THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 168 OF 2011

THOMAS NKULUNGIRA Alias TOM……..APPELLANT

VERSUS

UGANDA …….……. RESPONDENT

CORAM:

HON. MR. JUSTICE A.S NSHIMYE, JA
HON. MR. JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

(Appeal arising from the conviction and sentence of the High Court at Kampala before the Honourable Justice Albert Rugadya Atwooki)

JUDGMENT OF THE COURT

This appeal arises from the Judgment of Hon. Mr. Justice Albert Lugadya Atwooki, J in High Court Criminal Case No. HCT-00 -426- 2010 dated 12th August 2011.

Background

On 30th January 2010, Mr. Aziz Kakooza a resident of Bukasa Zone, Makindye Division, Kampala had brought a team of people to fumigate his house. The fumigation extended to include the septic tank. Mr. Kakooza's residence was in the same enclosure with that of the appellant, and they shared the same gate.

Both Kakooza and the appellant were tenants in the houses they occupied which belong to the same landlord, Abdu Hamid Juma who testified as PW6.

When the fumigators opened the septic tank, they saw a woman's dead body floating inside. They informed Mr. Kakooza, who in turn called in the Local Council Chairman of the area, the land lord and the police. The body was taken to the city mortuary. The police arrested Fred Sempijja who was employed by the appellant and Mr. Kakooza as a gate keeper and who also lived in the servant's quarters of the appellant. The police forcefully opened the appellant's house and carried out a search.

A number of items were recovered from the house, including 3 ladies bags which contained ladies clothes and identification items. Some of the items recovered included an ATM (Automatic Teller Machine) card issued to one Brenda Karamuzi by Barclays Bank, and an NSSF (National Social Security) Card also in the names of Brenda Karamuzi.

The police also picked suspected brain tissue samples from the house, and swabbed from the house and outside suspected blood stains. They also recovered a cushion from sitting room chairs that had suspected blood stains. A hoe with a wooden handle which also had suspected blood stains was recovered from a pit latrine outside the main house. A number of other items were recovered by the police.

The contents of the bags recovered from the ceiling led to a number of telephone contacts. When the police called the numbers at random, they were able to get in touch with one Ms. Joy Karamuzi, who informed them that her daughter named Brenda had been missing for some days and she and the others were searching for her.

The police directed her to the city mortuary where she identified the body that had been recovered from the septic tank at the appellant's residence as that of her daughter, Brenda.

The appellant and his househelp Fred Sempijja were arrested and later jointly charged with the murder of Brenda Karamuzi. They both denied the charges. To prove its case, the prosecution called 17 witnesses. The appellant testified on oath and also called 5 witnesses in his defence. Fred Sempijja (A2) made an unsworn statement and called no witnesses in his defence.

The Court having been satisfied that the prosecution had proved its case beyond reasonable doubt against the appellant convicted him of murder and sentenced him to the maximum penalty of death.

The Court acquitted Fred Sempijja of the offence of murder but convicted him of the lesser offence of being an accessory after the fact. He was sentenced to 5 years imprisonment. He did not appeal.

The appellant being dissatisfied with both the conviction and sentence appealed to this Court on the following grounds;-

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

2) ***That the learned Judge erred in law and fact when he engaged in speculation and conjecture to the prejudice of the appellant.***

3) ***That the learned trial Judge erred in law and fact when he disregarded the appellant's defense of alibi.***

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

When this appeal came up for hearing on 4th May 2015 **Mr. Benson Tusasiirwe** and **Mr. John Balenzi** appeared for the appellant who was present in Court. **Ms. Jane Okuo Kajuga** a Senior Principal State Attorney appeared for the respondent. The appeal proceeded by way of oral arguments although Mr. Tusasiirwe was allowed to adopt his written submissions which were already on record. In the determination of this appeal we have taken into account the oral submissions and the written submissions for the appellant. The respondent only made an oral reply to both submissions.

The appellant's case

Mr. Tusasiirwe for the appellant chose to argue grounds 1 and 4 together and the rest of the grounds separately. In addition to his 49 pages written submissions, counsel for the appellant made lengthy oral arguments, generally repeating and expounding on what was already set out in the written arguments. We have found no reason to reproduce the lengthy arguments of counsel, but we have endeavored to summarise them.

Counsel stated that the appellant does not dispute the following facts;–

- That Brenda Karamuzi is dead
- That she was killed unlawfully
- That the death was caused with malice aforethought.

The only ingredient of the indictment that is disputed is the participation of the appellant in the death of Brenda Karamuzi (deceased).

In respect of ground one, Mr. Tusasiirwe conceded that the learned trial Judge had correctly stated the law regarding circumstantial evidence. He however, submitted that the learned trial Judge had failed to apply the law to the facts of this case.

Counsel contended that, the learned trial Judge erred when he convicted the appellant on the basis of circumstantial evidence only when there was no irresistible inference of guilt from those circumstances. That the evidence adduced at the trial against the appellant fell below the required standard of proof in criminal cases.

Counsel submitted that it is not in dispute that Brenda Karamuzi died, her body was found in a septic tank at the appellant's house, that she was known to the appellant and had stayed at his place at least from 18th January 2010 to 22nd January 2010. However, he went on to submit that there was no evidence upon which to conclude that she was killed by the appellant. Counsel argued that there was evidence to suggest that she could have been killed elsewhere and the body could have been brought to the appellant's premises or that she could have been killed inside the

appellant's house by someone other than the appellant. He went on to suggest that Sempijja Fred, could have been the person who killed the deceased.

He argued that the crime scene as described by the police witnesses pointed to the fact that the evidence could have been planted by someone whose motive was to implicate the appellant. That the deceased's bags in the ceiling, the blood and brain matter splashed over the walls of the house, the murder weapons placed well in a pit –latrine all point to the fact that the evidence was planted.

Counsel further argued that, the exact time and date the deceased died is unknown, but was between 22nd January and 28th January 2010. That during this time it was Sempijja who had unlimited access to the premises and as such the person who is likely to have killed the deceased.

He faulted the police for not having dusted finger prints on walls, the suspected murder weapons and other items which if were done would have more accurately, pointed to the identity of the murderer.

He strongly submitted that the appellant, a sane and reasonable person would never have left all the evidence the police found in his house in open sight for all to see. Counsel went on to submit that there was no conclusive evidence that the deceased met her death inside the house of the appellant. He contended that evidence adduced in the court pointed to the fact that the body could have been carried to the septic tank from elsewhere other than from the appellant's house. That the drops of blood found outside the house could not have been left by a body that was being carried from the house.

Counsel argued further that Sempijja (A2) could have sexually assaulted the deceased and thereafter killed her in the appellant's house. That deceased's property having been found with Sempijja (A2) ought to have been considered by court as evidence of his participation in the crime. He cited as his authority the case of ***Nyakahuma Mohammed and Another vs Uganda SCCA NO. 51 of 1999.***

Counsel then went on in detail to analyse the telephone communication evidence adduced at the trial. He submitted that the telephone communication points to the fact that the appellant was not

at his home at the material time on 22nd January 2010 from 8.00 Pm to 23rd January 2010 9.30 am. That there was no evidence adduced to prove that the deceased was at the appellant's home at the material time set out above. That at least the telephone communication evidence does not indicate so. On the other hand counsel contended that there was sufficient evidence to prove that Sempijja (A2) was at all at material times at the residence of the appellant, and as such he ought to have been regarded as the prime suspect.

Counsel faults the learned trial Judge for having believed the prosecution evidence and for having failed to properly evaluate the whole evidence. That had he done so, he would have been able to find that the circumstantial evidence adduced at the trial was capable of other explanation upon other hypothesis other than the guilt of the appellant.

Learned counsel further faulted the trial Judge for having relied on evidence of regarding the character and lifestyle of the appellant as proof of his guilt. He contended that *"in his revulsion at and disapproval of the appellant's life style"* the Judge reached a factually erroneous conclusion that he had killed the appellant. That the Judge's disposition towards the appellant made it impossible for him to accept his version of events and his defence.

Counsel contended that the finding by the trial Judge that the appellant had told lies in Court was unfounded. He contended that what the appellant had told court was the truth only that the Judge had misconstrued the evidence.

Counsel submitted further that, although there were some inconsistencies in the testimony of the appellant, they were minor and did not go to the root of the subject matter. On the other hand counsel submitted that there were a number of inconsistencies and contradictions in the prosecution case, within each witness's evidence, and between evidence of several witnesses.

Counsel went on to detail inconsistencies in the evidence of Sempijja (A2) between his charge and caution statement and his unsworn statement in Court. He faulted the Judge for having relied on the unsworn testimony of A2 Sempijja which was not subject to cross examination and ignoring his charge and caution statement which had been made earlier.

Counsel also faulted the Judge for having relied on the evidence of PW4 Joan Nakira, a live-in girlfriend of Sempijja (A2). He contended that PW4 was not an independent witness. That she was effectively A2's wife who had been dragged from her home Masaka to testify against her husband. That she had tempered with evidence and had fled justice. That her testimony was to ensure that A2 avoided the death penalty. That her evidence ought to have been disregarded by the Judge.

Counsel also contended that A2's testimony was not treated by the trial Judge as that of a co-accused but rather as that of a prosecution witness.

Counsel also strongly submitted that since A2 in his defence, made an unsworn statement and therefore was not subjected to cross examination, the part of his defence that incriminated the appellant ought to have been rejected by Court. That the Judge should not have relied on that evidence. He cited **Article 28(3)** of the Constitution and ***R vs Rudd (1948) 22 Criminal Appeal No 133*** for the proposition of the law stated above.

Counsel also submitted that the trial Judge made a number of errors and omissions. That he did not consider the evidence of possibility of the deceased having been sexually assaulted. Some DNA tests were not followed up by the police. No attempt was made to use the DNA test to identify those who killed the deceased.

That there is a possibility that if all the necessary DNA tests had been carried out, the results would have exonerated the appellant. That it may be the reason, why the police did not follow up the tests and the results. That toxicology test results were never revealed, creating a gap in the prosecution case. He suggested that the deceased could have been poisoned or drugged before being killed. Counsel also question the manner in which evidence was collected at the scene of crime in a piece meal manner, which he contended, was strange and had created suspicion as to the integrity of the investigations.

He asked court to find for the appellant on the above two grounds.

On ground 2, learned counsel faulted the trial Judge for having relied on a weak prosecution case to convict the appellant. He contended that the Judge had at times come up with positions that were not borne out by evidence, some of which were hypothetical or even speculative.

Counsel contended that with evidence the Judge speculated that;

- The appellant had refused to open for the deceased when she came back late to his house.
- That the deceased could not have been the appellant's girlfriend.
- That the deceased had a low opinion of the appellant.
- That the appellant was at the scene of the crime at the materiel time.
- That the deceased met her death in the appellant's house.
- That the appellant did not tell his friends of the disappearance of the deceased from his house because he was guilty.
- That the evidence at the scene could not have been planted.
- That the appellant had kept away from his residence because he was feeling guilty.
- That he had apologized to his friend Bagaruka, because he was guilty.

Learned counsel also faulted the learned trial Judge for the manner in which he summed up to the assessors. That for example he stated as a fact to the assessors that the deceased was in the appellant's house when she died, yet that fact had not been conclusively proved.

That the appellant was in the house at the time of the death of the deceased, whereas this too, had not been proved conclusively. That the Judge exhibited bias in the way he summed up the evidence.

He asked court to uphold this ground too.

On ground 3, learned counsel pointed out that the prosecution had totally failed to point out any motive on part of the appellant as to why he should have killed the deceased. On this ground

counsel generally faulted the trial Judge for having failed to properly evaluate the evidence on record and as such having ended up with an erroneous decision. Since this court is required to re-evaluate the evidence we shall not dwell much on the submissions of counsel on this ground. We shall revert to that during our evaluation of evidence later in this Judgment.

He asked court to up hold the grounds of appeal and to quash the conviction.

On ground 5

This ground is in respect of sentence of death.

Counsel submitted that in the circumstances of this case a death penalty imposed upon the appellant by the trial Judge was not justified. He faulted the trial Judge for failure to take into account all mitigating factors in favour of the appellant. He contended that in similar case this court had not confirmed a death penalty. He cited the case of ***Francis Bwatatum vs Uganda (Court of Appeal Criminal Appeal No. 48 of 2011).***

He asserted that the death penalty should be reserved to the "*rarests of the rare"* cases, which this one was not. He asked court to set aside the death penalty and to substitute it with a custodial sentence.

The Respondent's case

Ms. Jane Okuo Kajuga the learned Senior Principal State Attorney opposed the appeal and supported the learned trial Judge. She agreed with Mr. Tusasirwe that the learned Judge had properly set out the law regarding circumstantial evidence. She however, went on to submit that the learned trial Judge had properly applied the law to the facts before him and had come to the correct conclusion and decision.

Counsel submitted, that the deceased, as the Judge had found, died in the appellant's house. She referred to the evidence of PW7 a police officer who visited the scene and the evidence of PW8 the scene of crime officer (Soco). The two witnesses had testified that blood and brain matter was found in the appellant's house. It was on the walls, the carpet and the cushions in the sitting room seats. The pathologist PW9 Dr. Sam Kalungi testified that the deceased had died of brain

injury. The skull had been so cracked that there was no brain matter inside it when the postmortem was carried out.

Counsel submitted further that the evidence of PW4 Joan placed the appellant at the scene of crime. She had testified that the appellant came back to his house on the night of 22nd and the morning of 23rd January 2010 at about 3:00 am.

That she had seen the appellant give to Sempijja A2 blood stained clothes to wash. That the appellant had told lies to the deceased's friends and family that he had not seen the deceased on 21st and 22nd January. This conduct of the appellant pointed to his guilt. He did not bother to find out where the deceased had gone, he did not ask anyone, he did not tell one yet everyone else close to her was looking for her. He advised her friends to look for her in the morgue.

That the telephone printout evidence shows that the appellant had been at his home on the night of 22nd going to the morning of 23rd January. The print out from the deceased's phone records show that she was at the deceased's home on 22nd January.

Counsel submitted that the learned trial Judge had analysed the evidence as a whole and had come to the correct conclusion .She submitted further that the trial Judge correctly acquitted A2 Sempijja of the offence of murder and correctly convicted him of the offence of being an accessory after the fact.

Ms. Okuo Kajuga submitted further that the learned trial Judge had not engaged in speculation or conjecture when he stated that the appellant had refused to open the house to let the deceased in when she came back to his house late at night. This was based on the evidence of A2. As to the conclusion that the deceased was not the appellant's lover or girlfriend, counsel contended that the learned Judge came to this conclusion after analysing all the evidence, and also having taken into account the conduct of the appellant before and after the death of the deceased. Counsel conceded that there were a few elements of conjecture in the Judgment but, they did not form the basis of the Judge's findings.

In reply to ground 3 that relates to the appellant's defence of *alibi* Ms. Okuo Kajuga submitted that the *alibi* was unsustainable. That it was based on the evidence of the appellant and that of

DW5 Mayanja, which was to the effect that on the morning of 23rd January 2010, the appellant was not at his home. The evidence of Mayanja DW5 was full of contradictions, as to where he and the appellants were, who they were with, that the Judge disbelieved the witness and rejected the *alibi.*

That there was very strong evidence, from A2 Sempijja and PW4 Joan to the effect that the appellant had come back to his house at 3:00 am and had sent them for cigarettes. This evidence was sufficient to override the appellant's defence of *alibi*. A2's evidence directly linked the appellant to the death of the deceased. The appellant had asked him (A2) to help him dispose of the body of the deceased on the morning of 23rd January 2010. With the assistance of A2 the body of the deceased was dropped in the septic tank where it was recovered.

On ground 4 the learned Senior Principal State Attorney argued that the ground was vague and offended the rules of this court. She submitted that the learned Judge had properly evaluated the evidence and come to the correct decision.

On ground 5 in respect of the sentence, Ms. Okuo Kajuga argued that the Judge took into account all the factors before imposing the sentence. That the deceased was only 27 years old, who trusted the appellant as a friend. She had no money, She was looking for a job. Her life was extinguished in the most brutal manner. Six stab wounds and a cracked skull. She asked this court to confirm the sentence.

Appellant's rejoinder

In rejoinder Mr. Tusasiirwe contended that the Judge had not relied on the charge and caution statement and so it could not have formed the basis of his decision. That he only relied on A2 unsworn testimony in court, which according to counsel, was worthless. That the only evidence which seemed to put the appellant was on scene was the statement of Sempijja A2 and PW4 his girlfriend. But PW4 was not in the house. She contradicted herself on material facts such the time A2 Sempijja spent in the house with the appellant. That she put the time at less than 10 minutes.

On *alibi* learned counsel restated that it was strong and had not been rebutted. He faulted the Judge for having rejected it and having imposed a burden on the appellant to prove it. In respect of sentence, Mr. Tusasiirwe retaliated his earlier arguments and emphasized that the death should be limited only to those offenders who commit the most serious offences and whose extreme culpritability makes them most deserving of execution. He asked court to consider all mitigating factors including alcoholism as a mitigating factor.

He asked court to allow the appeal in the alternative to reduce the sentence.

Resolution of the grounds of appeal.

This is a first appeal as such this court as the first appellate court is required under Rule 30(1) of the Rules of this Court to re-evaluate the evidence and to draw its own inferences of fact. This position of the law was re-affirmed by the Supreme Court in the case of ***Kifamunte Henry vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997)*** in which the Supreme Court states as follows;-

> ***"We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the Judge who saw the witnesses. However there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and***
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> ***Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire ys Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.***

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 331(i) of the Criminal Procedure Act."

We shall therefore proceed to re-evaluate the evidence and shall make our own inference on all issues of fact and law.

Learned counsel for the appellant argued grounds 1 and 4 together.

Ground 4 of the appeal is set out as follows;-

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

This ground appears to be too general and as such offends **Rule 66 (2)** of the Rules of this Court which stipulates as follows;-

66 (2) ***"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided."***

The ground is redundant in light or **Rule 30(1)** of the Rules of this Court that requires this Court as a first appellate Court to re-appraise the evidence. We would have been inclined to strike it out had it not been argued together with ground one.

In the resolution of all the other grounds, we shall consider whether or not the trial Judge properly evaluated the evidence at the trial and we shall also re-evaluate the evidence ourselves

as the law set out above requires. We shall therefore not refer specifically to ground 4 which shall be resolved together with the other grounds of appeal.

Ground one

This ground states that;-

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

The brief background to this appeal has already been set out earlier in this Judgment and we shall not repeat it here. Suffice it to say, it is common ground that the deceased Brenda Karamuzi is dead. That her death was unlawfully caused. That death was caused with malice aforethought. What is in contention is the participation of the appellant. The appellant disputes his participation in the murder of the deceased and contends that the learned trial Judge erred when he convicted him of the murder, where the evidence adduced at the trial was all circumstantial and was insufficient to sustain a charge of murder against him.

In respect of the first ground of appeal the appellant challenges the strength of the prosecution case against him and strongly contended that it fell short of the required standard of proof in criminal cases that is, proof beyond reasonable doubt.

We have carefully listened to the submissions of both counsel for the appellant and the respondent. We have also perused the court record and the authorities cited to us.

The undisputed facts of this case are that the appellant and the deceased were friends. They were very well known to each other and they got along well with each other in their own way. Whether the relationship was platonic as contended by the prosecution witness is not very material and does not go to the substance of the case. The deceased appears to have been a frequent visitor to the appellant's house located in Bukasa a Kampala suburb. The appellant was renting the house in which he stayed, apparently alone as he was unmarried. The premises in which he stayed was semi-detached (Two twin houses attached to one another). Both houses

share a gate and were in one enclosure. The other house was occupied by another tenant, one Mr. Aziz Kakooza. Both houses were owned by Mr. Abdul Hamid Juma who testified as PW6.

The appellant and Mr. Kakooza, employed a househelp (we consider the term shamba boy or houseboy to be derogatory) one Sempijja (A2) was commonly paid to man the common gate, clean the compound and for the appellant he also helped in cleaning inside the house and in doing other domestic chores including washing the appellant's clothes. He lived in the workers quarters adjacent to the main houses. At the material time, Sempijja had a live-in girl friend Joan Nakira (PW4).

It is at this house that on 30/01/ 2010 that people who had come to fumigate Mr. Kakooza's house discovered the deceased's body floating half naked in the common septic tank. Subsequently the appellant and Sempijja were arrested and charged with murder of Brenda Karamuzi (deceased), of which the appellant was convicted. It was stated in the indictment that the appellant and Sempijja and others still at large between 21/01/2010 and 30/01/2010 (in this Judgment references to days and dates unless otherwise stated refer to the month of January 2010 at Kijjwa zone, Bukasa, Makindye Division, in Kampala District, murdered Karamuzi Brenda.

Counsel for the appellant strongly submitted that there was no sufficient evidence to prove that the deceased was killed inside the appellant's house. He contended that the deceased could have been killed elsewhere, and "evidence planted" in the appellant's house to appear as if she had been killed there.

PW7 Detective Woman Sergeant Auma Grace Silver testified that on 30/01/2010, she respondent to information from the Local Council (LC) Chairperson of Kijjwa Zone. A body had been found in a septic tank at one of the residences in his area. She proceeded to the scene. The body of a young female unidentified at the time, was found floating in a septic tank.

Her skull was smashed, it had cut wounds on the face and was half naked. The occupant of one of the house in the compound was present. He is the one who had called in the fumigation team, which team had accidently stumbled on the dead body as they carried out their work. He is the

one who had asked them to extend the fumigation to the septic tank. Clearly he was ruled out as a suspect.

The other house was rented by the appellant. He was away. The house was locked. He was an unmarried young man who the witness were told by those at the scene had frequent female visitors.

The police decided to search his house on suspicion that they would get some evidence explaining the death of the deceased. The body was retrieved and sent to the city mortuary before it had been identified by any one. By the time the search into the appellant's house begun, the police according to PW7 had no clue as to who the deceased was. Inside the house pieces of suspected evidence were retrieved and exhibited in Court as follows;-

Suspected body brain tissue, recovered from the inner side of the kitchen door. Suspected brain tissue from the Eastern wall of the kitchen, suspected blood drops swabbed from the southern corridor wall next to the first door from the kitchen.

Suspected blood drops swabbed from the Eastern wall of the sitting room. A suspected blood stained orange cushion was picked from a big seat in the sitting room.

A coffee brown night dress with both sleeves torn was picked from the top of the wardrobe in the visitor's room.

A hoe with a wooden handle with suspected stains was picked from the outside pit-latrine that was used by the house keeper.

Three ladies hand bags were retrieved from the ceiling. Their description and contents were set out in PW7's testimony. Briefly they were:-

A flowered grayish ladies bag containing a number of different ladies clothes and jewelry.

A black ladies hand bag containing the following ;- a small black money purse, several business cards, a Flash disk an NSSF card serial No. 84027004182 and a Barclays Bank Electronic

Visa card serial No. 41170600535932 both in names of Karamuzi Brenda and a number of assorted ladies clothes and toiletries.

A coffee brown bag with white strips containing a number of ladies items such as lotions, creams earnings, underwears and some clothes.

The witnesses told Court that from 30/01/2010 the police posted guards at the appellant's resident on a 24 hour basis. On 31st PW7 together with other police officers returned to the scene. They also had some officials from the Government Analytical laboratory. They recovered further evidence suspected to be related to the killing of the person whose body had been recovered. By this time 31/01/2010 the body had been identified as that of Brenda Karamuzi, by her mother PW1 Joy Karamuzi. She had been traced by the police using clues provided by items recovered from the bags that had been found in the ceiling of the appellant's house. On that day a number of items were recovered from inside the appellant's house. They included the following:-

A Copper like metal rod with one side in form of a spear and another side pointed.

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A Suspected body fluid swabbed from the kitchen door inner side.

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A piece of crest foam - mattress cover with suspected stained with body fluids - cut from the crest foam mattress cover in the visitors' room.

An empty cover of Rough Rider condom picked from under wooden bed in visitors bed.

A small old purplish towel suspected blood stained recovered from inside outer toilet/bathroom north east comer

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Chips and meat "take away food" wrapped in silver paper and packed in khaki envelope written on steak - out Take out Fast Food recovered from the fridge in the kitchen.

On 3rd February 2010 more suspected evidence was recovered from the appellant's house which included a blood stained cushion and it's cover.

On 23rd March 2010 two broken mobile phone sim cards were recovered from an empty 20 litre jerrycan from the room of Sempijja. It is him who led the police to these exhibits. He was already in police custody.

On 30th April 2010 the police again visited the scene and retrieved a floor carpet from the appellant's sitting room. In addition before the removal of the body and the exhibits from the scene, the police had taken photographs of the body, the exhibits and had also drawn a sketch plan of the scene.

All the above items including the colour photographs were exhibited in court. Two mobile phones the property of the deceased were also recovered later. They were traced to PW4 and to her boy friend Sempijja, the appellant's house keeper.

Evidence from the deceased's mobile telephone records that were tendered in Court revealed that Sempijja had on the morning of 23/01/2010 used the deceased phone to transfer money to his own phone. Phone print out from the deceased's phone records indicated that she had last talked on her phone on the evening of 22/01/2010. The testimony of DW1 Pope Ahimbisibwe was to the effect that he had talked to the deceased on phone on the evening of 22/01/ 2010, apparently that was her last telephone conversation with anyone. The appellant in his testimony in court stated that he last saw the deceased on 22/01/2010 which was a Friday, she had been at his house since the 20/01/2010. On 22/01/2010 the appellant stated that he talked to the deceased on phone during that day at about 2:00 Pm. On that day 22/01/2010 at about 8: 00 am the deceased was at the appellants house. PW4 Nakira Joan the girl friend of Sempijja A2 saw her. She sent Sempijja to buy her food. He bought the food. At that time according to this witness the appellant was also in the house. Indeed the appellant told Court that the deceased had spent the night of 21st January in his house. In the morning when he woke up she was there in the sitting room drinking Waragi (a local gin) when the appellant left for town.

No one saw the deceased leave the house of the appellant on 22/01/ 2010. Neither PW4 nor A2 opened for her the gate. PW4 on that day only opened the gate for the appellant when he was leaving. A2 Sempijja did not see her leave the house either. No one else saw Brenda in town or elsewhere. From that day no one ever saw her alive again. The appellant said he talked to her on phone that day of 22/01/2010 but does not state else where she was.

By 23rd January in the morning, the deceased had vanished. Her phone was in the possession of Sempijja. No one ever contacted her again or saw her again. As already stated her lifeless body was retrieved by accident in the appellant's septic tank on 30th January 2010. The pathologist's report indicated that by 31st January, she had been dead for more than 72 hours or 3 days. He testified that her skull had been smashed with such a force that no brain matter was found inside when the postmortem was carried out. The DNA tests proved that the blood and the brain matter recovered from the appellant's house were those of the deceased.

The only reasonable inference from the above facts would be that such a blow that would result into a splatter of the brain matter scattering it some distance from the point of impact. It would also result into instant death. The deceased's brain matter was found splattered in the appellant's house. We do not accept the appellant's counsel's argument that it could have been planted there. The brain matter was found a distance from the sitting room in very inconspicuous places. The brain tissue was picked from the inner side of the kitchen door and from the eastern wall of the kitchen. The colour photographs taken show the brain matter was in very small pieces could not have been conspicuous.

It appears clearly to us that the existence of the deceased's brain matter in the appellant's house, her shuttered empty skull, the discovery of her blood in the appellant's house and the recovery of her body from the septic tank is proof that the deceased was killed inside the appellant's house.

The evidence of the PW7 who recovered the body and exhibits including blood samples, brain tissue and deceased's personal properties especially the bags that were hidden in the ceiling. The evidence of PW8 a police officer from the Forensic Section of CID, who took photos, drew a sketch plan, recovered blood and brain samples, and the property of the deceased. The evidence

of PW9 the pathologist who carried out the postmortem on the body of the deceased and determined that the cause of death was brain injury following blunt force trauma simply put a deadly blow on the head and also determined that death did not follow any struggle or resistance. The evidence of PW11 Cahingon, a police officer from the Forensic Department of CID who determined that there was a trail of blood of the deceased from the inside to the outside of the house. All corroborate each other and prove beyond reasonable doubt the fact that the deceased was killed inside the appellant's house.

In ***R.vs Baskerville (1916) 2 KB 658***. It was stated that;

> "***Corroboration need not be direct evidence. It is sufficient if it is merely circumstantial***".

In ***Rwalinda John vs Uganda Court of Appeal Criminal Appeal No. 011w of 2012***. This court held that:-

> "***Corroboration does not mean that every detail has to be corroborated"***

The trial Judge was alive to the law relating to circumstantial evidence. We find that he applied the law correctly to facts when he found that prosecution had proved beyond reasonable double that the deceased was killed inside the appellant's house. However, this is not the end of the story. The question remaining to be answered is "who killed the deceased?

The appellant denied having been at his house on the 22/01/2010, having left for town at about 9:00 am on that morning. That he did not return to his house until 5: 30 am on the morning of 23/01 2010.

That when he came back he did not find the deceased, that he called her two phones but they were both switched off. Simply he does not know what happened. Technically his defence is that he was not at anywhere near his house when the deceased was killed and as such he could never have been the one who killed her. In his defence the appellant accounts for his where abouts from the time between 22/01/2010 9:00 am and 23/01/2010 5:30 am. He called 5 witnesses to prove his defence of *alibi.*

The trial Judge did not believe him, neither did he believe his witnesses. He believed the prosecution case. He found that the appellant and his witnesses had been untruthful. The appellant now faults the findings and the decision of the learned trial Judge.

We accept the submissions of Mr. Tusasiirwe that whenever an accused sets up a defence of *alibi*, it is not sufficient for the court to state that having believed the prosecution, the *alibi* therefore crumbles.

The court must evaluate the evidence as a whole. It must not look and the prosecution case in isolation of that of the defence. Both the prosecution evidence and the defence must be equally and fairly evaluated and the court must come up with a rational decision. *See* ***Kagunde Fred vs Uganda (Supreme Court Criminal Appeal No 14 of 1998)*** *(unreported).*

Black's law Dictionary 6th Edition defines *alibi* as follows;-

> ***" A defence that places the defendant at the relevant time of crime in a different place than the scene involved and so removed there from as to render impossible for him to be the guilty party."***

From the above definition, it appears to us clearly that the defence of *alibi* requires certainty of three things:-

-The place at which the crime was committed.

-The time at which the crime was committed.

- The whereabouts of the accused at the material time.

In this particular case we have confirmed the finding of the Judge that the prosecution had proved beyond reasonable doubt that the deceased was killed at Bukasa at the residence of the appellant. The prosecution had in addition to prove the date and time of her death.

We have already stated above that PW3 Pope Ahimbisibwe talked to the deceased on phone at 7:00 pm in the evening of 22/01/2010. He was the last person she talked to on phone. The phone records indicate that on 23/01/2010 at 8:45 am A2 transferred money from the deceased's phone

to his own phone. She was no longer in possession of her phones at that time. No one else was able to contact her on phone thereafter. The only reasonable inference is that by that time she was already dead.

We agree with the trial Judge's finding that the deceased must have died between 7:05 pm on 22/01/2010 when she last talked to DW2 and 8:45 am on 23/01/2010 when her phone was in possession of A2. This fact is not seriously contested by the defence. In fact the defence relied on this fact to prove their defence, which is that at that material time the appellant was nowhere near his residence.

The appellant in his own testimony states that he was in town away from home at a night club called Silk Club on the early morning of 23/01/2010. That he left the club with a friend, Mayanja DW5 at 5:00 am. DW5 testified that he was with the appellant at Silk club on the Morning of 23/01/2010 and they both left the club in his car at 5:00 am. That he drove straight to the appellant's home at Bukasa where they arrived at 5:30 am. That it was still dark and his car lights were on.

The defence evidence itself clearly destroys the appellants' own *alibi*, because the 'material time' in this case is from 22/01/2010 at 7:05 pm to 8:45 am on 23/01/2010. His defence is that he arrived home at 5:30 am on 23/01/2010 He places himself squarely at the scene within the material time. Smashing a person's head with a blunt weapon does not have to take long in view of the fact that there was no evidence of struggle. The appellant could have killed the deceased and her body dumped in the septic tank between 5:30 am and 8:45 am on 23/01/2010.

Be that as it may, the learned trial Judge went in detail to evaluate the evidence of both the defence and the prosecution and gave reasons why he disbelieved the appellant's *alibi.*

For the prosecution, evidence was adduced by PW4 Nakira Joan who was living with her boy friend Sempijja at the appellant's residence at the material time. She testified on oath that on that morning she was at the appellant's residence the whole day on 22nd January. That the appellant left the house that evening at about 4:00 pm and did not return until late that night.

That while she slept with A2 Sempijja in their room that night the appellant woke up Sempijja and asked him to go and buy him cigarettes. That Sempijja woke her up and they went together since it was very late at night. She even noted that it was raining at the time. That the appellant's car was right in front of his house and all its doors were open. That the time they woke up to buy cigarettes it was 3:00 am. That after they had bought the cigarettes Sempijja took them to the appellant and spent a long time with him inside the house. That he later came back and slept. She asked him why he had delayed to come back to sleep after delivering the cigarettes.

The learned trial Judge believed her testimony. He described her as a simple village girl, who gave her testimony in a simple quiet but firm manner, devoid of exaggeration. He noted that she had nothing to gain from the testimony. That she even testified to matter which were incriminating her boy friend. It is the trial Judge who saw this witness and listened to her testimony. It is him who observed her demeanor.

We have found no reason to fault him in this regard. Even to us who neither saw this witness nor listened to her testimony, we find it more consistent, reasonable and believable than the appellant's version of events. This witness PW7 who was woken up in the middle of the night is more likely to have noted and remembered the time and the strange events of that night than the appellant and his friend Mayanja who had been at a number of night clubs and bars the whole night.

A number of inconsistencies noted by the learned trial Judge in the testimonies of both DW5 Mayanja and that of the appellant as to where they were and whom they were with makes their testimonies not only inconsistent but unbelievable. The learned trial Judge correctly rejected them as a pack of lies. Clearly the story was an afterthought intended to create an *alibi* for the appellant. The evidence of DW6, Phyllis Katana is also unbelievable. We agree with the learned Judge that her testimony was intended to strengthen the appellant's case. We agree with the learned trial Judge that Phyllis Katana told lies in court. Her testimony was meant to show that on 23/01/2010 everything was normal at the appellant's house, especially in the visitors' room. We know this is not true. The learned Judge correctly rejected it and we agree with the reasons he gave.

In his examination in chief the appellant states that:-

"22nd Friday, I got up about 9 a.m. Brenda was at home. She was in the sitting room drinking from a glass. She had a small quarter Waragi glass. I commented on her style and commended her braids hair style. I then got ready and left home.

He went on to state that;-

"We were at that bar across the Road from Divas for about 30 minutes being having drinks. From there, Ruthman Mayanja's car, we went to Club Silk Royale Section - we got there at Club Silk after 2 a.m. and left Silk after 5 a.m. I was with Ruthman. We met several people at Club Silk - Peter Kaddu, David Kigozi, Ben Bitature. All this time Ruthman Mayanja was seated next to me. I cannot recall the exact time I got home. It was morning of 23rd and it was light. Ruthman dropped me home. When I got home Sempijja opened for me the house. I went straight to my bedroom straight away I slept as I was very tired. I asked Sempijja of Brenda was and he told me she was not around. I woke up on 23rd at about 11 a.m. At that time Chris Bagaruka in. He used to do that. I talked to Chris and asked for his programe. He said he was going to his office for some work. I asked for a lift to 6th Street Industrial Area so I would pick up my car before they closed."

Further on he states that;-

"As usual practice, A2, was in charge of my premises when I was absent clearing the house, washing my clothes and ironing them and making sure all was in order - whether I was present or absent. That day Chris dropped me at Ambruad and I picked up my car from the garage and proceeded to the washing bay opposite Church that logn at Pan World Washing Bay, that day 23rd January I called Peter Kasedde who joined me at Bar World. Rita also joined me and we proceeded to thereafter lunch with drinks."

In cross examination he states that;-

"22nd Friday, the car was in the garage. I am not lying, the car was in Automed on 22nd Ruthman Mayanja was not at the vigil on 22nd but on other days. He joined us about midnight in the bar. We left that bar whose name I don't remember at 2.00 a.m. for Club Silk. It is not true that I drove home. It is not true that I went home earlier than 5 a.m".

The prosecution evidence is that PW4 on the morning of 23rd January at 3:00 am together and A2 her boy friend had been sent by the appellant who had woken them up to go and buy him cigarettes. They had found his car outside, in front of the house with all its doors open. It was still there when they came back.

The evidence of the appellant was that on the morning of 23rd January he was dropped by DW5 at after 5:00 am in the morning, when it was already dawn and there was light. He states that he only picked his car from the garage on 23rd January during the day after 11:00 am. If his story is true, then his car would not have been at his house in the morning of on 23rd January at 3:00 am when he sent A2 and PW4 to go and buy him cigarettes.

The Judge had to look only all the available evidence as whole, and when he did he dismissed the *alibi.* We agree with him that the prosecution evidence put the appellant at the scene especially PW4 Joan who clearly stated that at about 3:00 am on 23/01/2010 she and A2 were woken up by the appellant to go and buy cigarettes. PW4 was certain about the time and clearly narrated the events of that very early morning. We accept her evidence.

The appellant attempted to rely on the evidence of the telephone print outs to prove that he was not at his house at the material time. However, that evidence does not indicate or prove that he was away from his house between 3:00 am and 5:30 am on 23/01/2010. The telephone print out evidence is therefore immaterial in establishing his *alibi.*

In the result we agree with learned Judge that the appellant was at his house at the material time, when the deceased was killed. This is based on his own testimony, and the testimony of PW5

that he was dropped at 5:30 am. But move strongly on the evidence of PW4 Joan. In addition to the above, there other independent evidence linking the appellant to the crime.

PW4 testified that the appellant gave A2 his blood stained clothes to wash. The blood stained clothes were stated to be, a vest, a tee-shirt and male pants. The appellant's blood stained clothes seen by this witness seals the presence of the appellant at the scene of crime and directly links the appellant to the murder of Brenda Karamuzi

The appellant's conduct was also telling. In his testimony reproduced above, he was with the deceased inside his house in the morning of 22/01/2010. Three days later, when asked about her whereabouts by her friend PW2, he lied that he had not seen her at all. He told this lie to the deceased's sister PW3 that had not seen the deceased and even advised her to check in the morgue. The only logical conclusion from the conduct of the appellant is that he knew that deceased was dead, and he was trying to distance himself from the murder. The learned Judge rightly rejected his defence.

We have deliberately omitted to refer to the evidence of A2 which directly put the appellant at the scene and directly links him to the killing of the deceased, concealing evidence and disposal of the body.
Although his evidence is admissible under **Sections 28** and **132** of the Evidence Act, it is weakened by the fact that it was not tested in cross examination. In our evaluation of evidence we have come to the conclusion that even without the evidence of A2 Sempijja the prosecution had adduced sufficient evidence upon which to convict the appellant.

The evidence of A2 clearly must be taken into consideration and the learned trial Judge was justified in doing so. It lent credence and assurance to the evidence. Both for the prosecution and the defence as the whole evidence had to be looked at together.

In the result the whole evidence looked at as a whole proved beyond reasonable doubt that the appellant killed the deceased Brenda Karamuzi with malice aforethought.

This disposes of the first four grounds of appeal which are all dismissed.

The last ground is in respect of the death sentence passed by the trial Judge. This ground is set out as follows;-

> **"That the learned trial Judge erred in law in sentencing the appellant to death based on a wrong conviction."**

This ground is an appeal against the legality of sentence. It is not an appeal against the severity of sentence. We have already held that the learned trial Judge correctly convicted the appellant for the murder of Brenda Karamuzi. The conviction has been upheld.

The death penalty is a legal sentence for the offence of murder for which the appellant was convicted. *See:* ***Namaweje Pauline vs Uganda Supreme Court (Criminal Appeal No. 14 of 2009)*** *(unreported).* This ground which is solely based on the legality of the conviction and sentence therefore fails. The appellant was at liberty to appeal against the severity of sentence and he chose not to. This court cannot consider a matter of severity of sentence since it was not set out in the memorandum of appeal.

We find that the sentence was legal and that learned trial Judge did not err in law when he imposed it. It is accordingly upheld.

Ground 5 also fails.

This appeal accordingly fails. The conviction is confirmed and sentence of the High Court hereby upheld.

Dated at **Kampala** this **12th** day of **November** 2015

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HON. MR. JUSTICE A.S NSHIMYE

10 **JUSTICE OF APPEAL**

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15 **HON. MR. JUSTICE ELDAD MWANGUSYA**

JUSTICE OF APPEAL

20 **…….**

HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL