THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT JINJA

(Coram: Elizabeth Musoke, Barishaki Cheborion and Hellen Obura, JJA)

CRIMINAL APPEAL NO. 081 OF 2016

ODYAMBO JUVENTINE:: APPELLANT

VERSUS

UGANDA :: RESPONDENT

*[Appeal from the decision of the High Court of Uganda sitting at Soroti (**Hon. Lady Justice H. Wolayo**) dated 26th April 2016 in Criminal Session Case No. 13/2013]*

JUDGMENT OF THE COURT

Background

It was alleged by the prosecution that the appellant and others still at large on the 15th day of May, 2012 at Kamurejei village, in Otuboi sub county, Kaberamaido District with Malice aforethought murdered Elesu Richard, Akwi Martha and Apio Josephine. To prove its case, prosecution presented five witnesses and relied on post mortem reports PF48 marked as PEX1 & 2, medical certificates marked PEx3 and Pf 24 marked PEx4. The appellant pleaded not guilty to all the 3 counts of murder and raised the defence of alibi that at the time of the alleged incident he was asleep at his home. He gave unsworn evidence and never called any witnesses. The learned trial judge convicted him on all the 3 counts of murder and sentenced him to three

concurrent sentences of 40 years imprisonment. After taking into account the years he had spent on remand, the sentence was reduced to 36 years.

Being dissatisfied with both the conviction and sentence the appellant filed this appeal on the following grounds;

1. ***The learned trial judge erred in law and fact when she reached a conclusion that the death of Elesu Richard, Akwi Martha and Apio Josephine was caused unlawfully, with malice afore thought prosecution having failed to prove the cause of fire.***
2. ***The learned trial judge erred in law and fact when she held that there was correct identification of the appellant basing on the evidence of PW1, PW3 and PW4 which evidence is very inconsistent and majorly contradictory.***
3. ***The learned trial judge erred in law and fact when she dismissed the appellants' defence of alibi yet the prosecution did not destroy it any way by way of evidence of investigation.***
4. ***The learned trial judge erred in law and fact when she failed to properly evaluate the evidence on record thus reaching an erroneous decision that the appellant participated in unlawfully causing the death of Elesu Richard, Akwi Martha and Apio Josephine.***
5. ***That the sentence against the appellant was harsh and excessive the learned trial judge having failed to accord the appellate an opportunity to present his antecedents in mitigating the sentence.***

At the hearing, Ms Amojong Kevin represented the appellant on State brief while Ms Nyanzi Macrina, Asst. Director of Public Prosecutions (DPP), represented the respondent.

Due to the COVID-19 Pandemic restrictions, the appellant was not in court physically but attended the proceedings via video link to Prison. Both parties sought, and were granted, leave to proceed by way of written submissions.

Appellant`s submissions.

On ground one, it was submitted for the appellant that although prosecution had proved that indeed Elesu Richard, Akwi Martha and Apio Josephine died, it failed to prove that their respective deaths were caused unlawfully with malice afore thought. That there was no conclusive evidence to rule out the fact that the fire could have been ignited accidentally. According to appellant`s Counsel, PW5 Dectective Sgt Oboth Alfred never told court what the cause of the fire was when asked during his examination in chief and yet no further investigations of the scene were carried out to rule out any inference of accidental fire. Counsel submitted that the investigation officer`s testimony that he was told by a girl who he didn`t specify that she saw the accused setting the house ablaze. To Counsel, this was misleading as no prosecution witness told court that they saw the person setting the fire not even PW3 Abago Betty who claimed to have woken up first. Counsel contended that the investigation officer did not secure the scene of crime and only went there at 1:00am in the night. He never went back. That no inquiries were made on

what kind of light was being used in the hut or if there had been any charcoal stove inside.

Counsel for the appellant further submitted that PW3 Abago Betty in her testimony never stated that she saw the appellant setting the hut on fire. If the fire started outside and she woke up immediately then, by the time it descended inside, the occupants would have evacuated with minimal injuries. According to Counsel, the grave injuries which the deceased sustained show that the fire started from inside not outside and the allegation that the appellant wanted his child from Apio Josephine which child was also being claimed by another man was unbelievable and contradictory since no investigation and evidence was led in that regard.

On grounds 2 and 4, Counsel for the appellant submitted that the learned trial judge did not adequately warn herself of the special need for caution in dealing with the evidence of PW1 Epaingu, PW3 Abago Betty and PW4 Akeso Agnes. That the learned trial judge failed to weigh the alleged factors favouring correct identification as against those which made correct identification difficult. That the evidence of PW1 Epaingu Joseph, PW3 Abago Betty and PW4 Akeso Agnes which the trial Judge based on to reach a conclusion that the appellant was properly identified was marred with deliberate lies and was very inconsistent, contradictory and ought to have been rejected. Counsel asked Court to follow the decision in **Ruhweza vs Uganda, Supreme Court Crim Appeal No.7 of 2001.**

Counsel for the appellant further argued that the prosecution did not lead any direct evidence to prove that the appellant set the fire which caused the death of the 3 deceased. That even the circumstantial evidence was contradictory and the exculpatory facts were compatible with the innocence of the appellant. He referred court to **Simon Musoke vs R EA [1958] 715.**

On ground 3, it was submitted for the appellant that he was at his home when the house was set on fire and this alibi was never disapproved. Counsel contended that PW3`s evidence was very contradictory and inconsistent in all material facts and pointed to deliberate lies. That if indeed PW1 Epaingu Joseph and PW3 Abago Betty had seen the appellant commit the offence, he could not have been found at his home, he could have run away but instead the appellant went to the scene of crime after being informed by his brother about what happened to Josephine`s home. That the appellant`s conduct after the incident points to the fact that he was not guilty of the charges levied against him. Counsel argued that before dismissing the defence of alibi, it is incumbent upon court to evaluate both versions of evidence relating to where the accused could have been before making any inference as to the credibility of the alibi raised He cited **Bogere Moses v Uganda, SCCA NO.1 OF 1997** to that effect.

On ground 5, it was submitted for the appellant that the learned trial judge failed to accord the appellant an opportunity to present his antecedents in mitigation of the sentence. That she never inquired into his character and antecedents as required under section 98 of the TIA and direction no 6 (e), 9 (3), 9 (3) (f), (g), (h) and 9(4) of the sentencing guidelines 2013. That the

appellant was a first time offender, widower and a care giver, he is HIV positive, that exhibit PF 24 revealed that he was intoxicated with alcohol the day of the commission of the offence and was therefore, not in a clear state of mind. That all these factors were never considered in mitigation of the appellant`s sentence but the learned trial judge only concentrated to the aggravating factors. That the sentence of 40 years imprisonment reduced to 36 years after deducting the period spent on remand was in the circumstances harsh and excessive.

In reply, counsel for the respondent addressed court on grounds 1, 2 and 4 together and submitted that the prosecution did prove the ingredients of unlawful act, malice aforethought and participation of the appellant.

Regarding the ingredient of unlawful act, counsel submitted that PW1 Epaingu Joseph, PW2 Ajiko Dorcas and PW3 Abago Betty told court that 2 children got burnt in the house of Apio Josephine and died of severe burns. The post mortem reports showed that the cause of death was deep burn wounds on the bodies and that the learned trial judge rightly decided the way she did.

Regarding malice aforethought counsel submitted that in homicides, the intention and or knowledge of the accused person at the time of committing the offence is rarely proved by direct evidence. He cited **Nanyonjo Harriet and another vs Uganda, Supreme Court Criminal Appeal No. 24 of 2002**. That in determining whether the death was caused with malice aforethought, courts consider the nature of weapon used, manner in which the weapon was

used, part of the body targeted and the conduct of the accused during and after the incident for instance whether there was evidence of impunity.

Counsel submitted that PW3 testified that she woke up and noticed that their hut was on fire and that the children Akwi Martha and Apio Josephine had been burnt severely and they died. That the learned trial judge considered the evidence of PW3 Abago Betty, PW4 Akeso Agnes and PW2 Ajiko Dorcas that the bodies of the 3 deceased had been severely burnt and the nature of the burns on vulnerable parts of their body and that whoever set the house on fire did so with malice aforethought.

Regarding participation, counsel submitted that PW3 Abago Betty saw the appellant who was putting on a dark cloth holding a panga and a stick running towards the swamp. That prior to the fateful day, she had witnessed an argument between the appellant and Apio Josephine about their child and that the appellant had said that if she did not give him the child, it was a matter of death and life and at midnight she woke up only to see their house on fire. That PW3 Abago Betty and PW4 Akeso Agnes knew the appellant well as the father of one of the deceased Akwi because he used to come to their home during day and he could sometimes sleep there. Counsel further submitted that PW3 Abago Betty testified that she was able to identify the appellant because there was light provided by the burning house and that the accused was only 3 meters from her.

That PW1 Epaingu Joseph met the appellant who emerged from a path which led to Apio Josephine`s home carrying a stick and a panga the very items PW3

saw. Counsel contended that the learned trial judge rightly held that the deceased were killed unlawfully with malice aforethought and by the appellant.

On ground 3, it was submitted for the respondent that prosecution witnesses PW1 Epaingu, PW2 Ajiko Dorcas, PW3 Abago Betty and PW4 Akeso Agnes all testified on oath that they knew the appellant who resides in the same village with them. That they knew him as the father of Akwi Martha whose mother was Apio Josephine and the appellant used to reside at the home of Apio Josephine where PW3 and PW4 also resided. That on the date of the murder, PW3 and PW4 saw the accused with Apio and the two were involved in an argument over their child and the appellant promised to do to Apio something. That during the night PW3 woke up and saw their house on fire and that she saw the accused running away in possession of a stick and a panga. Further, that PW1 testified that he met the accused coming from a path that led to Apio Josephine`s home with a stick and panga.

On ground 5, it was submitted for the respondent that the maximum sentence for murder is death and that the Constitution Sentencing Guidelines provide for the sentencing range in capital offences like murder. The starting point is 35 years and upon considering both aggravating and mitigating factors the sentence starts from 30 years up to death. That the trial judge in sentencing the appellant considered both mitigating and aggravating factors and the time the appellant had spent on remand and sentenced him to 36 years imprisonment. In the instant case, 3 lives were lost and they were all members of one family, they suffered injuries which caused their death, the appellant

was a father of one of them. Counsel contended that the sentence of 36 years imprisonment therefore was not harsh.

In rejoinder, it was submitted for the appellant that the prosecution never adduced any direct evidence to indicate that the appellant had burnt the hut. That the circumstantial evidence relied upon to corroborate the evidence of PW4 Akeso Agnes was very contradictory. Counsel cited ***Kayaga Edith vs Uganda CA No.325 of 2015*** where a single identifying witness was a seven year old boy who alleged that he had seen his mother get petrol from the fridge and then set the house on fire and he also told court that he was awoken by his father when the house was already on fire. That court wondered how he could have seen the mother light the fire and yet he woke up when the fire was already gutting the house. Court found this evidence contradictory and acquitted the appellant. Counsel argued that Kayaga Edith was handled by Ms. Gladys Nyanzi Macrina learned state attorney the same attorney appearing in the present case and no appeal was preferred.

Counsel submitted further in rejoinder that PW3 Abago Betty was the only identifying witness who told court that she saw the appellant running which meant that she only saw the appellant`s back and that the assailant was 3 metres away. That she saw the appellant meet some people after he ran. That PW3`s evidence was contradictory as it was impossible for her to have had time to glare at the appellant up to a point where he met other people yet at the same time she claimed she was helped by others get out of the house. That PW2 Ajiko Dorcas`s evidence that corroborated that of PW3 Abago Betty

was contradictory because it`s unclear on whether the appellant was following them or walking towards them.

We have carefully studied the court record and considered the submissions of both counsel. We are alive to the fact that this court has a duty as the first appellate court under rule 30(1) (a) of the Rules of this Court to re-appraise the evidence and come up with its own conclusions. We are also further guided by the Supreme Court decision in the case of ***Father Narsensio Begumisa and others vs Eric Tibebaga; SCCA 17/2002*** in which Court held that;

> *"It is a well- settled principle that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."*

We shall resolve grounds 1, 2 and 4 together. The learned trial judge is faulted for having held that the appellant unlawfully and with malice aforethought caused the death of Elesu Richard, Akwi Martha and Apio Josephine.

Counsel contended for the appellant that there was no correct identification of the appellant by PW1 Epaingu Joseph, PW3 Abago Betty and PW4 Akeso Agnes and as a result the judge had erroneously decided that the appellant had participated in causing the death of the deceased persons.

In determining the issue of cause of death, the learned trial judge stated as follows;

> *"That Elesu Richard and Akwi Martha died from deep burn wounds on 6th may 2016 during and immediately after the fire is not disputed. PE.1 and PE 2 for Akwi and Elesu both children, show that Akwi`s body was totally burnt while Elesu`s body sustained deep brown bruises over the whole body.PE3 for Apio Josephine shows that she died on 10th June 2021 and cause of death was sepsis and severe burns.*
>
> *As to whether the death was unlawfully caused, this will become clearer during the evaluation and analysis of evidence."*

On the ingredient of malice aforethought, **Section 191 of the Penal Code act Cap 120** defines "malice aforethought" as follows:

"Malice aforethought shall be deemed to be established by evidence proving either of the following circumstances: -

a) *An intention to cause the death of any person, whether such person is the person actually killed or not; or*
b) *Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused".*

Perpetrators of crimes rarely voice out their intention when committing offences. Malice aforethought is therefore a state of mind. The intention and or knowledge of the accused person at the time of committing the offence is rarely or hardly ever proved by direct evidence. The courts usually deduce or

make inference of the intention or knowledge from the circumstances surrounding the killing such as the type of weapon used, the mode of killing, nature of the injuries inflicted, the part of the body affected; whether vulnerable or not, and the conduct of the accused before, during, and after the attack. See ***Tubere v. R. (1945) 12 EACA 63, Uganda vs Turwomwe (1978) HCB 182*** *and* ***Nanyonjo Harriet and Anor v. Uganda (S.C). Criminal Appeal No. 24 of 2002.***

PW2, Ajiko Dorcas testified that when she reached the scene of crime, she found that Apio Josephine had serious burns, one child Akwi Martha had died while Elesu Richard had been severely burnt but was still alive but later died after reaching hospital.

PW3, Abago Betty daughter to one of the deceased Apio Josephine gave testimony that when she went to the scene and after opening the door, she pulled out Elesu and Apio but Akwi perished in the house and her remains were recovered. That Elesu died on their way to hospital while Apio Josephine her mother died 2 months later.

While determining this ingredient, the learned trial judge stated as follows;

> *"The fact that 3 lives were lost as a result of the reckless conduct of the accused implies that he intended the consequences of his reckless conduct. Find that the death of the three people was a result of the unlawful and intentional actions of the accused person."*

Prosecution Exhibit 1, the post-mortem report of Elesu Richard showed that his body had multiple burns on the face, back, upper fore limbs, abdomen

and part of the upper thighs and superficial burns on the chest. The cause of death was deep burn wounds which could have led to severe dehydration and haemorrhage leading to death.

Prosecuton Exbit 2 the post mortem report for Akwi Martha showed that her body was totally burnt, her skull and radial ulna bones were exposed and the cause of death was ruled to be deep burn wounds all over the body and suffocation from oxygen due to very hot fire.

For Apio Josephine aged 50 years P.Ex.3 the post mortem report showed that the cause of death was sepsis due to severe burns.

Evidence on record shows that the hut in which the deceased and the survivors slept was burnt and the deceased persons obtained deep burn wounds which led to their death. The nature of injuries sustained were so grave. PEx1 shows that Akwi's skull was exposed due to the deep burn wounds. It is clear that whoever set the hut on fire wanted those inside dead and this in our view is proof of malice aforethought.

On participation of the appellant, PW 2 Ajiko Dorcas testified that she was awakened by an alarm raised by Akeso Agnes shouting that her child had gotten burnt and calling her for help.

PW3 Abago Betty testified that the appellant came to their home and after eating he struggled with her mother Apio and argued about the child; Akwi Martha and after the quarrel, each went away to drink alcohol. That the appellant and Apio Josephine were the parents of Akwi. During the quarrel, the appellant said that if Apio did not give him his child it will be a matter of

life and death. This evidence was corroborated by the testimony of PW4, Akeso Agnes who also witnessed the argument.

Abago Betty further testified that when she saw their house burning, she rushed and opened the door and saw the appellant approximately 3 meters away putting on a dark cloth holding a panga and a stick. That he was running towards the swamp.

PW1 Epiangu Joseph testified that while they were running to the scene of crime, they met odhaimbo who told them that there was someone who had burnt Josephine in the house together with the children. That he was carrying a stick and a panga coming from the path which leads to Joseph`s home.

PW4 Akeso Agnes also testified that PW3 Abago Betty told her immediately they ran out of the burning hut that she had seen the appellant running away from the scene.

The appellant testified that he never participated in the murder because he was at his home on the fateful night.

In determining the ingredient of participation, the learned trial judge stated as follows;

> *"The fact that the accused was found in the vicinity of the burning house, that he had with him a stick and panga as described by Abago PW3 and his omission to rush to the rescue of Apio with whom he cohabited and with whom they had a child is strong circumstantial evidence of participation in burning of Apio`s house. Walking away from the scene*

where a loved one is in danger only to be seen in the morning is consistent with guilt."

In ***Dhatemwa alias Waibi V Uganda, Criminal Appeal No. 23/1977***, the Court of Appeal stated that, *"It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial"*. It was held in ***R vs. Kipkering Arap Koske and Anor. (1949) 16 EACA.135*** **that "***in order to justify, on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt*". See also ***Mureeba (supra), Simon Musoke vs. R (1958) EA 715, Bogere Charles vs. Uganda (Supreme Court of Uganda Certified Criminal Judgement 1996/2000), and Dr. Aggrey Kiyingi & 2 others Vs Uganda Criminal Session Case No. 0030 of 2006***.

From the above evidence on record PW3 Abago Betty saw the appellant leave the scene of crime with a stick and a panga. This evidence was corroborated by the evidence of PW1 Epaingu Joseph who also testified that they met the appellant coming from the path from Apio's home. It's really disturbing how a person who could have been told of the news of a fire where his daughter and her mother were involved could act in the way the appellant acted. In addition, both PW1 Epaingu joseph and PW3 Abago Betty were consistent in their evidence. If the appellant was seen coming from the path from Apio's home as was stated by PW1 Epaingu Joseph, where was he really coming from if not from the scene where he had set a hut on fire.

Suffice to note here that the evidence on record indicates that earlier in the day the appellant had threatened the deceased Apio Josephine that if she did not give him his child it was going to be a matter of life and death and indeed a few hours after such an argument Apio`s hut was set on fire and 3 people died.

The appellant`s counsel submitted that during the fateful night, there were no factors which favoured correct identification. That the evidence of PW1 Epaingu, PW3 Abago and PW4 Akeso based on to reach a conclusion that the appellate was properly identified was marred with deliberate lies, inconsistent, contradictory and ought to have been rejected.

There is need for supportive evidence where the conditions favouring correct identification are difficult. The Supreme Court in ***Moses Kasana vs Uganda; Criminal Appeal No. 12 of 1981 (1992-93) HCB*** had this to say on identification;

> *"Where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and of fabricated alibi. "*

In determining whether there was proper identification, the starting point is understanding the conditions for making the identification. The other factors are the length of time the accused was under observation, the distance, the

light and the familiarity of the witness with the accused. ***See also: Moses Bogere vs Uganda; (SC) Criminal Appeal No. 1/1997***

PW3 Abago Betty testified that the appellant was 3 meters away from her and she managed to recognise him because the house was burning which created light around. PW1 Epaingu testified that while rushing to the scene with his grandson Edmond Epainyu, they met the appellant who told them that there was someone who had burnt Josephine together with her children in the house and he thereafter disappeared.

The appellant was well known to PW3 Abago Betty and PW4 Akeso Agnes as the father of the child he bore with Apio Josephine. Apio was also a mother to PW3 Abago Betty while PW1 Epaingu was an in-law to the appellant. They both knew that he used to cohabit with Apio Josephine one of the deceased and that sometimes he could sleep over or he could go to his home. They were familiar with him. PW1 met him and he even talked to them and told them Apio`s house had been burnt. There were no contradictions in this piece of evidence and there was no mistaken identity. The appellant was properly identified.

From the above evidence, it's now clear that the appellant set the deceased`s hut on fire that killed 3 of the inhabitants. This act was unlawful with malice aforethought. The appellant fully participated and put into effect his threats which he had earlier made that if he was not given his child, it would be a matter of life and death. The death which resulted from the fire was a natural consequence of that act and the appellant must have seen it (death) as a natural

consequence of his inhumane act. The fire that killed the deceaseds` did not start from inside the hut and was not accidental as argued by the appellant`s counsel. It was lit by the appellant with intention to kill the deceaseds. We see no other co-existing circumstances which would weaken or destroy this inference.

On ground 3, the learned trial judge is faulted for having dismissed the appellant`s alibi. That the prosecution did not destroy it in any way by evidence of investigation.

It is trite that when an accused person raises a defence of alibi, it is not his duty to prove it. It is up to the prosecution to destroy it by putting the accused person squarely at the scene of crime and thereby proving that he is the one who committed the crime. See: ***Sekitoleko vs. Uganda [1968] EA 531.***

In the instant case, the appellant testified that he was at his home that fateful night and went to the scene in the morning after being called by his brother who informed him that Apio's house had been burnt.

The appellant`s defence of alibi in our view was a lie. Prosecution evidence specifically the testimony of PW1 and PW2 destroyed the appellant`s alibi and put him at the scene of crime. The testimony by the said witnesses and the circumstantial evidence makes the version of the prosecution more believable than the appellant`s alibi. The learned trial judge rightly dismissed the appellant`s alibi and we find no reason to fault him in deciding the way he did.

On ground 5, the learned trial judge is faulted for passing a harsh and excessive sentence having failed to accord the appellant an opportunity to

present his antecedents to mitigate the sentence. That the trial judge did not take into account the appellant`s mitigating factors but instead concentrated only on the aggravating factors.

We have scrutinised the record, however it is silent on whether the learned trial judge held allocutus. The record of proceedings only stop at showing that the assessors gave in their opinion and advised court to find the appellant guilty. Thereafter there is a judgment of court and at page 76 of the record there appears the trial judge`s sentencing decision where she stated that;

"Three people lost their lives in a fire deliberately started by the accused person. More could have died but they survived. The fact that Akwi was his daughter and Apio his wife was not enough to deter the accused from committing the gruesome murder. That killing of spouses is rampant and therefore a pattern of violence against women is an aggravating factor that will attract an appropriate sentence as recommended by the UN Declaration on violence against women. Appropriate sentence is forty years on each count. As the accused has been on remand since May 2012, he is sentenced to 36 years imprisonment on each count. The sentence to run concurrently."

This Court can only interfere with the discretion exercised by the trial judge in imposing sentence if the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where the trial Judge ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. See;

Kiwalabye Bernard vs Uganda Criminal Appeal No.143 of 2001 (unreported)

A judicial officer must record what the accused submitted in mitigation and this should be evident on record. The judicial officer must state that the sentence was arrived at with both the mitigating and aggravating factors in mind. It is only then that the accused will be sure that the judge addressed his or her mind to the cited mitigating factors but nevertheless came to the conclusion that the aggravating factors outweighed the mitigating ones. See: ***Ramathan Magala vs Uganda (Criminal Appeal No.01 Of 2014) [2017] UGSC 34 (20 September 2017)***.

With the greatest of respect to the learned trial judge, her sentencing decision shows that she considered only the aggravating factors which she might have known from hearing the case generally. There was no allocutus held which would have enabled her to hear both aggravating and mitigating factors as required by law. The appellant was never given an opportunity to present the mitigating factors and the same do not appear anywhere in the sentencing decision.

The omission on the part of the trial court to conduct allocutus amounted to ignoring an important step or circumstance which ought to be considered and this occasioned a miscarriage of Justice on the part of the appellant. This is one of the circumstances under which this court, as a first appellate court, can interfere with the sentence imposed by the trial court.

For that reason, we set aside the sentence of the trial court and proceed to sentence the appellant afresh pursuant to Section 11 of the Judicature Act which provides:

> ***"11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated"*

In mitigation of the sentence, Counsel for the appellant submitted that the appellant was a first time offender, widower and a care giver, he is HIV positive, that PF 24 revealed that he was intoxicated with alcohol the day of the commission of the offence and not in a clear state of mind.

It was submitted for the respondent that 3 lives were lost and they were all members of one family. That they suffered injuries which caused their death and the appellant was a father of one of the deceased Akwi Martha.

The sentencing range in capital offences like murder is 35 years and upon considering both aggravating and mitigating factors is from 30 up to death. See: Paragraph 19, 3rd Schedule Part 1 of the Constitution (Sentencing Guidelines for Court of Judicature) (Practice) Directions 2013.

We are also alive to the principle of uniformity and parity in sentencing. In **Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015** where the appellant brutally murdered her husband and cut off his

body parts in cold blood, the Supreme Court set aside the death sentence imposed by the trial court and substituted it with a sentence of 30 years imprisonment.

In **Semanda Christopher & another versus Uganda CACA NO.77 OF 2010**, the deceased was assaulted by the appellant and he later died in hospital. They were sentenced to 35 years imprisonment for murder and on appeal, the court of appeal upheld the sentence.

In **Wamutabanawe Jamiru versus Uganda, SCCA No. 74 of 2007**, the Supreme Court sentenced the appellant to 34 years imprisonment for murder.

Having taken into account both aggravating and mitigating factors and the period the appellant had spent on remand from 13th September 2013 to 22nd April 2016 the date of conviction which is 3 years and 7 months we are satisfied that a concurrent sentence of 32 years imprisonment on each count will meet the ends of justice in this case. The sentence is to be served from the date of conviction.

We so order

Delivered at Kanjola this 30th day of February 2023.

Elizabeth Musoke

JUSTICE OF APPEAL

Cheborion Barishaki

JUSTICE OF APPEAL

Hellen Obura

JUSTICE OF APPEAL

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