the lost phone. In the evening of 04.12.08 he had gone to the National Theatre, watched a play and at about 10:00p.m he had gone to Mutungo to check on the home of his uncle. He had then retired to his home at Bwebajja.

The trial judge considered the evidence of PW16, Kyamukama James, the investigating officer, and that of PW29: DC Kikaawa Fred. According to PW16 the appellant gave to him telephone

Numbers 0782008595 as his own (appellant) and 0701131518 as that of the deceased. PW16 accessed the print outs of the two numbers and found that on 04.12.08 at 6:24p.m number 0701131518 called 0782008595 and a conversation of 18 seconds went on, in the Karo house, Kampala, being the base station for the connection. At 6:30p.m on the same day, again at around Karo house, Kampala, number 0701131518 called 0782008595 and spoke for 31 seconds. According to the trial judge, PW16 and PW29 were not challenged as to their assertion that No.0701131518 was the telephone number of the deceased. The Judge thus found the appellant's later assertion that the said number belonged to Nasira, a Tanzanian friend of the deceased, to be false and an afterthought.

The judge also considered the defence assertion that the telephone print outs of line 0782008595 belonging to the appellant did not show that the appellant picked or made calls in Mukono.

The trial Judge in this regard carefully considered the evidence of PW26, Samuel Rugesera, an MTN senior security officer who generated the print outs, exhibit P20; as well as that of PW27 Wilson Kayabya, operations centre engineer, Warid Telecom, to the effect that the system only records successful communications between caller and receiver and that a call which is made, but not accepted by the receiver is not recorded in the network. The trial judge on accepting the above evidence of PW26 and PW27 concluded that it was possible for the appellant

to be in Mukono area, which was within the 30 kilometres radius reception, according to the telephone print-outs, but the print outs would not show whether the appellant made or received calls while in Mukono.

We have made a fresh re-appraisal of the evidence that was adduced as regards the telephone calls and also considered the way the trial judge dealt with this evidence. We find that the judge properly dealt and analysed this evidence and arrived at the correct conclusions that telephone number 0701131518 belonged to the deceased and that there was communication by the deceased's number with the appellant's number on 04.12.08 between 6:00p.m – 6:30p.m from Karo House, Wandegeya, Kampala and also that it was possible for the appellant to have been in Mukono area, even though the print outs did not show that his telephone number 0782008595 actually made or picked any telephone messages. The appellant, who was in possession and control of his telephone number 0782008595 at the material time gave no plausible explanation as to how his said telephone number came to communicate with that of the deceased on that day and at that material time and place.

The trial judge also dealt with the evidence of the conduct of the appellant prior, during and after the death of the deceased. He analysed the evidence of PW1, PW2, PW9 and PW25 to the effect that the appellant had subjected the deceased to assaults, abuses and threats of death soon after marrying her on 16.12.07 until 04.12.08 when she was killed. This had forced the deceased to run away from the appellant at Bwebajja and taking refuge in

Nana hostel and also at her father's home at Martin Road, Old Kampala. A few days before the 04.12.08 the appellant persistently phoned PW1 and PW2 insisting that each one of them persuades the deceased to accept taking and responding to his telephone calls. The deceased yielded to the appeals of PW1 and PW2 and at 6:00p.m on 04.12.08, according to PW1, the deceased picked the appellant's telephone call. PW1 left the deceased talking to appellant on phone and moved elsewhere within the vicinity. After the talking stopped PW1, on returning, saw the deceased bathe and dress up; and explained that she was going out for dinner. The deceased subsequently left. Thereafter at 10:00p.m the deceased was killed at Lukojjo, Mukono.

After the deceased's death, the appellant stopped calling PW1 and PW2 and he became restless and did not stay in Bwebajja. He did not communicate to PW1, PW2 and PW28, even when the Red Pepper newspaper published photographs of the body of the deceased and carried a news story about her death.

The trial judge considered the defence evidence of the appellant as to why he called a press conference to inform the public about the news of the death of his wife. He was a Member of Parliament and so he had to explain to the public about the death of his wife. He also called the CID Chief and reported the death of the deceased to the Parliament police post, Kampala. He could not have been the one who invited the deceased to dinner, because if he had been the one, then the deceased would have so informed PW1 and PW2.

The trial judge evaluated all the above evidence including the fact that on 02.12.08 the appellant had called and offered to take PW1, PW2 and the deceased for lunch, yet, on the admission of the appellant, on that very day of 02.12.08, the appellant was in Arua before ASP Mindra (PW18) processing a fire arms license for his pistol and this certificate entitled the appellant to get more 20 bullets in addition to the 5 that he had at the time of licensing.

The judge also considered the evidence that at 6:00p.m on 04.12.08, according to the telephone print out, Exhibits P19, P20 and P21, there was successful communication between the appellant and the deceased at 6:00 – 6:30p.m at Karo House. Later the appellant's phone, according to the MTN print outs, showed him being along Jinja Road and Bweyogerere and later at midnight he is shown to be in Nakawa, places within the 30 kilometre radius of the scene of crime, according to the telephone print-outs and evidence of the communications experts, PW26 and PW27.

Having so evaluated the evidence as to the conduct of the appellant, before, during and after the death of the deceased the trial Judge concluded:-

> **"When I consider the background of hostility, persistent search through calls and physical appearance at Nana Hostel, final communication on 4th December, 2008, replenishment of ammunitions on 5th December, 2008 and the callous behavior that followed, I am inclined to find that the accumulated**

effect of the totality of these inculpatory facts are incompatible with the innocence of the accused."

After our own subjecting the same evidence to a fresh scrutiny we note that the telephone print-outs show the appellant communicating with the deceased at 6:00-6:30p.m in Wandegeya, Kampala, then the appellant is shown to be in Bweyogerere which is along Kampala-Mukono-Jinja Road, then again the appellant is shown to be along the Mukono-Kampala section of Kampala – Jinja Road, at about mid-night, thus fitting in well with being at the scene of crime at Lukojjo at 10:00 - 11:00p.m and being along Kampala Jinja Road towards Kampala at about mid-night of 04.12.08. We too on the basis of this evidence come to the same above conclusion that the learned trial judge arrived at that the appellant was put going in the direction of Mukono at 6:00-7:00p.m or there about, then in Mukono at about 10:00-11:00p.m and returning from there at about mid-night of 04.12.08. We have no reason to hold otherwise.

Further, the learned trial judge listed the fact that the examination of the appellant's motor-vehicle RAV 4 registration No.UAJ 455J showed evidence of having had an impact with a hard object as described by the evidence of PW4 and PW14 as one of the pieces of circumstantial evidence against the appellant. However, the trial judge in arriving at his final decision of convicting the appellant of murder of the deceased did not seem to have taken into consideration this piece of evidence. On appeal Counsel for the respondent submitted that this was

independent evidence, on its own or in addition to other circumstantial evidence that put the appellant at the scene of crime. The appellant's counsel did not regard this evidence as credible and capable of putting the appellant at the crime scene. In the course of our re-appraising and re-considering all the evidence adduced before the trial judge and re-subjecting it to a fresh scrutiny, we feel it legitimate to make our own inferences and draw conclusions on this piece of evidence.

The appellant in his own evidence on affirmation confirmed to court that he was the owner of motor-vehicle RAV 4 registration No.UAJ 455J. He denied ever driving to Nana Hostel using this vehicle. He also confirmed that on 10.12.08 while with the police at Kibuli, police told him that the killers of the deceased were travelling in a RAV 4 motor-vehicle and that since he had a similar car, he became a prime suspect in the said murder.

DW2 confirmed that on 10.12.08 he was the one driving the appellant's RAV 4 motor-vehicle. The appellant called and instructed him to take the motor vehicle to Kibuli which he did.

PW4 (Lwanga Muhamood), a boda boda rider testified that on 04.12.08 at Lukojjo along the main Mukono-Kayunga Road at about 10:00p.m – 11:00p.m, while carrying two passengers on his boda-boda motor-cycle, heading in Kayunga direction, a vehicle with full lights on, moving slowly in the direction of Mukono, knocked him and his passengers off the motor-cycle. Though the vehicle engine was on, there was no one inside the vehicle. To him the vehicle looked like a small pajero, blue in colour. It had a rear spare tyre. He recognized only the letters UAJ as part of its

registration numbers. He did not recognize the numerical numbers of registration because suddenly there was a gunshot which frightened him. He and his two passengers went to the home of the nearby Gombolola Chief at Nama, reported the incident, after which he was taken to hospital. The vehicle damaged his motor-cycle by colliding with it breaking its kick starter and plug. As the motor cycle could no longer move on the engine he moved away from the accident scene by physically pushing the motor cycle. The vehicle squeezed them on a road pavement hitting them with its front. He sustained a cut on the ankle. His two passengers also got injured. At Kibuli, he identified the appellant's motor vehicle RAV 4 registration number UAJ 455J as being similar to the one that had knocked him.

PW14 (Andrew Kizimula Mubiru), a Government Forensic Scientist, with Government Analytical Laboratory, Wandegeya examined PW14's motor-cycle UDJ 534T Bajaj Boxer and the appellant's motor-vehicle Toyota RAV 4, registration No.UAJ 455J. He found that the motor-cycle had had an impact with a hard surface and also that the appellant's motor-vehicle had had an impact with another hard object. There was insufficient evidence to conclude whether the vehicle and the motor-cycle were ever in contact with each other at any one time.

He found that the stains and the fibres found from the co-driver's seat of the appellant's vehicle were of human blood. The blood on the fibers was of a female. However, because the vehicle had been exposed to sunshine, the DNA had been

degraded and so it could not be ascertained for comparison purposes.

We find it significant that according to the evidence of PW4 (Lwanga Muhamood), PW3 (Henry Tamale) and PW15 (Nakanwagi Harriet) it was almost the time when the deceased was being killed and two gunshots were being fired : The first one being followed by a second one after a lapse of some few minutes, between the hours of 10:00p.m-11:00p.m on 04.12.2008, that the accident involving a vehicle similar to that of the appellant collided with a boda-boda motor-cycle belonging to and being ridden by PW4, and the collision was at Lukojjo, along Mukono-Kayunga Road, the very area where the deceased was killed.

In his otherwise detailed evidence in defence, the appellant, who stated he owned four motor vehicles, including the RAV 4 registration No.UAJ 455J, gave no explanation as to where motor-vehicle RAV 4 registration No.UAJ 455J was on the 04.12.08 yet, he claimed, he had been told by the police at Kibuli on 10.12.08 that the killers of the deceased had used a vehicle similar to his and therefore he was a prime suspect in the murder of the deceased.

It was also not controverted that, at the time of the collision with the boda boda motor-cycle, the motor-vehicle engine and its lights were on, yet there was no driver inside. The vehicle moved on its own on a main road. We thus infer that the driver of the vehicle must therefore have been involved in some other activity other than concentrating on driving the motor-vehicle. Since it was at that time and at that very place that the deceased was

shot at with a gun, and gunshots were heard at that very time, it is not far fetched to conclude that the driver of the vehicle similar to that of the appellant was also involved in the killing of the deceased. The appellant offered no explanation as to how blood stains came to be on the co-driver's seat of his motor-vehicle. He also gave no explanation as to how the fibres from the co-driver's seat of his said vehicle had to have blood of a female.

PW14 stated in detail the damage he found on the appellant's said vehicle when he examined the same on 23.10.08. The front guard had two bolts holding the front guard. The bolt on the driver's side was newer than the one on the co-driver's side of the front guard. The lower fasteners on the front guard to the suspension, the one on the driver's side was broken. So too was the head lump on the co-driver's side. The appellant in his defence did not explain as to how and when his vehicle came to get the off centre dent, the breakage of one of the fasteners and that of the head lump. The statement he made in his defence that:

"The bolt the witness talked about was replaced way back before December, 2008" does not, in our considered view amount to explaining the circumstances under which the appellant's said motor-vehicle came to have the damages that were observed upon it. There was no explanation as to how, when and where the motor-vehicle came to have each of the damages on its front. This explanation was the more necessary given the other evidence fixing the appellant to the commission of the crime.

On the totality of the evidence adduced by the prosecution and the defence as regards the appellant's motor-vehicle Toyota RAV 4 registration No.UAJ 455J, and making allowance for the fact that it was at night and there were gunshots causing fear in the witnesses which might have affected their capacities to properly observe matters of detail, such as colour, make, registration numbers and other details of the motor vehicle, we have come to the conclusion that the prosecution evidence, circumstantial as it may have been, proved beyond reasonable doubt that the appellant's said vehicle is the one that collided with PW4's motor-cycle at Lukojjo along Mukono–Kayunga Road just near the crime scene as the deceased was being shot at with a gun, ultimately ending in her death.

The trial judge, after analyzing each piece of the evidence we have dealt with above, except the evidence relating to motor-vehicle Toyota RAV 4 registration number UAJ 455J, and on being so advised by the lady and gentleman assessors found and held that the appellant had been placed at the scene of the crime on 04.12.08 at 10:00p.m when the deceased was killed. He then concluded that:

> **"On the basis of the several pieces of circumstantial evidence I have discussed above, I find that the prosecution has proved the case against the accused beyond reasonable doubt. I find him guilty of murder C/SS 188 and 189 PCA and I convict him accordingly."**

We are in agreement with the above conclusion of the trial judge which was also the advice given to him by the assessors.

We add, that on our subjecting the evidence adduced at trial to a fresh re-appraisal and scrutiny, we have concluded that the evidence adduced at trial in respect of the appellant's motor-vehicle Toyota RAV 4 registration Number UAJ 455J puts the said vehicle at the scene of the crime on the date and time the deceased was killed. In the absence of a plausible explanation from the appellant as its owner, possessor and user, as to the whereabouts of this vehicle at the material time the deceased was killed, leads to an irresistible inference, on its own, independent of, or in addition to the already considered pieces of evidence, that the appellant was at the scene of crime, and participated in killing the deceased on 04.12.08 at Lukojjo, along Mukono Kayunga Road, between 10:00p.m and 11:00p.m or there about.

We accordingly disallow grounds 1 and 4 of the appeal.

Ground 3

That the learned trial judge erred in law and fact when he engaged in speculation and conjecture to the prejudice of the Appellant.

Submission of appellant's Counsel on ground 3

Counsel submitted that there was no evidence for the Judge to assert that the appellant's conduct to the deceased before her death amounted to brutalizing and slavery, or that the appellant

was restless after the death of the deceased. It was also speculative of the judge to state that the appellant could have been in Mukono, even though the telephone print-outs did not show, and that the appellant was in Arua on 02.12.08 when he offered, through a telephone call, to take the deceased and her sisters PW1 and PW2 out for lunch. This was speculation and amounted to shifting the burden of proof to the appellant to prove his innocence. Counsel relied upon **Yiga Robert Vs Uganda (Court of Appeal) Criminal Appeal No.05 of 2001** and **Mbiridde Abdu & 2 Others Vs Uganda (Court of Appeal) Criminal Appeal No.38 of 2007** for the principle that evidence that just amounts to raising mere suspicions cannot be a basis for convicting an accused. In the case of the appellant, the evidence amounted to raising mere suspicions against the appellant.

Submissions of Respondent's Counsel on Ground 3

Counsel submitted that the evidence of PW1, PW2, sisters of the deceased and PW25 Khadija Nasur, deceased's step mother, clearly proved beyond reasonable doubt that appellant treated the deceased brutally and like a slave. He constantly assaulted her, forced her to take refuge in Nana Hostel and with her parents at Martin Road, Old Kampala. He also constantly sent phone messages threatening to kill her and her friends.

The clear evidence was that on 02.12.08 when appellant offered to take the deceased and her sisters, PW1 and PW2 out for lunch, he was actually in Arua licensing his pistol to get more live ammunitions.

The telephone print-outs showed that appellant communicated on phone within a radius of 30 km in Mukono and the scene of crime was within this distance. Therefore ground Number 3 of the appeal had no merits at all.

Resolution of Ground 3 by Court

We have re-appraised the evidence of PW1, PW2, PW9 and PW25 as well as that of the appellant as to how the appellant treated the deceased.

The evidence of PW1, PW2, PW9 and PW25, which evidence the trial judge believed, proved beyond reasonable doubt that the appellant persistently and grossly mistreated the deceased since their marriage. The appellant consistently sent to the deceased phone messages that she would face death if ever she revealed to anyone else whatever she saw in the laptop about him, and for being unfaithful to him because she was returning home from school late or not at all. Appellant alleged deceased had other men. He took police women to arrest her for stealing the laptop. He demanded of her to return a small TV and hand over her passport to him.

According to PW2, the appellant continued threatening to kill the deceased even after the deceased's father had intervened by having the deceased handover the laptop back to the appellant. The deceased disclosed to PW2 that on 01.12.08 the appellant had sent to her one Khalid with a threat to harm her if ever she revealed to anyone else what was in the laptop.

PW25, the deceased's step mother, had been called by the deceased while crying to visit her at the Bwebajja matrimonial home to see how the appellant had mistreated her. PW25 found the deceased crying and her eyes swollen. The deceased had always called her (PW25) while crying. Deceased told PW25 that the appellant was going to kill her. She, PW25, counselled the deceased that marriage was for better or for worse and advised her to adjust to the conditions she was in. According to PW25 the misunderstandings between the appellant and the deceased started 2-3 months after their marriage. When PW25 would phone the appellant to counsel him, the appellant would switch off his phone.

As a result of this persistent mistreatment the deceased was forced to leave the Bwebajja matrimonial home for her father and step mother's home at Martin Road, Old Kampala, and also at Nana Hostel, where two of her Tanzanian girl friends were staying.

According to PW9 (Grace Bukenya) security officer, Nana Hostel, the appellant harassed the deceased at the hostel. The appellant was sending to deceased and her two Tanzanian girl friends phone messages threatening to harm them.

On 30.11.08 PW9, being called by the two Tanzanian girls, PW9 found the deceased with bruises on her body and the deceased claimed the appellant had inflicted the same on her and, in the process, one of the deceased's girl friend (Yvonne)'s phone went missing. On 01.12.08 the same two girls, showed to PW9 a message **"if you want to distance yourself from**

death, distance yourself from Caesar", sent through a phone number of Yvonne whose phone had gone missing from the deceased at the time she was being assaulted by the appellant and his group. On 03.12.08, PW9 took the same two girls, to Old Kampala Police Station to report a case of threatening violence and theft of their phone.

The learned trial judge considered all the above evidence together with that of the defence and then reached the conclusion that:

> **"The evidence of these four witnesses show or reveal that the accused would not rest and never left the deceased alone but traced her at every place and made threats of death which eventually occurred. I would treat the evidence of the four witnesses as circumstantial evidence relevant to this case."**

In law evidence of previous threats is a relevant consideration in determining the guilt or innocence of the accused. Such evidence if accepted as correct, shows an expression of intention of the appellant in the commission of the crime. It goes beyond mere motive and tends to connect the accused person with the commission of the crime: See: **Kifamunte Henry Vs Uganda**

(supra)

: Waibi & Another Vs Uganda

[1968]

EA 228 and

: Okecho S/o Olilia V R [1940]vol.7 EACA 74.

We find that the learned trial judge properly considered and analyzed the evidence that was before him and properly applied the law before he reached the above conclusion with which we agree. His descriptive language that the appellant brutalized and treated the deceased as a slave, may appear to have been too strong, but it was justified, given the evidence that was before him. It was neither conjecture nor speculation on the part of the learned trial Judge.

The trial judge considered the evidence and found that the appellant after midnight of 04.12.08 and entering 05.12.08, soon after the death of the deceased, appellant ceased to make or receive any calls to or from PW1 and PW2, did not go to Nana hostel to see the deceased, did not report to Old Kampala police station to record a statement about the phone case and yet the said police had called him twice to do so. When pictures of the death of the deceased came out in the newspapers, the appellant did not communicate by phone or otherwise with PW1, PW2, sisters of the deceased, or PW25, her step mother, about the deceased. According to DW2, the appellant did not stay at his home at Bwebajja.

We agree that, on the basis of the above evidence, which the trial judge, in our considered view, rightly considered and believed, justified the trial judge’s conclusion that:

“once the murder occurred, the calls to PW1 and PW2 stopped. When the press published pictures of the deceased, the accused called a press conference and offered his co-operation but became so restless that he never slept at his house.”

We find the criticism that the trial judge was speculative when he stated that:

“I accept this explanation. It was possible for the accused to be in Mukono area but did not make or receive calls:, not justified.

The trial judge had received an explanation from PW27, Wilson Kayabya, an engineer with Warid Telecom, that their telecommunications system only records communications where the receiver accepts to receive the telephone call of the caller. It was thus possible of the appellant to be in Mukono area and the telephone communications to him would not be recorded by the Warid Telecom system if the appellant did not make telephone calls or those made to him were not received by him. Given the fact that there was already evidence before the trial judge that placed the appellant to the scene of crime, and that of PW26, that a telephone call may be picked within a radius of 30km, the trial judge’s statement above cannot be termed conjecture or speculation. It was an inference and/or a conclusion based on solid evidence that was before the trial Judge.

The learned Judge was also faulted for engaging in conjecture and speculation when he stated that the appellant had called by

phone and offered to take PW1, PW2 and the deceased out for lunch and that he did this when he was in Arua on 02.12.08. We find the criticism misplaced because PW18 ASP Mindra, then of Arua Police station, confirmed in his testimony to court that on 02.12.08 he was with the appellant at Arua Police Station where the appellant was licensing his gun.

Having ourselves subjected all the evidence adduced at trial to a fresh review, and having held as we have done in respect of the above instances where the learned trial judge is said to have engaged in conjecture and speculation, we find no merit in the third ground of appeal. The same is disallowed.

Ground No.2:

Submissions of appellant's Counsel on ground Number 2.

Counsel submitted that an alibi was available to the appellant by law. The trial judge ought not to have disregarded its consideration. Counsel referred Court to:

Bogere & Another Vs Uganda (SC) Criminal Appeal 1 of 1997 (supra).

and

Cpl. Wasswa & Another Vs Uganda (SC) Criminal Appeals Nos. 48 & 49 of 1999(supra).

and called upon this court to hold that, on consideration of the appellant's alibi, there was no credible evidence to place the appellant at the scene of crime.

Submissions of the respondent's counsel on ground number 4:

Counsel submitted that the overwhelming circumstantial evidence adduced by the prosecution, and not controverted by the defence, rebutted the alibi. The appellant was properly placed at the scene of crime. Counsel prayed this court to dismiss the second ground of appeal.

In **Bogere & Another Vs Uganda (supra)** the Supreme Court stated:

> **"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 a proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime, and the defence not only denies it, but also adduces evidence showing 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."

The trial judge, in our judgement, properly directed himself on the law of alibi that an accused person who puts up an alibi does not assume any responsibility of proving that alibi. It is the duty of the prosecution to prove the alibi to be false: He relied on **Uganda Vs Dusman Sabuni [1981] HCB 1.**

We are satisfied that on the evaluation of the evidence the trial judge evaluated the evidence as a whole, both of the prosecution and the defence and then reached the conclusions that he reached.

We have, on our own, also re-evaluated the evidence as a whole and we have also come to the conclusion that the evidence as to the threats, telephone printouts, the shoes and the soil examination, the soil expert's evidence, the appellant's pistol, the cartridges, the bullet removed from the deceased's body and the evidence of the ballistic expert, the appellant's motor-vehicle Toyota RAV 4, registration number UAJ 455J when considered together as a whole with the evidence of the defence, including the assertion that on 04.12.08, the appellant was at the National Theatre, then at 11:00p.m went to Mutungo and then returned to his home, and that he never met the deceased on the evening of that day, we find that the inculpatory facts are incompatible with the innocence of the appellant.

This is so because the evidence of the pistol, the cartridges fired from it, and the bullet found in the deceased, having

similarities with those having been fired from the appellant's pistol, was unchallenged. The appellant admited being in control and possession of his pistol on 04.12.08.

Equally, the appellant offered no explanation where his motor-vehicle Toyota RAV 4 registration No.UAJ 455J was at the time the deceased was killed. Yet the appellant had four vehicles, and was told by the police early on in the investigations, that a vehicle similar to his RAV 4, registration number UAJ 455J was suspected to have been used by those who killed the deceased.

The appellant consciously avoided in his evidence in defence to state which motor-cycle he was driving on 04.12.08 when the deceased met her death. The evidence of the pistol, the motor-vehicle, shoes from appellant's house, and the soil thereon matching the soil of the scene of crime, as well as the telephone print outs, when considered with the alibi evidence put up by the appellant, in totality, the appellant's alibi that he was elsewhere and not at the scene of crime when the deceased was being killed, stands destroyed.

We too, like the assessors advised the learned trial judge and indeed as he too found, do find on re-appraisal of the whole evidence both for the prosecution and for the defence, that the inclulpatory facts, on the basis of the totality of all the evidence, are incapable of explanation upon any other reasonable hypothesis than that of the guilt of the appellant. We find no co-existing circumstances to weaken or destroy the inference of guilt of the appellant.

We dismiss ground number 2 of the appeal as having no merit.

All the four (4) grounds of the appeal having failed, this appeal stands dismissed. The appellant is to serve the sentence of 25 years imposed upon him by the trial court.

This judgement is delivered and signed by only two members of the court coram Justices S.B.K. Kavuma, now Acting Deputy Chief Justice and Remmy Kasule, Justice of Appeal, because after the hearing of the appeal and after the court had reached its decision on the appeal, the Honourable Lady Justice C.K. Byamugisha then Acting Deputy Chief Justice subsequently fell sick and ultimately passed away before putting her signature on the Judgment.

Dated and delivered at Kampala this ...26th .....day of ... July.....2013.

C.K. Byamugisha
AG. DEPUTY CHIEF JUSTICE (R.I.P)

S.B.K. Kavuma
JUSTICE OF APPEAL, NOW AG.DCJ

Remmy Kasule
JUSTICE OF APPEAL