THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KABALE

[Coram: M.M. Kibeedi, C. Gashirabake & O. Kihika, JJA]

CRIMINAL APPEAL NO.0038 OF 2016

MUJUNI CLEOPHAS..... APPELLANT

Versus

UGANDA.....RESPONDENT

(Appeal from the Judgment of Hon. Justice Michael Elubu at the High Court of Uganda Holden at Kabale dated the 04th of February 2016)

JUDGMENT OF THE COURT

Introduction

1] The deceased (Tumukwasiibwe Stephen aka Chance) was a resident of Kabu Horne cell, Bukongozo Parish, Nyakishenyi Sub-County, Rubabo County, Rukungiri District. The Appellant was a resident of Bugandazi cell, Kafunjo parish, Nyakishenyi sub county in the same District. On 02/9/2012 at around 2000hrs, the deceased together with Nabaasa Wensi went to Kirimbe Trading Centre at a bar of one Natukunda Scovia. They found the Appellant, Makara Benard, Mucunguzi' Davis, and Innocent already inside the bar drinking waragi. The deceased demanded to taste waragi bought by the Appellant. However, the Appellant and his friends refused. There was a bitter exchange between the two groups that resulted in a fight, between the Appellant and the deceased in and outside of the Bar. After the fight, the Appellant together with Bernard Makara and Kadevi left the deceased and Nabaasa Wensi at the Bar and disappeared.

2] At around 2200hrs, the deceased together with Nabaasa Wensi left the Bar for home. Along the way, the Appellant and two others still at large attacked the deceased and Nabaasa, with Pangas. Nabasa managed to escape with an injury on his right arm leaving the deceased being cut by

the Appellant and his friends. Nabaasa reported the Incident to Tibandeeba Siliva (the father of the deceased).

3] Tibandeeba immediately reported the case to the Kirimbe police post. Policemen rushed to the scene but did not get the assailants but only found the deceased lying in a pool of blood -dead.

4] On 3/9/2012, Inquiries commenced. After realizing that he was seriously implicated, the Appellant person voluntarily took himself to the police for fear of being killed. He was, therefore, arrested and charged with the offence of murder.

5] The High Court convicted the appellant and sentenced him to serve a term of imprisonment of 26 years and six months' after taking into account the remand period of 3 years and 6 months.

6] The Appellant being aggrieved with the decision of the High Court appealed to this Court. The appeal is premised on four grounds set out in the Memorandum of Appeal as follows:

1. *The learned trial Judge erred in law and fact when he convicted the Appellant without properly evaluating all the evidence on record and this occasioned a miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when he failed to draw an adverse inference in the prosecution's failure to call, the Doctors who examined the body of the deceased and the Appellant person.*
3. *The learned trial Judge erred in law and fact when he convicted the Appellant by relying on evidence full of contradictions thereby arriving at the wrong decision and this occasioned a miscarriage of justice.*
4. *The learned trial Judge erred in law and fact when he imposed on the Appellant a sentence of 26 ½ years' imprisonment which was manifestly harsh and excessive hence occasioned a miscarriage of justice.*

Legal Representation

7] At the hearing the Appellant was represented by Mr. Felix Bakanyebonera. The Respondent was represented by Ms. Fatina Nakafeero, Chief State Attorney.

Submissions for the Appellant

8] Counsel argued grounds one, two, and three together and then ground four separately.

9] Counsel submitted that to prove their case against the Appellant at the trial. The prosecution relied on the evidence of six witnesses. Prosecution called Natukunda Scovia (PW1), Nabaasa (PW2), Silver Kigarama (the deceased's father) as PW4, No.26947 Detective Corporal Tumwesigye Francis (PW5) and D/AIP Turamye Frank (PW6).

10] Briefly PW1 told the Court that she operated a bar where the Appellant and his friends Makara and Davis were having a drink of waragi when the deceased Tumukwasibwe Chance came in with his friends Mucunguzi and Nabaasa Wensi. The deceased tried to forcefully take the glass of waragi and sip from it but the Appellant resisted and a fight ensued between the two which fight ended outside the bar when they were separated.

11] PW1 further told the Court that the Appellant and his friends then left for their homes at about 9:00 p.m., followed by the deceased and his friends. PW1 later heard that the deceased had been killed.

12] PW2 told the Court that he was in the bar with the deceased and the others when a misunderstanding arose over waragi which the deceased and his two friends were drinking. That the deceased tried to taste the waragi but this resulted in a fight between the Appellant and his friends Makara and Davis on one hand and the deceased on the other.

13] PW2 further told the court that he and the deceased left the bar at about 10:00 p.m. While on their way, they were ambushed by the Appellant, Makara, and Davis who were armed with a panga. PW2 was cut on the right arm and he ran away leaving the deceased also being cut. He ran and informed PW4. He was emphatic that he recognized the assailants and even mentioned their names.

14] PW4, the father of the deceased told Court that PW2 came to his home at about 9:00 p.m. and informed him that the Appellant, Makara and Davis ambushed him and the deceased on their way home and that his son was dead. PW4 together with other members of his family and friends then went to the scene and indeed found out that the deceased was dead.

15] PW5 stated that he took the Appellant's plain statement and escorted the Appellant to PW6 for a charge and caution statement, compiled the file, and sent it to the Resident State Attorney. PW5 testified that he did not visit the scene of the crime.

16] PW6 told the Court what he had heard from PW1. He testified that according to PW1 the deceased and his friends left the bar first and that the Appellant and his friends followed later. That the Appellant left while threatening the deceased. He was emphatic about this during examination in chief, re-examination, and when examined by the Court. PW6 also told the Court that the Appellant was suspected because he lived close to the scene of the crime and picked the murder weapon from his home.

17] The prosecution closed its case without calling the investigation and scene of crime officers as witnesses. Neither were the Doctors who examined the deceased's body nor the Appellant called as witnesses. The record of proceedings does not indicate whether the two examinations were carried out or not.

18] The Appellant (as DW1) testified on oath and had no witnesses. He confirmed that he was in the bar of PW1 on the day of the incident. He witnessed the fight between the deceased and Mucunguzi with his friends Davis and Ahimbisibwe Bernard over waragi. He did not fight the deceased but the others including his two friends, left for their various homes. Immediately after the fight.

19] He denied ever threatening or waylaying the deceased and PW2. From the bar, he went straight home. The following morning several residents came to his house looking for Davis and Bernard whom they thought were at his home. Then they started beating him saying he had also been in the bar. The Appellant further testified that he broke free from them and ran to the police station where he was later arrested and detained.

20] The trial Judge made a finding that indeed the deceased died and that he died from the injuries inflicted on him. That a post-mortem was done at Kisiizi Hospital and that Court received the report as PEI. He further found that the Appellant was examined and found to be 20 years old and was mentally sound as per PE2 received by the Court.

21] The Appellant wondered how PEI and PE2 became part of the Court record. It was argued that the two documents were not agreed upon by the prosecution and defence under S. 66 of the Trial on Indictments Act nor were they tendered in Court as evidence after the doctors had given evidence in Court because there is no record of their testimony/ evidence.

22] Another issue is, whether Tumukwasibwe Stephen Alias Chance died or not. It was argued that they examined PEI (prosecution exhibit 1) which was filled by Dr. Mukisa Serunjogi Jimmy, a Medical Officer at Kisiizi Church of Uganda Hospital. Although he gave his findings and

observations the form (PF48B) he did not indicate the name of the body he examined.

23] It was submitted that regarding PE2(prosecution exhibit 2), the Doctors should have been called to testify whether the Appellant was examined and found to be mentally sound at the time of the offence. The prosecution never explained why the two doctors were not called as witnesses.

24] Additionally, counsel submitted that the trial lower Court should have drawn an adverse inference against the prosecution as crucial evidence of the cause of death of the deceased was not adduced. It was not proved that the Appellant was of sound mind as PE2 was smuggled on the Court record. Counsel further submitted that the principle of adverse inference was explained in the case of **Oketcho Richard Vs. Uganda, Supreme Court Criminal Appeal No. 26 of 1995**. In which the Appellant was appealing against conviction in the absence of medical evidence showing that the complainant in the case had been defiled and also the failure by the prosecution to produce two other important witnesses.

25] Counsel argued that in this case, the only direct evidence against the Appellant was that of Nabaasa (PW2) who told the Court that he was with the deceased when the Appellant and two others attacked them. PW2 further told the Court that he identified the attackers because there was moonlight and that they had been with them before this incident.

26] Counsel observed that before convicting the Appellant the learned trial Judge warned himself and the assessor of the danger of relying on the evidence of a single identifying witness. Counsel however argued that the evidence of PW2 is questionable because PW2 told the Court that he saw the Appellant, Makara, and Davis as the assailants at about 10:00 p.m. The following morning, he made a statement to police indicating

that the assailants were not known to him. On 3 / 09 / 2012 he made the statement which was relied on as defence evidence and allowed as DEI. PW2 told the Court that he made a statement in that way because he feared to be associated with the death of Tumukwasibwe.

27] Further, counsel stated that the learned trial Judge acknowledged that the conditions of identification were difficult but went ahead to convict the Appellant after making a finding that PW2 properly identified the assailants because he had been with them before the incident and that there was moonlight. That in analysing the evidence on record the learned trial Judge omitted the evidence of PW6 who told the Court that he interrogated PW1. PW1 told him that the deceased and his friends left her bar first and that the Appellant and his group left later. Counsel argued further that PW6 told the Court that the Appellant left while threatening the deceased. This evidence contradicted that given by PW1. Counsel submitted that the inconsistencies between the evidence of PW1 and PW6 and that of PW2 in Court and his statement at the police cannot be said to be minor. They are grave and the Court should have found so. The Appellant's alibi was that he was at home at the time the offence was committed. Counsel argued that the prosecution did not disprove the Appellant's alibi – the Appellant reported himself to police because people were threatening to harm him after learning that he had been with the deceased at PW1's bar where there was a fight.

28] Counsel submitted that it is settled law that where an Appellant person puts forward an alibi as an answer to a charge he does not assume any burden of proving that answer. If an alibi raises a reasonable doubt as to the guilt of an Appellant, it is sufficient to secure an acquittal. See the case of **Mohamed Mukasa and Anor. Vs. Uganda, Supreme Court Criminal Appeal No. 27 of 1995**.

29] It is also settled law that the prosecution shoulders the burden to prove all the ingredients of the offence beyond reasonable doubt and this burden does not shift throughout the proceedings. Any doubt must be resolved in favour of the accused by way of any acquittal. (See **Woolmington Vs. Dpp (1935) AC 462**) Counsel submitted that the prosecution failed to prove the case against the Appellant.

30] Regarding ground four, counsel cited section 11 of the Judicature Act Cap 13, which gives this court the power to grant an appropriate sentence. Counsel further cited the case of **Kakooza Vs. Uganda, Criminal Appeal No. 17 of 1993**, where it was held that an Appellant court will only alter a sentence imposed by the trial Court if it was evident that it acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive given the circumstances of the case.

31] Counsel submitted that the starting point for a murder case is 35 years but can range from 30 years up to death depending on aggravating or mitigating factors.

32] Counsel submitted that both counsel agreed the Appellant was a first-time offender. Although the aggravating factors were that the deceased was a young man who sustained multiple cuts on the head and that the offence of murder is rampant in the area.

33] In mitigation the Appellant stated that he was a young man of 23 years, who was the sole breadwinner of his wife and their child. He was looking after an old mother. He prayed for a lenient sentence. Counsel prayed that considering the above factors, a sentence of 26 ½ years should be set aside.

Submissions for the Respondent

34] Counsel for the Respondent submitted that the Appellant's major contest raised on the three grounds lies with the Appellant's participation

in the commission of the offence. He submitted that the contention raised 6 major issues.

1) Contradictions in the prosecution evidence of PW2, PW1 and PW4
2) Contradictions between PW2's testimony in Court Visa vi His Police Statement.
3) Identification of the Appellant
4) Evaluation of evidence defence of alibi
5) Failure to draw an adverse inference from the failure to call witnesses who examined the deceased and the Appellant.
6) Imposed a harsh and excessive sentence.

35] Counsel submitted that he would address the grounds according to the issues raised.

Identification of the Appellant

36] Counsel submitted that the testimony of PW1 was that she saw the Appellant in her bar, that the Appellant and the deceased fought from her bar until they were separated and the Appellant left at about 9 pm. PW1 further told the Court that the 2nd group that is the deceased and his friends left later. Counsel submitted that this evidence was corroborated by that of PW2 who testified that on the 02nd of September 2012, they left with the deceased from PW1's bar close to 10 pm, and on their way they met the Appellant, Makara with Davis who had pangas and started cutting him and the deceased.

37] PW2 went ahead to narrate how she was able to identify the Appellant when she staed that *"I identified the Appellant person because I knew him well. There was moonlight and I had been with them at the bar. The incident for the time I was there lasted 10 minutes before I ran away, I ran when they cut my arm and I left them cutting the deceased. It was a struggle and we were close to each other as they cut."*

38] In response to the Appellant's submission that the trial Judge would have found that the Appellant did not way lay the deceased, counsel stated that this was speculation rather than the record of appeal. The witness was the area officer in charge of the police post where the Appellant ran to as the crowds allegedly went after him. He disclosed the events of the previous night to this witness and the witness then effected an arrest on the Appellant.

39] Counsel concluded that there was proper identification.

Inconsistencies and contradictions

40] In response to the allegations of inconsistencies in the evidence of PW1, PW2, and PW6, counsel argued that the inconsistencies were minor and did not touch the root of the case, and therefore the trial Judge rightly disregarded them. Counsel relied on the case of **Okwonga Anthony Vs. Uganda (2001-05) HCB at 38.**

41] As regards the witness police statement of PW2 and its value, counsel cited the case of **Chemonges Fred Vs. Uganda, SCCA No. 12/2001** where the court found that where a police statement is proved to be contradictory to his testimony, the court will always prefer the witness's evidence which is tested by cross-examination. Counsel argued that the trial court properly preferred the evidence of PW2.

Alibi

42] Counsel relied on the evidence of PW1 who testified that he saw both the deceased and his group and the Appellant fight in her bar and they were separated. PW1 also told the court that the first group left earlier and the 2nd group which was with the deceased and his friend also left later. It was stated that there was sufficient moonlight for proper identification. Counsel argued that the evidence was corroborated by that of PW2 who testified that on the 02nd of September 2012, they left with the deceased from PW1's bar close to 10 p.m., and on their way they met

the Appellant, Makara, and Davis who had pangas and started cutting him and the deceased. Counsel relied on the case of **Kato John Kyambadde Vs. Uganda, SCCA No. 0030/2014**, where the court held that being at another place a while after the occurrence of the murder was not believable as an alibi since there was nothing to prevent him from moving from one place to another. Counsel argued that the alibi was rebutted.

43] As regards the conduct of an Accused, corroboration of the prosecution case has been reiterated in several cases. Counsel **cited Magezi Gad Vs. Uganda, SCCA No. 17/2014 and Ntambala Fred Vs. Uganda, SCCA No. 0730/2014**, where the court found that the conduct of an Appellant after the occurrence of the offence is not consistent with innocence. Counsel argued that the conduct of the deceased running away to the police station was not consistent with that of an innocent man.

Drawing adverse inference from calling witnesses who examined the deceased and the Appellant

44] Counsel argued that there was a memorandum of agreed facts that was prepared including the police form 48 which was PE1 detailing the contents of the documents as noted by the learned trial Judge, and the police form 24 which was the form on which the Appellant was examined and marked PE2. This memorandum was signed by all the parties including the Appellant and the Judge and thus binding on all the parties once endorsed by the court as directed in section 50 (1) of The Evidence Act.

The sentence was harsh and excessive in the circumstances.

45] Counsel agreed with the position of the law regarding the interference of the appellate court with the sentencing discretion of the Court as cited by the Appellant. Counsel cited the case of **Wamutabaniwe Jamiru Vs. Uganda, SCCA No. 74 of 2007 and the**

case of Kyalimpa Edward Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1005

46] Counsel argued that in arriving at the sentence of 26 and ½ years imprisonment for the Appellant, the trial Judge had a comprehensive consideration of both the mitigating and aggravating factors. Counsel argued that the Judge could not be faulted.

47] Counsel cited the case **of Karisa Moses Vs. Uganda, (SCCA No. 23 of 2016**, where the court held that an appropriate sentence is a matter of discretion of the sentencing Judge.

48] Counsel further argued that the Appellant had been indicted for murder contrary to sections 188 and 189 of the Penal Code Act which carried a maximum for death sentencing. That under the guidelines the starting point for murder is 35 years and the sentencing range is 30 years to death.

49] Counsel submitted that considering the above the sentence was not as harsh and excessive as alleged by the Appellant.

50] Counsel cited the case of **Bashasha Sharif Vs. Uganda, SCCA No. 82 of 2018** where the supreme court upheld a death sentence, and in the case of **Turyahabwe Ezra and 12 others Vs. Uganda, SCCA No. 50 of 2015**, the supreme court upheld a sentence of life imprisonment for murder and in **Ssemaganda Sperito and Anor vs. Uganda, CACA No 456 of 2016** upheld a sentence of 50 years' imprisonment

51] Counsel submitted that considering the above authorities the court should uphold the sentence of 26 and ½ years imprisonment against the Appellant.

Consideration of Court.

52] As a first Appellate Court, it is the duty of this Court as provided under Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions

S.I 13-10 to re-evaluate the evidence, weighing conflicting evidence, and reach its conclusion on the evidence, bearing in mind that it did not see and hear the witnesses. In the case of **Kifamunte Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, the Court stated that:

> *"We agree that on the first appeal, from a conviction by a Judge, the Appellant is entitled to have the Appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first Appellate Court must review the evidence of the case and reconsider the materials before the trial Judge. The Appellate Court must then make up its mind not disregarding the judgment appealed from but carefully weighing and considering it."* ***See also the cases of Pandya Vs. R [1957]EA 336, Bogere Moses Vs. Uganda, SCCA No.1 of 1997***

53] The Respondent raised a preliminary objection that the grounds offend Rule 66(2) of the Rules of this Court, which requires that a ground of appeal should be specific and not narrative pointing out either a point of law or fact that was wrongly decided by the trial Judge. This Rule provides that:

> *"The Memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection* ***to the decision appealed against****, specifying in the case of a first appeal the points of law or fact or mixed law and fact..... wrongly decided."*

54] In the case of **Mugerwa John Vs. Uganda, Criminal Appeal No. 0375 of 2020,** the Court held that:

> *".. A simple reading of the first ground of appeal shows that the Appellant has not pointed out what point of law or fact the learned trial Judge failed to evaluate. An Appellant cannot and should not throw grounds of appeal at the Court and expect the Court to wade through them looking for where the learned trial Judge went wrong an Appellant has a duty under Rule 66(2) of*

the Rules of this Court to set forth concisely the grounds of objection to the decision appealed against. The Appellant must in a first appeal, which this one is specify the fact or mixed law and fact which he is alleging was wrongly decided."

55] We have perused through the Court record, and we find that ground one offends Rule 66(2). The Rule requires that the Appellant clearly states the grounds for objection to the decision appealed against. The ground does not state which part of the law that the Judge erred. Ground One is therefore struck out.

56] Turning to ground two, the court was faulted for not calling the Doctor who examined the dead body and the Appellant. Section 133 of the Evidence Act, Cap 16 provides that:

"Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact."

57] In interpreting the above Section Court in the case of **Abdullah Nabulere and Anor Vs. Uganda, Criminal Appeal No.09 of 1978,** the court stated that there was a clear statutory provision that for the proof of any fact a plurality of witnesses is not necessary. In the case of **Bumbo & others Vs. Uganda, Supreme Court Criminal Appeal No. 28 of 1994 c**ourt held that: -

"While it is desirable that the evidence of a police investigating officer and of the arrest of an Appellant person by the police should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not as a rule, be fatal to the conviction of the Appellant."

58] It was alleged by the Appellant that failure to call the Doctor who examined the deceased and the Appellant was fatal. Considering the above position of the law, there is no specific number of witnesses required to prove the fact. Death can be proved by any other evidence

other than the evidence of the post-mortem. The fact that PW4(the father of the deceased) gave undisputed evidence that his son died was sufficient proof of the deceased's death. Hence failure to call the Doctor did not amount to a miscarriage of justice.

59] Turning to ground three on inconsistencies and contradictions, the **Black's Law Dictionary sixth edition** defines the two terms as follows: -

At page 326; **contradict:**

> *"contradict to mean disapprove. To prove a fact contrary to what has been asserted by a witness."*

At page 767; **inconsistent:**

> *"inconsistent are mutually repugnant or contradictory contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other."*

60] Case law regarding the effect of contradictions and inconsistency in prosecution evidence was stated in the case of **Obwalatum Francis Vs. Uganda, Criminal Appeal No. 30 of 2015**, where the Court held thus: -

> *"the law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to rejection of such testimony unless satisfactorily explained."*

61] Furthermore, in **Sgt. Baluku Samuel and Anor Vs. Uganda [2018] UGSC 26 (24 May 2018)** the Supreme Court noted: -

> *"We are aware that in assessing the evidence of a witness and the reliance to be placed upon it, his or her consistency or inconsistency is a relevant consideration. This Court in Sarapio Tinkamalirwe Vs. Uganda, Criminal Appeal No. 27 of 1989 (SC) held as follows: -*

"it is not every inconsistency that will result in a witness testimony being rejected. it is only a given inconsistency, unless satisfactorily explained, which will usually, but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies will not usually have the effect unless the court thinks they point to deliberate untruthfulness."

62] The appellant submitted that the evidence of PW2 was questionable because he told the court that he clearly, identified the Appellant, Makara, and Davis at 10:00 p.m. However, the following morning when he made a statement he stated that the assailants were not known to him. When the court inquired into his inconsistency he stated that he made that statement because he feared to be associated with the death of Tumukwasibwe.

63] Counsel argued that the evidence of PW4 could not corroborate the evidence of PW2.

64] Counsel further questioned the evidence of PW1 and PW6. He argued that the PW6 who interrogated PW1 gave different accounts of the evidence. In that, PW6 stated thatPW1 told him that the deceased and his friends left the bar first and the appellant and the friends left later. That had the Judge considered the evidence of PW1, PW6, and PW2 he would have found that the appellant did not waylay the deceased person. The Judge stated the following while making his findings: -

"To avert the stated danger the court will look at the circumstances under which the identification is made to test the quality of the identification evidence by scrutinising the right conditions; familiarity of this witness with the Appellant; the length of time observing the incident; and the distances (see ***Abdallah Nabulere and other Vs. Uganda Cr. Appeal 1 of 1978)***

PW2 stated he knew the Appellant very well. They had grown up together. They had also spent a significant amount of time in the

bar that night. It is also his evidence that they struggled with their assailants as he and the deceased were attacked and that they were in direct physical contact during the struggle. It is his uncontested evidence that there was bright moonlight that night. These factors make for good identification evidence.

There is an additional aspect of the police statement of PW2 however. He made the statement on the 3rd of September 2012, a day after the attack, and in it said the attack was by people unknown to him. It was put to this witness that his story in court was significantly different from what he told police when the matter was still very fresh. The witness however stuck to his testimony even during thorough cross examination. He explained that he was very frightened at the time he made the statement fearing the assailants may attack him and that the village folk may think he was part of the attack.

It is noteworthy that when he went to call PW4, PW2 told him that the attack on the deceased was by the Appellant (Mujuni Cleophas), Maraka, and Davis. This was just moments after the attack.

I noted in addition that Maraka and Davis disappeared from the Kirimbe village following the death of the deceased and have never been seen since.

From the above, therefore, though the statements contradict the testimony of PW2 the above circumstances show that his evidence in Court is consistent with what he told PW4 immediately after the attack. That testimony was given under oath and withstood a rigorous cross examination in light of that I believe PW2 was not lying to this Court."

65] From the above extract it is evident that the trial Judge was able to evaluate the evidence as a whole to conclude that the evidence of PW2 was sustainable. It is trite that even where there are contradictions, as long as they are explainable it is not fatal. PW2 clearly explained that he

feared that the villagers would think that he was part of the murder so he had to state so to protect himself. We find the explanation satisfying. We therefore find that the trial Judge correctly evaluated the evidence as a whole to make an informed decision as regards the contradictions. Furthermore, the conditions for proper identification were all satisfied in that there was sufficient moonlight the appellant was well known by PW2 and that evening they had spent the time tighter in the bar. Further PW2 was there when they were attacked and he also sustained an injury on his hand in the process of the fight. The appellant was properly put at the scene of the crime.

66] This ground therefore fails.

67] Regarding ground four, it must be appreciated that a sentencing Court has the discretion in sentencing but it has to exercise this judiciously. As the first appellate Court, we cannot interfere with the trial Court Judgment on the sentence unless it is found that the trial Court has misdirected itself, then this court will interfere with the said sentence on the terms it considers appropriate after considering both the law and evidence on record. See the case of **Kyalimpa Edward Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995** where the court referred to the case of **R V De Haviland (1983) 5 Cr. App. R 109.**

68] In assessing whether the sentence was harsh or manifestly excessive, we are firstly guided by the fact that the maximum sentence for the offence of murder under sections 188 and 189 of the Penal Code Act and the third Schedule item 3 of the sentencing guidelines, attracts a maximum sentence of death and the starting point is 35 years before considering any circumstances. Additionally, principle 19(1) of the sentencing guidelines provides that the Court shall be guided by the sentencing range specified in Part 1 of the Third Schedule in determining the appropriate custodial sentence for a capital offence.

69] This court is further guided by the principle of consistency provided under principle 6 (c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 which provides that:

> *"Every court shall when sentencing an offender take into account-*
> *(c) the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances."*

70] The Supreme Court explained in the case of **Aharikundira Yustina Vs. Uganda, SCCA No. 27 of 2015,** that with judicial discretion perfect uniformity is hardly possible because sentencing is not a mechanical process. The Court held thus:

> *"There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial Judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process, but a matter of judicial discretion therefore perfect uniformity is hardly possible. the key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation."*

71] Considering similar cases, the case of **Opolot Justine & Another vs. Uganda, SCCA No. 20,2014,** the Supreme Court confirmed a sentence of life imprisonment. In the case of **Paul Kibolo Nasimolo vs. Uganda, SCCA No. 46 of 2017**, a sentence of death was substituted with a sentence of life imprisonment for murder. Relatedly, in **Kaddu Karule Lawrence vs. Uganda, SCCA No. 72 of 2018,** the appellant hacked his former partner to death with a panga and he was sentenced to death. On appeal, this court substituted his sentence for life imprisonment which was upheld by the Supreme Court.

72] The circumstances we find that the sentence of 26½ years metered out on the Appellant was neither harsh nor manifestly excessive.

73] This ground fails.

Decision

1. This appeal lacks merit.
2. The Appellant will continue serving his sentence.
3. The Orders of the Lower Court are upheld.

We so Order

Dated, signed, and delivered this 27th March day of 2024

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MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL