THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[Coram: R. Buteera, DCJ. C. Gashirabake, JA, O. Kihika, JA.]

CRIMINAL APPEAL NO. 248 OF 2019

(Arising from Criminal session case No. 030 of 2012, at Mbarara)

BETWEEN

1. **MATATA BWAMBALE alias SSALONGO**
2. **BOGERE SAMWIRI**
3. **MWESIGYE OSBERT**
4. **KAGWA GODFREY alias GUDU ..... APPELLANT**

AND

UGANDA ..... RESPONDENT

(Appeal against the sentence passed by Duncan Gaswaga J. delivered on the 15th day of March 2012 at Mbarara)

JUDGMENT OF THE COURT

Introduction

1.] The appellants were indicted for murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120.

2.] It was the prosecution's case that on the 24th day of July 2012, at around 7:30 p.m. the deceased, Murangira Dennis a businessman dealing in hardware received a phone call while at his home with his wife one Beinomugisha Sarah (PWl). The deceased got into his motor vehicle Registration No. UAF 143K but never returned. Worried, PW1 tried to call him on his cell phone at around

1:00 a.m. but the number could not be reached. The following morning as PW1 was taking her child to school she got information that her husband's car was parked at the roadside with a dead body inside. When she rushed to the scene she indeed found that it was her husband's car and his lifeless body was lying inside. The matter was reported to the police and investigations commenced leading to the arrest of the appellants. It was established that the deceased had given over 80 million Shillings to A1 (a witch doctor) which he had failed to repay. While at police A1 admitted to that fact and also revealed how he had committed the crime together with the rest of the appellants. A1 narrated in his charge and caution statement that he was the one who had called the deceased the previous night and tricked him into meeting him near a water dam in Bwizibwera where he was with A2, A3, and A4.

3.] When the deceased came A1 went to meet him at the roadside while the rest of the accused took different positions, A1 then led the deceased to the dam and instructed him to take the contents of a mineral water bottle tricking him that it would help him to multiply his money to UGX. 800,000,000/=. After taking the drink the deceased collapsed dead. A1 with the help of A2, A3, and, A4 lifted the deceased, took him to his vehicle, and drove off to Rubaya where they left the car. All this was happening while A4 was closely following the car riding on his motorcycle. They later left together on the motorcycle A4 was riding. The same facts were narrated by A2, A3, and A4 in their charge and caution statements where they each described the respective roles they played in the crime under the instructions of A1.

4.] When the matter came up for trial A1 and A2 pleaded guilty and were each convicted on their plea. A1 was sentenced to 30 years' imprisonment while A2 was sentenced to 15 years of imprisonment. When the prosecution closed its case the Court found that a prima facie case against, A3 and A4 had been

established and each was put to his defence. Both Al and A2 who had pleaded guilty and convicted were later called and had been testified for the prosecution against their co-accused as PW1 and PW2 respectively. The court found the A3 and A4 guilty and sentenced each to 25 years' imprisonment.

5.] Aggrieved with the trial Court's findings, the appellants lodged this appeal on five grounds;

1. *The learned trial Judge erred in law and fact when he convicted the 1st and 2nd appellants based on a plea of guilty recorded without following the legally established procedure of recording a plea of guilty hence occasioning a miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when he irregularly admitted the charge and caution statements of the appellants to convict 3rd and 4th appellants.*
3. *The learned trial Judge erred in law and fact when he convicted the 3rd and 4th appellants based on video recordings and fingerprint reports that were improperly admitted.*
4. *The learned trial Judge erred in mixed law and fact by failing to consider the poor legal defense accorded to the appellants at the trial.*
5. *The learned trial Judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellants.*

Representation

6.] At the hearing of the appeal, the appellants were represented by Mr. Vicent Turyahabwe on State brief. The respondent was represented by Mr. Jacob Nahurira, State Attorney holding brief for Nkwasibwe Ivan.

Submissions by counsel for the appellant

7.] On ground 1, counsel for the appellant submitted that the law governing the taking of plea in the High Court, by any person indicted of an offence triable by the High Court, is provided for under section 60 of the Trial on Indictments

Act Cap 23 which spells out the procedure that Court should follow during the taking of plea. It provides, inter alia, that an officer of the Court must read over the indictment to the accused person. It provides further that, if need be, the officer of court shall explain the indictment to the accused, or it may be interpreted by an interpreter of the Court; and the accused person shall be required to plead instantly to the indictment. It also provides for instances where the accused person may, as of right, decline to plead to the indictment against him or her.

8.] Further, Section 63 of the Trial of Indictments Act is to the effect that upon the accused person pleading guilty, the Court shall record the plea of guilty; and may convict the accused person on it.

9.] Noteworthy, whereas the Act provides that an accused person may be convicted upon his plea of guilty to the indictment, it is now a well-established and mandatory requirement founded on the Court decision as was held in the case of **Adan Vs. Republic [1973] EA 45.** In that case, the Court explained that after the Court has entered the plea of guilty, the prosecution must state the facts of the case. It is only after the accused person has admitted that the facts as stated by the prosecution are correct, that the Court may proceed to convict the accused person on his or her plea of guilty.

10.] Furthermore, it was submitted that there is a need for this elaborate process in furtherance of the imperative need to protect and promote the right of an accused person to a fair trial which is a safeguard enshrined in Article 28 of the Constitution.

11.] Counsel argued that the record of proceedings is silent on whether or not the particulars and facts of the case were ever read and interpreted to the 1st and 2nd appellants before they pleaded guilty. Secondly, there is no record to demonstrate that each of the essential elements/ingredients of the offence

was duly explained to the 1st and 2nd appellants before they pleaded guilty in the language they understood. Lastly, the plea of guilty must be recorded in the exact words stated by the appellants. In the present case, the exact words stated by the 1st and 2nd appellants are not indicated, the trial court just recorded *"It is true and I plead guilty"*. Counsel contended that this was insufficient and or equivocal plea of guilty.

12.] Counsel submitted that the procedure of recording the plea of guilty of 1st and 2nd appellants was not strictly adhered to thus their conviction should be quashed on that account. Counsel relied on the case of **Tomasi Mufumu vs R. [1995] E. A. 625,** cited by this Honourable Court in **Sebuliba Siraji Vs. Uganda, Court of Appeal Criminal Appeal No. 319 of 2019**.

13.] On ground 2, counsel submitted that A1 and A2 pleaded guilty and they were convicted on their own plea. They are said to have made charge and caution statements and the same were admitted in court as prosecution exhibits. The trial court relied on the same to convict the 3rd and 4th appellants. Counsel contended that A1 told the court that he was tortured before he made the charge and caution statement. That it was incumbent upon the trial court to establish the allegations by conducting a trial within a trial. (See **Amos Binuge & Ors vs. Uganda, [1991]1 UGSC 5, M'Murari s/o Karegwa v R (1954) 21 E. A.C.A. 262 and Mwangi s/o Njerogi v R (1954) 21 E.A.C.A 377**"). That the evidence of A1 was not admissible because under section 24 of the Evidence Act evidence/confession obtained as a result of torture cannot be admissible as evidence in courts of law.

14.] Additionally, counsel submitted that the requirement to conduct a trial within trial to ascertain the voluntariness of the confession is a must regardless of whether it was rejected or not by the defense. Counsel cited the cases of **Dusabe Mashambele Odeta Vs Uganda, Criminal Appeal No. 070 of 2016,**

and **Kawoya Vs Uganda, Criminal Appeal No. 50 of 1999,** where the Supreme Court held as follows:

> *"If prejudicial or incriminating evidence is tendered and is not challenged. The court should not permit its reception without ascertaining that the accused person is aware of the consequences of its reception".*

15.] Counsel submitted that the other reason for contesting the charge and caution statements of the appellants is that they were admitted irregularly. The persons who are alleged to have recorded the same were never called in to tender them. It appears that after A1 and A2 admitted that they made the charge and caution statements, the trial Judge admitted them immediately. In respect of A4, he never admitted his charge and caution statement and it was also tendered through the person who did not record it. The submission that the officer who recorded it was dead was a submission from the bar the prosecutor, not from any witnesses.

16.] In counsel's view, admitting the charge and caution statements because A1 and 2 admitted to having made them was irregular because the appellants were not the authors of those statements. The law on who is supposed to tender in a piece of documentary evidence is very clear. It has to be the author of that document to tender it as an exhibit. Secondly, if the officer who is alleged to have recorded the charge and caution statement had testified, it would be easy to determine if he was authorized under the law. For the confession to be admissible it should be recorded by a police officer of the rank of AIP and above as per the Evidence Act.

17.] On ground 3, it was submitted that the learned trial Judge heavily relied on the video recording and fingerprint report to convict the 3rd and 4th appellants. Apart from testifying as the scene of crime officer (SOCO), PW3

never mentioned his expertise in video evidence or fingerprint capturing. He was in effect testifying as an expert when his expertise was not proved in court. **The Constitution (Management of Exhibits) (Practice) Directions, 2022 Practice directive 15** on Electronic devices states how they should be managed and tendered. It provides thus:

> *"1. The officer collecting electronic data shall ensure that he/she is accompanied by a person with basic knowledge of ICT.*
>
> *2. The Officer shall ensure that the computer system or any other similar device is operating properly or if it is not, the fact of its not operating properly cannot affect the integrity of the data or the records stored on the system.*
>
> *3. The officer shall file a statement stating the circumstances the information on the electronic device was collected or recorded.*
>
> *4. The experts analyzing the computer system shall also provide a statement confirming that the evidence was collected or recorded in conformity with the Electronic Transactions Act, 2011."*

18.] Counsel argued that the above provision indicates who can be able to tender in electronic evidence to be non-other than a person with basic knowledge of ICT. In the present case, PW3 never proved that he had knowledge of ICT nor did he prove that he was accompanied by any person knowledgeable in ICT. PW3 never proved that he ever filed any statement stating the circumstance in which the information was collected or recorded. In effect, none of the above requirements were complied with.

19.] Furthermore, counsel submitted that nowhere on the record is it indicated that the video was ever transcribed in the language of the Court or that what was being spoken in the video were transcribed onto the record of proceedings.

20.] Counsel for the appellant cited the case of **Olega Vs. Alidriga, (Civil Appeal No. 6 of 2013) [2016] UGHCCD 63 (29 September 2016)** Justice Mubiru relied on the case of **Steve M. Solomon, Jr., Inc. Vs. Edgar 88 S.E.2d 167 (Ga. Ct. App. 195),** where the court stated:

> *"A proper foundation for [the use of a mechanical transcription device] must be laid as follows:*
>
> *(1) it must be shown that the mechanical transcription device was capable of taking testimony.*
>
> *(2) It must be shown that the operator of the device was competent to operate the device.*
>
> *(3) The authenticity and correctness of the recording must be established.*
>
> *(4) It must be shown that changes, additions, or deletions have not been made.*
>
> *(5) The manner of preservation of the record must be shown. (6) Speakers must be identified.*
>
> *(7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress".*

21.] Counsel argued that in the **Olega case** (supra) the requirement of transcribing and the purpose thereof was emphasized:

> *"The evidentiary value of a recording depends in large measure on who said what, by a court's ability to use that information depends upon two qualities of the recording: audibility and intelligibility. Audibility relates to whether the listener can hear what is on the recording. Intelligibility relates to whether the listener is able to understand what the conversant said."*

22.] Counsel submitted that the issue courts most often focus on is intelligibility. The ultimate test of audibility and intelligibility is whether the party offering the recording has been able to produce a transcript of the recording that accurately reflects the recording's content (see **R Vs.**

Rampling [1987] Crim LR 823). For that reason, as required by s. 88 of the Civil Procedure Act, since evidence in all courts has to be recorded in English as an official language of courts if the recording is in any other language the transcript of the recording should be translated into english before it can be received in evidence.

23.] As regards the fingerprint report, counsel for the appellant submitted that the person who purported to tender it was not the author of the same. He was not the expert thereof and was thus incompetent to tender it in. Besides the incompetency of the witness (PW3), the witness did not guide the court on how the fingerprints were captured. Section 2 (1) of the Identification of Offenders Act Cap 229 provides that fingerprints must be per the form prescribed by the minister. Under Section 4 of the same Act, it is only those forms as per section 2(1) of the Act that shall be admissible in evidence.

24.] Counsel argued that all the above requirements of the tendering and relying on video evidence were not followed by the witness and court. Counsel submitted that the video recording evidence was irregularly admitted as evidence. Section 4 of the same Act provides that the minister may make rules prescribing how fingerprints shall be taken. Rule 4 of the identification of offenders rules SI 119 – 1, gives the overview of how the fingerprints should be taken.

25.] Counsel additionally submitted that the witnesses and court never considered any of the above provisions in admitting the fingerprint report. If anything, what was required of being tendered in court was the fingerprint as stated under section 4 of the Act, not the report. By admitting the report, not the form, the same was irregularly admitted.

26.] Counsel submitted that the author was well aware that what was required as a court exhibit was not the report but rather the form which was not prepared as he had requested.

27.] For all the above reasons counsel prayed that ground 3 too succeeds.

28.] On ground 4, the appellants' counsel submitted that the appellants' counsel at the trial failed to represent the appellants diligently as required by regulation 11 of the Advocates (Professional Conduct) Regulations 1977. Counsel alleged that when all the charge and caution statements were admitted in evidence, counsel did not object even when they had issues. Secondly, the defence counsel had no issues with tendering the video and fingerprint reports as exhibits even when they were irregularly handled. Counsel did not cross-examine the witness about those exhibits. Counsel cited the case of **Joseph Kawooya Vs. Uganda, Supreme Court Criminal Appeal No. 50 of 1999** the Supreme Court addressed issues of poor defence representation.

29.] Counsel prayed that this court upholds this ground.

30.] Finally, on ground 5, counsel submitted that it is trite that an appellate Court will only interfere with the sentence of the trial Court if there is an illegality such as where the trial Court acted contrary to the law or upon a wrong principle, or overlooked a material factor as it was inter alia held in **Jackson Zita Vs. Uganda, Supreme Court Criminal Appeal No. 19 of 1995.**

31.] In the counsel's view the respondent did not make out the case against the appellants. He argued that the prosecution evidence was tainted with inconsistencies that would not warrant a conviction against the appellants.

32.] Counsel also noted that the appropriate sentence is a matter of discretion and the court will not interfere unless there are material factors overlooked, the sentence was harsh and manifestly excessive or the court

failed to exercise its discretion. He cited the case of **Kyalimpa Edward Vs. Uganda, Supreme Court Criminal Appeal No. 20 1995**, the case of **Livingstone Kakooza Vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993,** and the case of **Kiwalabye Bernard Vs. Uganda, Supreme Court Criminal Appeal No 143 of 2001**.

33.] Counsel further submitted that the court must be guided by the principle of consistency or uniformity of sentence as was enunciated by this Court in **Naturinda Tamson Vs. Uganda, Court Appeal Criminal Appeal No. 13 of 2011.** Counsel also cited the case of **Mbunya Godfrey Vs. Uganda, Supreme Court Criminal Appeal No. 4 of 2011.** In this regard, counsel cited the case of **Attorney General Vs. Susan Kigula & Others, Supreme Court Constitutional Appeal No. 1 of 2005,** where the court reduced the death sentence imposed on the appellant to 20 (twenty) years. In the case of **Mbunya Godfrey Vs. Uganda,** (supra), the Supreme Court imposed a sentence of 25 years in prison. In the case of **Akbar Hussein Godi Vs. Uganda, Supreme Court Criminal Appeal No. 3 of 2013**, the Appellant had murdered his wife with a gun. The Supreme Court imposed a sentence of 25 years in prison. In the case of **Atuku Margaret Opii Vs. Uganda, Court Appeal Criminal Appeal No. 123 of 2008,** this court imposed a sentence of 20 (twenty) years in prison. In the case of **Kereta Joseph Vs. Uganda, Court Appeal Criminal Appeal No. 243 of 2013**, this court reduced the sentence of 25 (twenty-five) years 'imprisonment, to 14 (fourteen years) in prison.

34.] It was counsel's prayer that court grants lenient sentences to the 1st, 3rd, and 4th appellants

Submissions by counsel for the respondent.

35.] Counsel submitted that the trial Judge properly followed and adhered to the procedure for recording a plea under section 60 of the Trial on

Indictments Act Cap 23 which spells out the procedure that the court should follow during the taking of plea. Further, Section 63 of the Trial on Indictment Act is to the effect that upon the accused person pleading guilty, the court shall record the plea of guilty and may convict the accused person on it.

36.] Counsel further argued that at the start of the trial, the indictment was read to the Appellants, 1st and 2nd appellants who were represented by counsel and pleaded guilty. According to the record of page 12 from line 17 1st appellant pleaded guilty, 2nd appellant on the same page line 18 equally pleaded guilty. The trial Judge then directed the prosecution to read out the facts of the case to the two appellants which was done in detail from page 12 to page 14 the two appellants respectively admitted the facts as were read out to them and thereafter were convicted on their plea. On page 14 the Trial Judge went on to convict the appellants. The two appellants thereafter went through allocutus.

37.] It was submitted that this court finds that there was no breach of procedure laid down in the case of **Adan V Republic** (supra) and hence no miscarriage of justice was occasioned to the two appellants. Counsel alluded to **Section 139 of the Trial of Indictments Act, Cap 23**, which is to the effect that no sentence or finding of the Court shall be passed on account of any error, omission irregularity, or misdirection unless such occasioned a failure of justice.

38.] Additionally, counsel invoked Article 126 of the Constitution of Uganda which enjoins court to do substantive justice instead of majoring in technicalities. To support his argument counsel cited the case of **Uganda Vs. Guster Nsubuga and Robinhood Byamukama, Supreme Court Criminal Appeal No. 92 of 2018.**

39.] Counsel prayed that the court finds that there was no miscarriage of Justice occasioned to the appellant.

40.] Ground 2, counsel submitted that the trial Court did not rely on the evidence of A1 and A2 to convict A3 and A4. He noted that on page 55 paragraph 15 of the record of appeal, the trial Judge equally relied on the forensic report concerning fingerprints which squarely placed the accused persons at the scene of the crime, this forensic report formed part of the agreed facts, the trial Judge also relied on the evidence of PW3 as seen on paragraph 16 on page 56. Counsel contended that the trial Judge evaluated the evidence as a whole to arrive at his findings as opposed to counsel for the appellant's assertion that the trial Judge was greatly influenced by the charge and caution statements of A1 and A2. Counsel further submitted that by the time the charge and caution statement of A1 was tendered in court, A1 had already pleaded guilty and sentenced by the court.

41.] Counsel further cited cases that caution the court when admitting confessions, in support of his submissions. Counsel cited cases of; **Dusabe Mashambele Odeta Vs. Uganda, Criminal Appeal No. 070 of 2016**, **Omaria Chadia Vs. Uganda, [2002] UGSC 1**, **Sewankambo Francis Vs. Uganda, SCCA No 33 of 2001**, and **Hajji Makubo Nakulopa Vs Uganda SCCA No. 25 of 2001**.

42.] Counsel for the respondent further argued that on Page 18 of the record of appeal, the prosecution prayed to tender in the statement and the same was not objected to by defence counsel. In respect of the charge and caution statement of A4, it was the evidence of PW4 that the officer AIP Masereka who recorded the said statement had since died. According to the record of appeal page 31 paragraphs 15 and 16, the prosecution prayed to the court to have the said charge and caution statement tendered as evidence through PW4

who testified that he knew the handwriting and signature of AIP Masereka who recorded the statement, the same was tendered in court without any objections.

43.] Counsel further contended that S30(b) of the Evidence Act alludes to a statement made by a person whose attendance could not be procured without delay or expense. It was the evidence of PW4 that AIP Masereka had since died. This court has in the case of **Seru Bernard Vs. Uganda, Court of Appeal Criminal No 0277/2009** held that if the court has to admit evidence of an unavailable witness, it must be within the purview of the evidence of the Evidence Act, which was the case in the instant case. Additionally, this court has further addressed the issue in the case of **Serunkuma Edirisa & Others Vs. Uganda, CACA No. 0147 of 2015** where the provisions of S.27 of the Evidence Act, it was held that the court may take into consideration such a confession as against other persons. See also the case of **Andrew Walusimbi and 3 others Vs. Uganda, SCCA No. 28 of 1992.**

44.] In conclusion, counsel submitted that the trial Judge properly admitted in law and fact the charge and caution statements and relied on them. He prayed that this ground would fail.

45.] On ground 3, counsel for the respondent submitted that PW3 on page 26 line 8 testified that he was a police officer attached to Rwizi Regional Police, where he was working as the scene of crimes officer(SOCO). In that capacity, counsel submitted that he was therefore competent to tender in the video and fingerprint reports. Furthermore, he submitted that the witness testified as a scene of crimes officer, not as an expert. According to the **Constitution (Management of Exhibits) (Practice) Directions, 2022 Practice Directive 15 on Electronic Devices** states how they should be managed and tendered. It provides thus:

(1) The officer collecting electronic data shall ensure that he/she is accompanied by a person with basic knowledge of ICT.

(2) The Officer shall ensure that the computer system or any other similar device is operating properly or if it is not, the fact of its not operating properly cannot affect the integrity of the data or the records stored on the system. Electronic Transaction Act, 2011.

46.] Counsel submitted that the above practice alludes to a person with 'basic' knowledge, not an expert. According to the trial Judge in his judgment on page 56 when the video recording was played, the court was able to see and hear the narration of the appellants, in other words, it was operating properly. This was the same position as in the case of **Olega Vs. Alidriga** (supra)as cited by counsel for the appellant.

47.] Counsel submitted that the Trial Judge properly convicted the 3rd and 4th appellants based on video recordings and fingerprint reports that were properly tendered and he invited the court to disallow this ground.

48.] On ground 4, counsel for the respondent strongly opposed the ground that the defence counsel did not properly represent the appellants. He further submitted that the court did not offend the principle enshrined under Article 28 (1) of the constitution of the Republic of Uganda. Counsel prayed that this ground was devoid of merit and should be disallowed.

49.] On ground 5, counsel for the respondent agreed to the position of the law in the case of **Kiwalabye Bernard Vs. Uganda, Criminal Appeal No. 143 of 2001**, as cited by the appellant counsel.

50.] Counsel submitted that the offence of murder contrary to Sections 188 and 189 Penal Code Act attracts a maximum sentence of death with a starting point of 35 years per the **Constitution Sentencing Guidelines for Court of Judicature) (Practice) Directions, Legal Notice No. 8 of 2013.**

51.] In light of the above, counsel submitted that the learned trial Judge exercised his discretion judiciously within the precincts of the law. No illegality was occasioned and all material factors were duly considered in imposing the sentence. Looking at the record of appeal, none of the rules in the case of **Kiwalabye** (supra) was offended by the learned Trial Judge to warrant interference.

52.] In the case of **Bakubye Muzamiru and Another Vs. Uganda, SCCA No. 56 of 2015,** the appellants were contesting the harshness of the sentence of 40 years for murder and 30 years for aggravated Robbery running concurrently. In upholding the sentences, the Supreme Court cited its earlier decision in the case of **Okello Geoffrey Vs. Uganda, SCCA No. 34 of 2014,** where it was stated as follows:

> *"In terms of severity of punishment in our penal laws, a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws."*

53.] Counsel submitted that the sentence of 30 years and 15 years respectively, and a period of 5 years, 7 months and 6 days spent on remand considered by the trial court during sentencing for the 1st and 2nd appellants is lenient considering that the maximum prescribed sentence under the sections 188 and 189 of the Penal Code Act is death. They were spared the maximum sentence of death and the next severe sentence of life imprisonment.

54.] Furthermore, 25 years' imprisonment given to the 3rd and 4th appellants was appropriate in the circumstances.

55.] On consistency, counsel cited the case of **Biryomumaisho Alex Vs. Uganda, Criminal Appeal No. 464 of 2014** restated with approval the position in **Katureebe Boaz and another Vs. Uganda, SCCA No. 066 of 2011** in which it was held that 'Consistency in sentencing is neither a

mitigating factor nor an aggravating factor, the sentence imposed lies in the discretion of the court which exercise thereof may consider sentences imposed in other cases of similar nature. In the case of **Bakubye Muzamiru and Another Vs. Uganda, SCCA No. 56 of 2015**, the Supreme Court upheld a sentence of 30 years for aggravated Robbery and 40 years for murder. In the case of Kidega **Joseph & Anor Vs. Uganda, SCCA No. 007 of 2019** the Supreme Court upheld a sentence of 36 years and 4 months' imprisonment and 39 years and 1-month imprisonment in respect of the 1st and the 2nd appellants respectively for murder. In the case of **Ssemanda Christopher and another Vs. Uganda, Court of Appeal Criminal Appeal No. 77 of 2010**, this court declined to reduce the sentence of 35 years on the appellant who had been convicted. In the case of **Abaasa Johnson and Another Vs. Uganda, UGCA 71/2016,** the court confirmed a sentence of 35 years' imprisonment for the offence of murder. This court has upheld a sentence of 30 years' imprisonment for murder in **Kalyango Musa, Kamya Edward Vs. Uganda, CACA No. 377/2019**, a sentence of 28 years' imprisonment for murder was upheld by this court in **Nshaija Abasi alias Rukyeikaire Vs. Uganda, CACA No. 142/2021**.

56.] Counsel submitted that the trial court judiciously exercised its sentencing power. Counsel prayed that both the conviction and sentence should be upheld.

Consideration of Court.

57.] We have carefully considered all the material in the appeal including the record, the submissions of counsel for either side, the law, and the authorities cited. This being a first appeal, we shall begin by reiterating the duty of this Court while handling such an appeal. Under **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10**, this Court, on

appeal from a decision of the High Court, may reappraise the evidence and make inferences of fact. In the case of **Kifamunte Henry Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, it was held that:

> *"We agree that on the first appeal, from a conviction by a Judge, the appellant is entitled to have the appellate Court's consideration and views of the evidence as a whole and its own decision thereon. The first appellate court must review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its mind not disregarding the judgment appealed from the carefully weighing and considering it."*

58.] Recently this Court held in the case of **Mwesigwa Robert Vs. Uganda, Criminal Appeal No. 0241 of 2019**, that:

> *"it is also trite that even where the Court has erred, the appellate court interferes with the decision of the lower court only where there has been a miscarriage of justice to any of the parties in the proceedings. The appellate court is guided by the presumption of innocence under article 28(1)(a) of the 1995 Constitution of Uganda and the burden of proof as articulated in the case of Woolmington Vs. The DPP, 1936, AC 462."*

59.] Ground 1, criticizes the Judge for convicting the appellants on the basis of an improper plea procedure. The procedure of recording a plea of guilt was laid down in the celebrated case of **Adan Vs. R, [1973] EA. 445,** where the East African Court of Appeal (as it then was) stated as follows: -

> *"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then a plea of guilty formally entered.*

The prosecutor should then be asked to state the facts of the case and the accused be allowed to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."

60.] The proceedings for plea-taking in the lower court were as follows:

Court:

The indictment read to the accused.

***A1**. I am guilty PG*

***A2.** I am guilty PG*

***A3.** I am not guilty PNG*

***A4.** I am not guilty PNG*

BRIEF FACTS

Murangira Dennis (deceased) was a businessman in Mbarara dealing in hardware. on 24/07/2012 at about 7:20 pm while at home with his family members received a phone call and moved out talking on the phone then he told the wife that he would be back and drove away in his motor vehicle No' UAF 143K. The wife waited for him to return until 1:00 a.m. when she called his phone number and it was off. whole taking the child to school on a motorcycle she was stopped and told their vehicle was parked at Rubaya by the roadside and there was someone seated in the driver's seat who looked to be dead. she rang other relatives and they went to Rubaya where they found the husband dead in the vehicle.

The matter was reported to the police and investigations commenced. It was then established that the phone call received by the deceased was from one Matata Bwambale A1. A call date was retrieved where the common caller of Matata Bwambale A2 Bogere was arrested. Bogere led to the arrest of Matata where through investigations the two A1 and A2 admitted to killing the deceased.

It was established that the deceased had given over B0 million to A1 which he had failed to pay back. A1 admitted to that fact and also revealed that he committed that murder with A2 Bogere, A3 Mwesigye Osbert and A4 Kaggwa Godfrey alias Mastiko alias Dudu. A1 and A2 recorded to the police how the offence was committed in their charge and caution statement that when the deceased continued to demand his money he took him to a water dam in Bwizibwere where he was with A2, A3, and A4 and told play different notes to convince the deceased that he was going to get his money from the water' A2, A3, and A4 took different positions.

A1 collected the deceased from the road where he was waiting and while in the water he instructed him to take the contents of a mineral water bottle convincing him that it would help him get the money he was looking for. With the help of A2, A3, and A4 they lifted the deceased to the vehicle. He was already dead. They drove it to Rubaya and placed him in the driver's seat Since Kaggwa (A4) had gone with a motorcycle they all boarded it and returned

A2 made a charge and caution statement corroborating that of A1 which led to the arrest of A3 and A4 who also made their respective charge and caution statements revealing the notes they played as instructed by A1. A1 was a witch doctor and he even confirmed it.

Post-mortem revealed a closed head injury and a dislocated right shoulder which was due to dragging. This was done before the arrest of any of the accused. After their arrest, A1 revealed he gave the

deceased some chemicals in the mineral water bottle. The body was re-examined where it was discovered that in addition internal organs had been destroyed/damaged. Parts of the internal organs were taken to Government Analytical Laboratory and the cause of death was a content which was poisoning and acidic. The body had been buried for some days.

A1 30 years and A2 34 years were medically examined on PF 24 and were found to be of normal mental status. A1 and A2 led the police to the dam where the offence was committed and also the mineral water bottle with some liquid was discovered.

***A1.** Matata - facts admitted*

***A2.** Bogere - facts admitted as correct*

Court:

Since A1 and A2 have admitted the facts as correct each of them is hereby convicted on their plea of guilty as charged.

61.] The proceedings indicate that detailed brief facts were read to the appellant who was represented at the moment and he did not seem confused about what was stated to him. We acknowledge the fact that the trial court omitted to read the ingredients of the offence to the appellant. However, for this court to interfere with this decision it must be demonstrated that this omission led to failure of justice as provided for under section 139 of the Trial on Indictments Act. It provides that:

*"**139. Reversibility or alteration of finding, sentence, or order because of error, etc.***

(1) Subject to the provisions of any written law, no finding, sentence, or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity, or misdirection in the summons, warrant, indictment, order, judgment or other proceedings

before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.

(2) In determining whether any error, omission, irregularity, or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

62.] In our assessment, having considered the proceedings, the appellant did not suffer a miscarriage of justice that would warrant the interference of this court for two reasons; Firstly, we find that the charge sheet had been read to the appellant, he knew the offence he was charged with. The facts of the case he was charged with were read to him. He admitted he had committed the offence. Secondly, the appellant was represented, and he did not raise any objection against the entry of the plea of guilt. He had an opportunity to object after the reading of the facts but he agreed to them.

63.] It is therefore our conclusion that even when the procedure in the Adan case was not adhered to, there was no failure of justice as such, this ground fails.

64.] One of the contentions in ground 2 is that the trial Court relied on a charge and caution statement of A1 yet he stated that he was tortured before making it.

65.] In his charge and caution statement, A1 stated that he was a traditional doctor at Nombe Trading Centre Ncune Parish, Kashari sub-county, Mbarara district. He stated that Murangira Denis (deceased) and Robert told him to solve their problems. A1 told them that their money was lost and they needed it recovered. Which they affirmed. A1 went on to state that the money to the tune of Ug Shs. 3,000,000/= (Three million shillings only) was recovered. Later on the deceased returned to A1 claiming that he had a debt and he wanted medicine that would help make the creditor forget about the money.

A1 told them he did not have that medicine but he would give them one that would just calm down the creditor.

66.] Later after some days he was told by his fellow witch doctors, Matovu David and Kakofira that they had a client and they needed his help. When he went there, he found them busy and did not want to disrupt them. So he left the place. He however saw the client's car leave and he went back. Matovu told him that the client was Murangira. Matovu told A1 that they had medicine causing Murangira to give them money but they needed to go to the lake. Matovu asked whether A1 could step into the waters but he said he could not. So A1 called Bogere Samwiri who is also a witch doctor. Matovu also asked A1 to find a driver whom he did. He found a mechanic but he did not know his name. Matovu gave them a boda to find them at Lake Omugabe. They were ridden by Gudu. They arrived at 19 hrs., and 30 minutes later Murangira arrived in his car. Bogere was already in the lake, he used the horn to speak from the lake. He came with some medicine in a bottle of coke and asked the deceased to take it. After the deceased had drunk the liquid, he started complaining that he was thirty and needed water to drink. He became weak and they carried him to the car. The mechanic drove the car and they abandoned the deceased on the way somewhere unconscious. They all got on the boda and went to their homes.

67.] The next morning when A1 demanded his money from Matovu, he was told that he should return and they talk, but when he returned he found that Matovu had taken off with all his property and Kakofira as well.

68.] During trial A1 pleaded guilty and he was convicted on his own plea of guilt. He became a prosecution witness, and while giving his testimony he stated that he was tortured.

69.] The appellants' counsel contended that the charge and caution statements of A1 and A2 influenced the decision of the trial court yet, A1 in his testimony stated that he had been tortured. Counsel argued that since the charge and caution statement were implicating the other appellants, the court ought to have conducted a trial within a trial to see if the confession was true.

70.] During his testimony as a prosecution witness, he stated that he made the charge and caution statement but he was tortured and he said certain things. He did not seek to retract his confession, but instead, he stated that he was telling the truth about his dealing with the deceased and how he died.

71.] In his judgment, the trial Judge compared the narration in the video footage and concluded that it was following the same chronological order as the statements made by PW1, PW2, and A3 themselves. He noted that this cannot be a coincidence but the truth.

72.] The fact that the PW1 attempted to state that he was tortured during his testimony makes no difference in this case since he admitted that the facts read to him were the same as those in his Charge and caution statement. This court handled a similar matter in the case of **Tomusange Lasto & Bulega Richard Vs. Uganda, Criminal Appeal No. 103 of 2015**. The court stated as follows:

> *"in cases where a confession is retracted, the trial Judge is under a duty to caution herself before finding a conviction on such a confession and should be fully satisfied in all the circumstances of the case that the confession is true.*
>
> *In the case before us, three distinctions need to be made. The first is that at different stages the 2nd appellant attempted to retract his confession. He retracted his confession after he had pleaded guilty and had been convicted. This was when he was put on the stand to testify as*

a prosecution witness. He finally retracted after he was called as a defence stamen. The second is that this confession was corroborated by physical pieces of blood-stained articles found in the home of the 1st appellant. The third is that the DNA samples taken of the articles found in appellant No.1's house proved that the blood samples were identical to the samples taken from the deceased. It should be noted that DNA stands alone as another form of physical evidence. DNA data is considered to be more reliable than many other kinds of crime scene evidence. The unique profile of each DNA sample is analyzed for comparison to crime scene evidence. We therefore agree that when all this evidence was pieced together, it created the perfect profile of what a trial would be looking for in order to rely on circumstantial evidence."

73.] This case squarely fits in the facts before us. The appellant in this matter did not retract his confession but instead stated that he was tortured. As noted in the above case, this makes no difference because the allegation of torture was made after the appellant had pleaded guilty, convicted, and sentenced. Additionally, as noted by the trial Judge, the evidence against the appellants did not rest on the statement of the 1st appellant alone. It was corroborated by the evidence of the video clip that was in the same chronological flow as the statements of PW1, PW2, and A3 as observed by the trial Judge. This was further corroborated by the evidence of the forensic report of the appellants' fingerprints that were found on the deceased's car.

74.] The other arm of this ground was that the charge and caution statement were not tendered in by their authors. The respondent's counsel argued that this could be tendered under section 30(b) of the Evidence Act. This section provides that:

" when the statement was made by such person in the ordinary course of business, and, in particular, when it consists of any entry or

memorandum made by him or her in books kept in the ordinary course of business or the discharge of professional duty, or of an acknowledgment written or signed by him or her of the receipt of money, goods, securities or property of any kind, or a document used in commerce written or signed by him or her, or of the date of a letter or other document usually dated, written or signed by him or her;"

75.] This provision has been interpreted in several cases. In the case of **Seru Benard Vs. Uganda, Court of Appeal Criminal Appeal No. 0277 of 2009** referred to by counsel of the respondent, Court cited the case of **Aramanani Kampayani Vs. Uganda, Supreme Court of Uganda Criminal Appeal No. 5 1987,** where the Court evaluated the applicability of section 30(b) of the Evidence Act. The court stated as follows:

"According to the record, Dr. Ndimbirwe was the one who carried out a post-mortem examination of the body of the deceased on 2nd November 1981 the day after the deceased had been killed, and wrote out a post-mortem report (exhibit P.1) He was apparently out of the country on a post-graduate course at the time of the trial. The post-mortem report was admitted under S.64; so was the evidence of Dr. Masika, which was to the effect that having previously worked with Dr. Ndimbirwe in Kabale Hospital he was familiar with his signature on the post-mortem report which he therefore identified as having been signed by Dr. Ndimbirwe. The purpose of Dr. Masika's evidence was apparently to facilitate the admission of the post-mortem report under S. 30 (b) of the Evidence Act as a statement made by a person whose attendance could not be produced without delay or expense which in the circumstance of the case appeared to Court to be unreasonable. In the Court's view, the postmortem report should not have been admitted in the manner it was for two reasons. Firstly, the procedure required under section 30 (b) was not complied with in that there was no evidence to show that Dr. Ndimbirwe could not

be found or that his attendance could not be procured without any amount of delay or expenses considered to be unreasonable in the circumstances of the case. In the case of ASSOCIATED ARCHITECTS Vs CHRISTINE NAZZIWA Civil Appeal No. 5 of 1981 (unreported) this Court had this to say.

"in MUZAMIN KISIANGO & ANOTHER Vs SAM BIRABWA Civil Appeal No. 1 of 1980, this Court had to consider the conditions which made Section 30 (b) of the Act applicable. The Court said, "It is the duty of the party seeking to tender the witness statement to satisfy the Court by evidence that the witness cannot be found or his attendance cannot be produced without an amount of delay or expense which in the circumstances of the case appear to Court to be unreasonable. In this case, no such evidence was found. The court had no such material upon which it could exercise its discretion to receive the report. Without such evidence, the medical report was wrongly admitted. It should be excluded. Section 30 (b) of the Act should be used sparingly and only in the circumstances falling within the purview of that section."

The same criticism of the Court regarding the admission of the medical report in the Muzamiri (Supra) case equally applies to the admission of Dr. Ndimbirwe's post-mortem report in the instant case. No evidence was found regarding where Dr. Ndimbirwe had gone for his course; when he went and when he was coming back to Uganda or whether he was still outside Uganda. It was not proved that his attendance could not be procured without an amount of delay or expense which in the circumstances of the case appeared to the Court unreasonable. The trial Court was not asked to, nor did it rule, whether the post-mortem report be tendered under Section 30 (b)."

76.] Considering the above analysis, for a party to rely on section 30 (b), there must be evidence led to the effect that the said witness who authored the

document was dead, cannot be found, or is incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense. In this case, PW4 testified that the recording officer Mr. Kawaza was dead, and this was not disputed at trial by the opposite party. The trial Judge cannot be faulted for that. It is a general rule that what is not objected to at trial is generally accepted.

77.] Additionally, it has to be noted that under section 166 of the Evidence Act, the improper admission or rejection of evidence should not be ground itself for a new trial, or reversal of any decision in any case, if it shall appear to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. In this case, other than the charge and caution statement of A4, there was independent evidence of the forensic fingerprint and the video narration that was in the same chronological narration as that of the statements of PW1, PW2, and A3. The appellants did not demonstrate how tendering the charge and caution statement through PW4 led to failure in justice. This was sufficient to secure the conviction of A4 to the desired standards in criminal proceedings. For the above reasons ground 2 fails.

78.] Turning to ground 3, paragraph 15 of The Constitution (Management of Exhibits) (Practice) Directions, 2022. Provides as follows:

> *"15. Electronic devices.*
>
> *(1) The officer collecting electronic data shall ensure that he/she is accompanied by a person with basic knowledge of ICT.*
>
> *(2) The Officer shall ensure that the computer system or any other similar device is operating properly or if it is not, the fact of it not operating properly cannot affect the integrity of the data or the records stored on the system.*

(3) The officer shall file a statement stating the circumstances the information on the electronic device was collected or recorded.

(4) The experts analysing the computer system shall also provide a statement confirming that the evidence was collected or recorded in conformity with the Electronic Transactions Act, of 2011."

79.] Counsel faulted the trial Judge for allowing the video through PW3, yet there was no proof that they adhered to the requirement of the law laid down in paragraph 15 (supra). While testifying, PW3 did not adduce any evidence to prove that all the requirements under paragraph 15 (supra) had been adhered to.

80.] It should be noted that the trial/ judgment took place in 2012, and the judgment was delivered on the 15th of March 2012. This was before the passing of the Constitution (Management of Exhibits) (Practice) Directions of 2022, They do not apply retrospectively. We cannot therefore fault the trial Judge for not following procedure which was not in existence at the time the judgment was written. We find that this ground lacks merit. Ground 3 fails.

81.] Ground 4 is to the effect that the appellant's counsel failed to represent the appellants effectively when at the trial court. Specifically, he did not object to the fact that the charge and caution statements were in the language that the appellants did not understand. We do not agree with the appellants' counsel on this ground, throughout the record there was no demonstration from the appellants that they did not understand English.

82.] We agree with the position of the law in **Joseph Kawoya Vs. Uganda, Supreme Court Criminal Appeal No. 50 of 1999,** the circumstances of the case differ. It was evident from this case that the appellant was dissatisfied with the services of the defence counsel given to him. During the trial, at the close of the prosecution case, the appellant stated that he was not going to give

evidence and that he was not going to call any witnesses because his counsel was bent on making him lose the case. Court noted that this utterance by the appellant demonstrated that the appellant was dissatisfied with the service of the defence counsel who had been assigned to him. The court went ahead to note that when they investigated the trial record, it was evident that the counsel did not cross-examine the prosecution witnesses. The court observed that the trial court failed to intervene when the appellant raised his concern to establish the truth in the assertion. Which led to a mistrial.

83.] This is not the case in this matter. We have interrogated the file and we find that the appellants did not object to their counsel. He cross-examined the witnesses and ably represented the appellants. When we analysed the file, we find that there was evidence that the appellants had committed the crimes. We therefore find that this ground lacks merit.

Ground 4 fails.

84.] Ground 5, what we gather from the record is that the appellant opposed the sentence on the ground that it was inconsistent with other similar cases of murder. We agree with the position of the law in the cited cases by both counsel concerning the discretion of this court in interfering with the discretion of the sentencing Judge. See the case of **Kyalimpa Edward V Uganda, Criminal Appeal no. 10 of 1995**, the Supreme Court referred to **R V Haviland (1983)5 Cr. Appeal R(s) 109** that:

> *"An appropriate sentence is a matter of discretion of the sentencing judge. Each case presents its own fact upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the judge was manifestly so excessive as to amount to an injustice."*

85.] The appellants' counsel tried to raise an issue of illegality, but he addressed issues that ought to be addressed against the conviction and not sentence. This was inappropriate and cannot be addressed as an illegality in the sentencing process.

86.] The principle of consistency is provided for under paragraph 6 (c) of The Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice)Directions Legal Notice No. 8 of 2013. The principle provides that:

> *"6. General sentencing principles.*
> *Every court shall when sentencing an offender take into account—*
> *the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances;"*

87.] The Supreme Court in **Aharikundira Yustina Vs. Uganda,** (supra) held that:

> *"While sentencing, an appellate court must bear in mind that it is setting guidelines upon which lower courts shall follow while sentencing. According to the doctrine of stare decicis, the decisions of appellate courts are binding on the lower courts. Precedents and principles contained therein act as sentencing guidelines to the lower courts in cases involving similar facts or offences since they indicate the appropriate sentence to be imposed."*

88.] We agree with the position of the law in the case of **Biryomumaisho Alex Vs. Uganda, Criminal Appeal No. 464 of 2014** restated with approval the position in **Katureebe Boaz and another Vs. Uganda, SCCA No. 066 of 2011** in which it was held that the principle of consistency in sentencing is neither a mitigating factor nor an aggravating factor, the sentence imposed lies

in the discretion of the court which is in the exercise thereof. The court may consider sentences imposed in other cases of similar nature. We consider the case of **Ariho Abel Vs. Uganda, Criminal Appeal No. 024 of 2015**, where this Court upheld a sentence of 30 years' imprisonment. We also consider the Supreme Court position in the case of **Opolot Justine and Another Vs. Uganda, SCCA No. 20, 2014**, where the Supreme Court confirmed a sentence of life imprisonment. In the case of **Kaddu Kalure Lawrence Vs. Uganda, SCCA No. 72 of 2018** the sentence of life imprisonment was confirmed as well by the Supreme Court.

89.] On the issue of whether the sentences handed down were harsh and manifestly excessive, the maximum sentence of murder under the Penal Code section 189 is death. The third schedule, item 3 of The Constitutional (sentencing Guidelines for the Courts of Judicature) (Practice) Directions Legal Notice No. 8 of 2013, provides that the sentencing starting point for murder cases after considering both mitigating and aggravating factors is 30 years of Imprisonment. Having considered the principle of consistency and the sentencing range, we find that the sentence handed down to the appellants was not harsh and manifestly excessive because it was within the range prescribed by the law.

90.] This ground fails.

Decision

1. The conviction of the lower Court is upheld.
2. The sentence of the lower Court is upheld. The appellants will continue serving their sentence.
3. Appeal is dismissed.

We so order

Dated at Kampala this ..... day of 2023

.....

RICHARD BUTEERA

DEPUTY CHIEF JUSTICE

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL