

THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA  
AT KAMPALA

5

*{Coram: Katureebe, Tumwesigye, JJSC.; Tsekooko, Okello & Kitumba, Ag. JJSC.}*

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*Criminal Appeal No. 03 of 2013.*

*Between*

AKBAR HUSSEIN GODI ===== APPELLANT.

15

*And*

U G A N D A ===== RESPONDENT.

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*{Appeal from the judgment of the Court of Appeal at Kampala (Byamugisha, Kavuma & Kasule, JJA.) dated 26<sup>TH</sup> July, 2013 in Criminal Appeal No. 62 of 2011.}*

**JUDGMENT OF THE COURT:-**

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This is a second appeal which arises from the judgment of the Court of Appeal which upheld the conviction of Akbar Hussein Godi (the appellant) by the High Court for the murder of his wife, Rehema Caesar Nasur. The High Court sentenced him to a term of 25 years imprisonment. On appeal to the Court of Appeal, that Court upheld the decision of the trial judge.

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**Background:**

The facts of the case as found by Gidudu, J., the trial judge, and accepted by the Court of Appeal are that Rehema Caesar Nasur (the deceased) was the wife of the appellant. The two got married on 15/12/2007. By then the appellant was aged 21 years while the deceased who was a school girl was aged 19 years.

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After their marriage, the appellant, a University graduate in law from Kampala International University, participated in the parliamentary elections and was elected a Member of Parliament to represent Arua Municipality Constituency in the North West of Uganda. The deceased  
5 continued with her secondary education in senior six at Kakungulu Memorial School, Kibuli, in Kampala. The couple resided in their matrimonial home in Bwebajja along Kampala – Entebbe Road, Wakiso District.

10 The evidence adduced during the trial shows that soon after the marriage, the appellant and the deceased developed discord as husband and wife. The deceased complained to her relatives and friends that the appellant was beating her up and threatening to shoot her with a gun. Apart from her sisters, one of the witnesses about the threat of shooting is Khadija Nasur  
15 (PW25) who testified that bad relationship started within 2 – 3 months after the marriage. PW25 saw injuries on the deceased which the deceased claimed were inflicted on her by the appellant. The appellant, on his part, complained that the deceased was returning home late after her school hours falsely claiming to have been staying at her parents' home at Martin  
20 Road, Old Kampala. The appellant suspected the deceased to be engaged in relationships with other men. This was a bad beginning for a young couple. The evidence of Adiga Habib (DW2) confirms that the marriage developed problems soon after the marriage. The deceased refused to attend a reconciliation meeting in October, 2008 which was soon after the  
25 wedding.

The discord escalated leading to the deceased separating from the appellant. She moved to her parents' home at the aforementioned Martin

Road, Old Kampala, and later to Nana Hostel, near the Law Development Centre, Makerere, in Kampala. At the hostel, she stayed with two Tanzanian female student friends. She also left Kakungulu Memorial School, Kibuli, and joined Old Kampala Secondary School, Kampala, to  
5 complete her secondary education.

The appellant now and then telephoned the deceased quarrelling. At one time he physically confronted her at Nana Hostel. The deceased continued to complain to the family and friends that the appellant was threatening to  
10 do harm to her. She stopped responding to the appellant's incessant telephone calls. For a number of days the appellant telephoned to the two sisters of the deceased namely, Bizu Rashida (PW1) and Cisse Nassier (PW2) appealing to each of them to persuade the deceased to respond to his (appellant's) telephone calls.

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The two sisters appealed to the deceased to respond to the appellant's telephone calls. In the evening of 04/12/2008, at Martin Road, at the home of the deceased's father and step mother, the deceased, after responding to a telephone call apparently from the appellant, was seen by her two sisters  
20 dressing up and then left home explaining to her two sisters that she was going out for dinner with someone, whose particulars she did not disclose to the two sisters.

Later at night (of 04/12/08) at Lukojja village, near the home of Henry  
25 Tamale (PW3) in Mukono District, PW3 and some other witnesses heard gun shots and a fracas. Later the deceased was found dead having been shot with a gun. A post mortem examination was performed by Dr. S.

Onzivua (PW7) on the deceased's body before the same was buried in Arua at the home of the appellant.

The appellant was subsequently arrested, charged, tried by the Hon Justice  
5 Gidudu. There were two assessors to assist the trial Judge during the trial  
namely, Owori Galison and Ojiambo Betty. In their joint opinion they  
believed the prosecution evidence. They were satisfied with prosecution  
evidence about bad relationships between the couple soon after marriage.  
They were satisfied about the evidence of the appellant threatening  
10 deceased and certain aspects of phone printouts. They advised the trial  
Judge to convict. The learned trial judge convicted the appellant of murder  
and sentenced him to 25 years imprisonment. He unsuccessfully appealed  
against both conviction and sentence to the Court of Appeal. He has now  
appealed to this Court. The appeal is based on three grounds set out in the  
15 memorandum of appeal.

Originally the memorandum of appeal was filed in Court by Kunya & Co.,  
Advocates, and indeed when the appeal was first called in this Court on  
22<sup>nd</sup> of May, 2014, Mr. Kunya from the said firm appeared for the  
20 appellant on a private brief. The appeal was adjourned that day because  
Mr. Kunya was not ready. The appellant appears to have subsequently  
instructed a different firm of Asiiimwe, Namawejeje and Co., Advocates, to  
represent him. That firm lodged in Court a written statement of arguments  
and later a rejoinder to the written reply of arguments by counsel for the  
25 state (the Respondent).

When the appeal was called up for hearing on 01<sup>st</sup> December, 2014, Ms.  
Wakabala of Asiiimwe, Namawejeje & Co., Advocates, appeared for the

appellant on a private brief, while Mr. Mulindwa, Senior Principal State Attorney (SPSA) held a brief for Mr. M. Wamasebu, Asst. DPP, who represented the Respondent.

5 In the written statement of arguments, counsel for the appellant argued grounds one and two together followed by the third ground. The respondent followed the same order. The said two grounds of appeal are worded as follows—

10 *1. “That the Justices of Appeal erred in law and fact when they upheld the appellant’s conviction in absence of satisfactory prosecution evidence to sustain the charge.*

15 *2. That the Justices of Appeal erred in law and fact when they failed to properly re-evaluate the evidence adduced at trial to come to their own conclusion hence occasioning miscarriage of justice.*

In effect, in the first ground the complaint is that the prosecution evidence did not prove the charge of murder preferred against the appellant, while in the second ground the complaint is that the Court of Appeal did not re-  
20 evaluate the evidence properly and consequently occasioned miscarriage of justice by upholding the decision of the trial Judge. These two grounds are in effect similar to grounds 1 and 4 which were argued in the Court of Appeal.

25 We are forced to observe at this point that counsel for the appellant argued the appeal as if this was a trial Court. Counsel used small prints and spacing in the written arguments in order to accommodate the many details. Counsel should desist from this practice and follow the procedure prescribed by the Chief Justice’s Practice Direction No. 02 of 2005. We  
30 consider it desirable to set out arguments for both sides in some detail.

As we understand the views of counsel set out in the written arguments, counsel for the appellant contends, correctly in our considered opinion, that the case for the prosecution is based on circumstantial evidence. Upon  
5 careful perusal of the arguments we understand learned counsel when arguing the 1<sup>st</sup> and the 2<sup>nd</sup> grounds to contend that the evidence adduced by the prosecution did not disprove the alibi raised by the appellant that he was not at the scene of the crime nor indeed that he is the one who murdered the deceased by shooting her with a pistol. Learned counsel criticized the trial  
10 judge for his approach in assessing the evidence adduced by the prosecution. Counsel also criticized the Court of Appeal for not re-evaluating the evidence as required by the law and such decisions as **Bogere Moses vs. Uganda (Supreme Court Criminal Appeal No. 01 of 1997); Musoke vs. R (1958) EA 715** and **Kifamunte Henry vs. Uganda**  
15 **(Supreme Court Criminal Appeal No. 10 of 1997).**

While counsel for the appellant conceded at the opening of the written arguments that ***“indeed in their judgment at page 73 paras 10 – 15, the learned Justices did mention the pieces of circumstantial evidence they***  
20 ***evaluated to consider the confirmation of the sentence which we contest .....*”** Learned counsel contradicted this by contending that ***“the Justices of Appeal abdicated from their duty of subjecting the available evidence to fresh re-appraisal and evaluation.”***

25 Counsel criticized the Court of Appeal regarding the manner in which the Court re-appraised the evidence relating to the blood found on the co-driver’s seat of the appellant’s car NO. UAJ 455J. The appellant did not explain how blood stains were found on his said car seat. Counsel also

criticized the Court of Appeal for concluding (which conclusion is correct in our considered opinion) that in the absence of plausible explanation from the appellant, evidence of the vehicle placed the appellant at the scene of crime as a participant in the killing of the deceased. Learned counsel  
5 contended that the Justices of Appeal did not address “themselves on the contradictory and false evidence adduced by the prosecution.” Counsel thereafter referred to the various aspects of the prosecution evidence. Counsel, for instance, referred to the evidence of Dr. Mubiru Andrew (PW14) about the testing of fibre clothes and the incident involving alleged  
10 appellant’s car and *Boda Boda* motor cycle of PW4. Counsel relied on this Court’s decision of **Bogere Moses vs. Uganda** (*supra*) for the view that the evidence available did not place the appellant at the scene of *crime*.

Counsel contended that because the appellant’s car was not impounded nor  
15 exhibited in Court and as the evidence of Andrew K. Mubiru (PW 14) (Exh.P8) exonerated the appellant because the evidence regarding the number of doors of the car seen at the scene of murder was conflicting, the Court of Appeal failed to link both the appellant and his car to the scene of crime. Counsel appears to base this contention regarding the number of  
20 doors on the vehicle seen at the scene of crime on the evidence of SP Kyomukama (PW 11) and that of PW14. SP / Kyomukama. PW14 testified during his Examination-in-Chief that on the 10<sup>th</sup> December, 2008, the appellant who was accompanied by his Advocate, (Hon. Katuntu) was interviewed by the police at Old Kampala Police Station about the murder  
25 of the deceased. According to PW11 the appellant stated that he had three vehicles including RAV 4 UAJ 455J. When the appellant was asked whether he had given out that RAV4 vehicle to anyone to use, the appellant stated that between 3<sup>rd</sup> and 5<sup>th</sup> December, 2008, he had used the vehicle

himself and denied driving it to Mukono. PW11 testified that Lwanga (PW4) had mentioned that he (Lwanga) had seen at the scene that night the vehicle which knocked him and his *Boda Boda* motorcycle stating that the vehicle had four doors. On the other hand Andrew Kizimula Mubiru  
5 (PWI4) a Forensic Scientist, Ministry of Internal Affairs, who examined both the appellant's car and the motorcycle which the car had knocked on the night of the murder (4/12/2008) testified that the car had three doors and both vehicles (car and motorcycle) had been damaged. According to him, he examined the car at Kibuli on 23<sup>rd</sup> December, 2008, which was  
10 three weeks after the accident. It should be noted that Lwanga found that vehicle at the scene moving automatically while he himself was seated on his *Boda Boda*. This was at night at about 10:00pm. In those circumstances Lwanga's observation about the doors of the car are minor inaccuracies which are understandable. They do not raise any doubt in our  
15 mind about the evidence presented against the appellant.

Counsel also criticized the trial judge as well as the Court of Appeal for holding that the report of the Ballistics Expert, (Exh. 16) by Robinnah Kirinya (PW 23) and her evidence placed the appellant at the scene of  
20 crime. Counsel contended that both the trial Judge and the Court of Appeal failed to evaluate the evidence and veracity of PW23 and ended up speculating. Relying on the evidence of D/SP Kyomukama (PW16) Counsel submitted that the appellant never fired his pistol from the time he acquired it up to the time it was tested by the expert.

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Submitting on the killer bullet (Exh. P21), counsel for the appellant contended in effect that the evidence of the prosecution witnesses D / SP Aisu (PW22) was in conflict with that of PW23 and casts doubt on the

report of PW23. Counsel contended that the evidence of PW23 did not place the appellant at the scene of the murder and that the two courts speculated on the evidence of PW23 and counsel relied on **Okethi Okale & Ors. Vs. Republic (1965) EA 554** in support of these arguments.

5 Counsel also relied on **Mutesasira Musoke vs. Uganda (Supreme Court Criminal Appeal No. 17 of 2009)** for the opinion (which is correct) that expert evidence must be carefully scrutinized and not be taken as unquestionable truth.

10 We hasten to observe that the case of **Okethi** (*supra*) is distinguishable from the present case because there the trial judge relied on his own theories. The facts as summarized by the former Court of Appeal for East Africa were as follows—

15 *The four appellants were convicted of murder. In the Court below the only issue was identification and the prosecution case consisted of evidence from the widow of the deceased and the evidence of a dying declaration. The Judge, after discounting the evidence of the widow, proceeded to put forward a theory of his own which was inconsistent with the widow's evidence and unsupported by the*  
20 *medical evidence; and he accepted the deceased's brother's evidence as to the dying declaration without giving any reasons. The judgment also contained a passage suggesting that the Judge had accepted the prosecution case and then cast on the appellants the burden of disproving it or raising doubts about it.*

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The former Court of Appeal for East Africa held that—

30 *“in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels' speeches.”*

In the present case counsel criticized both the trial Judge and the Court of Appeal for holding that the evidence of Ochom J. Mike (PW28), the

Government Analyst, was credible and that it placed the appellant at the scene of crime because his report(Exh. P22) in effect showed that the soil found on the sole of the exhibited shoe matched both mineral and chemistry profile of the soil got from the scene of crime. Essentially  
5 counsel based his argument on the assumption that the appellant disowned the exhibited shoes contending that although the appellant denied that the shoes exhibited were his and claimed that they were bigger than his size, **he was not ordered by the trial court to wear the exhibited shoes.** Consequently counsel opined that the prosecution did not prove that the  
10 exhibited shoes belonged to the appellant and that both the trial Court and the Court of Appeal wrongly assumed that size 39 and size 42 are in the same range. Counsel contended that the appellant's witness (DW2) who signed the search certificate because of fear that he might be treated as an accomplice disowned the exhibited shoes. Counsel urged this Court to  
15 examine Photo C-3 and draw its own conclusions. Counsel also doubted the reliability of the evidence from the sample of soil got from the scene three weeks after the murder particularly since the scene was not secured.

Again appellant's counsel criticized the Court of Appeal for accepting the  
20 evidence of PW28 on the basis that he was not challenged even though the witness himself testified that he **"had no qualification in soil science."** Counsel in effect contended (without a proper basis or evidence) that the shoes could not in the circumstances of this case bear mud or soil two weeks after the event.

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We ought to point out at this point that DW2 on whom the appellant's counsel relies was treated by the trial Judge as a liar who was acting in the witness box. The trial Judge noted this at page 151 of the typed

proceedings. Therefore the Judge who saw the demeanour of PW2 in witness box acted correctly in disbelieving him (DW2).

**Telephone Printouts:-**

5 The evidence adduced here is technical and interesting. With respect to the telephone printouts, counsel challenged the reliability of the evidence of PW1 and PW2, the two sisters of the deceased. Relying on the evidence of witnesses like Lugesera, (PW 28), on phone printout, and D / Sgt. Kikaawa F. (PW 29), counsel submitted that both the trial judge and the Court of  
10 Appeal erred in their respective conclusions. Counsel does not support the two Courts' holding that the appellant called the sisters of the deceased and the deceased herself. (With respect we think that counsel here has ignored the evidence of the appellant himself that he called the two sisters of the deceased.) Counsel contended that the conclusions of the Court of Appeal  
15 were watered down; first by the omission by the prosecution to tender in evidence the appellant's telephone and secondly by absence of evidence that the appellant called PW1 at 10:00am on 04/12/2008 as claimed. Counsel submitted that no threatening messages of the appellant from service providers were tendered in Court by the prosecution during the  
20 trial. Therefore the Honourable Justices of Appeal speculated. Counsel contended that it was a serious error for the trial Court to admit phone printouts and, therefore, the Court of Appeal should have cured this.

Counsel for the appellant referred to and criticized the evidence of Sgt.  
25 Kikaawa Fred (PW29) for whom Peter Angole (PW30) is reported to have generated telephone prints for 0701131518 of deceased from Warid Telecom in December, 2008 whereas according to PW30, by that period he was not employed by WARID. Counsel criticized the Court of Appeal for

relying on this evidence because according to counsel, PW21 testified that **telephone printouts do not show that the appellant was in Mukono.**

Learned counsel did not with respect present the evidence of PW29 and PW30 in the context when criticizing the trial Judge and the Court of Appeal. The evidence on the record shows that PW29 had apparently been interacting with PW30 many times and so initially hinted that PW30 had given him printout in 2008. A perusal of page 127 of the record at the top shows that the original printout which was apparently produced earlier in December, 2008 got misplaced. The witness (PW29) testified that —

10       *“This is the very one I retrieved from WARID in December, 2010. I got it from the same Peter of the WARID and eventually the one lost at CID Headquarters was found also. I processed printouts for 0714008595 but there was no information useful in the period of November 2008 to 31<sup>st</sup> December, 2008. I was to analyse .....*”

15       *I found out that on 04<sup>th</sup> December, 2008, at 05:56pm 0714445555 called 0701131518 for 82 seconds then 0701131518 called 0782008595 at 06:12pm for 17 seconds. 0701131518 called 0782008595 at 06:18pm. same day 04<sup>th</sup> December, 2008 for 30 seconds.....”*

20       *The number 0701131518 stopped communication at 06:18pm. on 04<sup>th</sup> December, 2008. Its last call was to 0782008595. I failed to track 0701131518 because it did not communicate after 06:18pm. On 04<sup>th</sup> December, 2008.*

During cross-examination by Mr. Kabega, counsel for the appellant in the trial Court, the witness answered at page 130 as follows—

30       *“On 04<sup>th</sup> December, 2008, 0782008595 did not call 0701131518. **It is the deceased who called the accused on 04<sup>th</sup> December, 2008. She called at 06:12 pm and .....**”*

Counsel also relied on the evidence of Samuel Lugesera (PW26) for the opinion that mast or base station on printout means the caller is within the radius of 30km not exactly at the place showing where a call was made or

received. Why was Tel. No. 0715408783 that communicated to the deceased for a record **ten times on the day she died with the last call at 05:55pm not queried** by police yet PW29 stated printout for 0714008595 of the deceased which appellant bought for her did not generate useful  
5 information (**per page 127 line 4**). Mr. Lugesera Samuel (PW26) of MTN testified (**at page 110 line 7 - 8**) that he generated appellant's printouts for Tel No. 07820088595 and its serial number was 3586968369840 yet those exhibited varied.

10 (**At page 300 line 3**) Prosecution produced a phone E 71 with different serial number or IMEI (International Mobile Equipment Identity) with that of appellant's telephone prints exhibit (**P. 20 at page 185**). PW26 testified (**page 110 line 8**) that Serial Number or IMEI don't change even if more cards are swapped in a telephone yet prosecution exhibited a phone E71  
15 with different Serial Numbers 35925020791408, 35869601836840 and 352925020791400 all for same handset! (**Per page 300 line 3 – 6.**)

Counsel criticized the Justices of the Court of Appeal for saying nothing about what counsel described as apparent contradiction which went to the  
20 root of the matter when the deceased's phone and that of the appellant were not tendered in Court yet (**page 7 line 13 – 14 of the record**) PW1, the sister of the deceased testified, that deceased's phone was still on after murder? Counsel cited MUSOKE Vs. R. (1958) EA for the proposition that circumstances must produce moral certainty to the exclusion of every  
25 reasonable doubt. He also relied on **Cpl. Waswa & Anor. Vs. Uganda (SCCA No. 48 of and 49 of 1995)** on suspicion.

Appellant's counsel went on to criticize the Court of Appeal for holding that the appellant harassed the deceased at the hostel before adding that on 30<sup>th</sup> November, 2008, the appellant and his group assaulted the deceased inflicting bruises leading to loss of her friend's phone. Counsel again  
5 criticized the Court for holding that the evidence of PWs 1, 2, 9, 25 proved that the deceased was mistreated and that the **appellant persistently sent threatening messages** to the deceased. Counsel submitted that this was contrary to the evidence allegedly because on 30<sup>th</sup> November when the **deceased was purportedly assaulted, printouts that show appellant**  
10 **was in Arua (PW25 at page 101).**

#### **RESPONDENT'S REPLY:**

In reply counsel for the prosecution submitted that the trial Court evaluated the available evidence in depth. Counsel referred to pages 341 and 342 of  
15 the record of appeal where the learned trial judge listed and considered 14 pieces of circumstantial evidence adduced by the prosecution. Counsel contended that the learned judge considered all the evidence and submissions made on behalf of the appellant. Counsel submitted that after evaluating all the pieces of evidence the judge came to the conclusion that  
20 the accused was not only placed at the scene of crime but he single handedly shot and killed the deceased. Again counsel submitted that the Justices of the Court of Appeal re-evaluated the evidence before they agreed with the findings and conclusions of the learned trial Judge.

25 Learned counsel for the respondent concluded his submissions on this aspect by submitting that it is not open to this Court to re-evaluate the evidence again as to do so would amount to assuming the role of the first

appellate Court. Counsel concluded that grounds one and two of the memorandum of appeal have no merit and should be dismissed.

The approach taken by both sides in their respective arguments for and  
5 against the appeal makes it desirable for us to refer to the appropriate Rules of Procedure in the Court of Appeal and in this Court.

The power of the Court of Appeal to reappraise evidence adduced in a trial court is set out in Rule 30 (1) of the Court of Appeal Rules as follows—

10 *30 (1) on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the Court may:*

*(a) Reappraise the evidence and draw inferences of fact*

This Rule has been in operation for many years. Many cases have been decided by this Court and its predecessors concerning the role of the Court  
15 of Appeal as a first appellate Court or for that matter the role of a first appellate Court in our legal system.

The manner in which counsel for the appellant presented arguments compels us to refer to and quote a number of decisions relevant to the role  
20 of a first appellate Court and that of a second appellate Court (which this Court is) under our law.

This Court considered the role of the Court of Appeal in the case of **Fr. N. Begumisa & Others Vs E. Tibebaga** (*Supreme Court Civil Appeal No. 17 of 2003*;  
25 where *Mulenga (RIP) JSC. had this to say (See Pages 7, 8 and 9 of the judgment)*—

“..... That leads me to consider counsel's novel proposition that the court was under no legal

obligation to re-evaluate the evidence in view of r.29 (1) of the Court of Appeal Rules 1996, which provides -

5 "29. (1) On any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the Court may -

- (a) re-appraise the evidence and draw inferences of fact; and
- (b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner." (emphasis is added)

10

I notice the slight change from the wording of the otherwise identical predecessor to that rule, i.e. r.29 (1) of the Court of Appeal for East Africa Rules, 1972, which provided that " the Court shall have power, (a) to re-appraise evidence..". In my view, however, that change did not alter the purport of the rule. By either wording, the rule declares the court's power to re-appraise evidence, rather than imposes an obligation to do so. The legal obligation on a first appellate court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) put the matter as follows—

30 "Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials

5 before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

10  
15 In Pandya vs. R (1957) EA 336, the Court of Appeal for Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction. It held that the High Court sitting on an appeal from a Magistrate's court had –

"erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect"

25 The principle behind Pandya vs. R (supra) was subsequently stressed in Ruwala vs. R (1957) EA 570, but with explanation that it was applicable only where the first appellate court had failed to consider and weigh the evidence. More recently, this Court reiterated that principle in Kifamunte Henry vs. Uganda, Criminal Appeal No. 10/97 and Bogere Moses & Another vs. Uganda, Criminal Appeal No. 1/97. In the latter case, we had this to say -

30  
35 "What causes concern to us about the judgment, however, is that it is not apparent that the Court of Appeal subjected the evidence as a whole to scrutiny that it ought to have done. And in particular it is not indicated anywhere in the

5 judgment that the material issues raised in the appeal  
received the court's due consideration. While we would not  
attempt to prescribe any format in which a judgment of the  
court should be written, we think that where a material issue  
of objection is raised on appeal, the appellant is entitled to  
receive an adjudication on such issue from the appellate  
court even if the adjudication be handed out in summary  
form... In our recent decision in Kifamunte Henry vs.  
10 Uganda we reiterated that it was the duty of the first  
appellate court to rehear the case on appeal by  
reconsidering all the materials which were before the trial  
court and make up its own mind... Needless to say that  
failure by a first appellate court to evaluate the material  
evidence as a whole constitutes an error in law. "

15 On the other hand Rule 30 of the Supreme Court Rules gives power to this  
Court when deciding a second appeal like the present one as follows—

20 Rule 30 (1) "Where the Court of Appeal has reversed, **affirmed** , or varied  
a decision of the High Court acting in its original jurisdiction, the Court  
may decide matters of **law or mixed law and fact** but shall not have  
discretion to take additional evidence."

25 This Rule differs just slightly from the previous Rule 29 (1) (a) of the  
Supreme Court Rules 1972 and 1991 (See Statutory Instrument No. 179 of  
1972 and Statutory Instrument No. 19 of 1991.) but the effect of its  
operation is the same.

30 It is now well established that when both sides in a second appeal present  
arguments at this level this Court has to bear in mind areas where there are  
concurrent findings by the two lower courts. See **Bakare Vs. The State**  
(1985) LRC (Cr) 179; **Kifamunte Henry Vs. Uganda** (*Supreme Court*  
*Criminal Appeal No. 10 of 1997*), **Bogere Vs. Uganda** (*Criminal Appeal*  
*No. 01 of 1997*); **Selle Vs. Associated Motors B** (1968) EA 123.

At pages 10 and 11 of its judgment in *Kifamunte Henry case* (*supra*) this Court held—

*“We have not been persuaded that the learned judges erred in law or in mixed fact and law to justify our intervention.*

5 *Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the first appellate Court has wrongly held that the trial Court correctly directed*  
10 *itself, yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view R. Mohamed All Hasham vs. R (1941) 8 E.A.C.A. 93.*

15 *On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: R. vs. Hassan bin Said (1942) 9*  
20 *E.A.C.A. 62.”*

In *Uganda vs. Kabali* (1975) E.A. 185 a decision by the East African Court of Appeal on second appeal; the Court considered the matter in the following words—

25 *“It is true as Mr. Omondi has submitted that the first appellate Judge does not seem to have treated the evidence to independent scrutiny as he should have done. See Pandya vs. R. (1957) E.A. 336. He contended himself with satisfying himself that the Magistrate’s finding as to the respondent’s intention could be supported. But in*  
30 *concluding his judgment, the judge made it clear that he agrees with the Magistrate’s evaluation of the evidence and with his finding as to intention. In our view although the form of the first appellate judgment is open to criticism, we think that the Judge did in fact make his own evaluation of the evidence and came to the same*  
35 *conclusion on it, so far as intention is concerned, as the Magistrate, although he does not say so in terms. Even accepting the prosecution evidence in toto, we see no reason to doubt the validity of the findings of the two Courts.*

***The position now, on second appeal, is that the Court is faced with the concurrent findings by the two Courts below that the respondent's intention was innocent and not criminal.***

5

*There is no reason why this court should depart from the concurrent findings of fact as to the respondent's innocence, findings which were reasonable and supportable on the evidence."*

10 That is the law and the practice. It is rare for a second appellate court to interfere with concurrent findings of two courts below on the same case. This Court held a similar view in the **Bogere Case** (*supra*)—

There are many decided cases which set out the relevant principles which  
15 courts apply in deciding cases based on circumstantial evidence. In the case of **Simmon Musoke Vs. R (1958) EA 715** at page 718H, the Court of Appeal for East Africa held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the  
20 accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt" See also **Teper Vs. R (1952) 2 ALLER 447**. Also See **Audrea Obonyo & Others Vs. R (1962) EA 542** where the principle governing the application by Courts of circumstantial evidence were considered.

25

We have carefully studied the judgments of both the trial Judge and of the Court of Appeal. The learned trial judge in his judgment fully appreciated the fact that the case before him depended on circumstantial evidence. He had pointed this out to the two assessors during his summing up and in his  
30 detailed and well reasoned judgment. There is no doubt that the two assessors in their joint opinion also appreciated that the case was based on

circumstantial evidence. Finally the Court of Appeal in its well reasoned and detailed judgment appreciated that the case was based generally on circumstantial evidence. When considering arguments on the first and fourth grounds the Court of Appeal analysed all relevant evidence before  
5 the Court concurred with the findings of the trial Judge. This explains why in the written statement of arguments in this Court learned counsel for the appellant attacked those areas which hinge on circumstantial evidence especially the evidence of PW1, PW2, PW6, PW7, PW14 (Dr. Mubiru Andrew), PW23, PW24, PW26, PW28 and PW29 yet the judgments of  
10 both the trial Judge and the Court of Appeal are clear in each case. Let us for instance, consider that on 3/12/2008, the appellant was not near the deceased.

Even if it can be accepted, as submitted by counsel for the appellant, that  
15 on 3<sup>rd</sup> December, 2008, the appellant was in Arua which is miles away from Kampala and Mukono, there is no concrete evidence to rule out the fact that the appellant could communicate with the deceased and or with both or either of her two sisters (PWs 1 and 2) as testified to by these two sisters of the deceased. Indeed in his own defence evidence, the appellant  
20 testified (*See page 94*) that—

*“On 3<sup>rd</sup> December, 2008, I was in Arua. I received a call from Osuna Opendi of Old Kampala Police Station. He asked me about Rehema Caesar and I told him I was not staying with her. He, as O/C, CID, was informing me one Nasira had reported my wife to  
25 the police over a mobile phone. I told him I was in Arua but the law should take its course. I told him I would come to Kampala the following day or on Sunday (See 2<sup>nd</sup> paragraph on page 294 and page 295 of the records of appeal).”*

From what he testified, it is clear that the appellant was in no mood to help his wife on 3<sup>rd</sup> December, 2008. By asserting that “*let the law take its course*”, he meant that she should be punished. This is evident from the following passage—

5           *“I called Bizu Rashida to confirm if there was case against her sister. The police felt I could help sort out the matter outside court. He never told me I had a case of threatening violence. I never recorded any statement.”*

We should point out that Bizu Rashida is PW1 and is the sister of the  
10   deceased.

In the next paragraph on the same page 294, the appellant indicated he was in Kampala as follows—

15           *“On 4<sup>th</sup> December, 2008, I was in Kampala in the morning. There was a by-election in Kyadondo to replace the late Kibirige Sebunya. I was summoned by my party FDC to monitor elections in the constituency. I was assigned Nansana and parts of Gayaza Road. On arrival I met our team in Nansana coming to 09:00am. By 10:00am, I went home at Bwebajja and changed clothes I had travelled in from Arua in the night. I freshened up and returned to*  
20           *Kampala. I went to my office at Bauman House.....*  
*At 06:16pm. I received a call on 07011318. My number was 0782008595 and 0776660550. Rehema Caesar had 0714008595 and 071008595. Nasira the Tanzanian had .....*

25           Thus, in the morning of 4<sup>th</sup> December, 2008, the appellant was in Kampala monitoring by-elections in Kyadondo on behalf of his political party and doing other things like moving to various places including going to his residence at Bwebajja on Entebbe Road to change clothes.

30           Therefore, since the presence of the appellant in Kampala on 04<sup>th</sup> December, 2008 is undisputed, the main issue to decide is whether indeed the appellant was at the scene of murder where the deceased was shot dead

in Mukono on the night of 4<sup>th</sup> December, 2008 as held by the two courts below. That question can be answered after analyzing particularly the evidence of PWs 1, 2, 3, 4, 6, 7, 23, 24, 26 28 and 29 alongside the evidence of the appellant and DW2. A perusal of the judgment of the trial  
5 Judge and of the Court of Appeal shows that the learned trial Judge considered all the evidence adduced during trial. He evaluated all the relevant circumstantial pieces of evidence whether from oral evidence by witnesses or expert reports by those witnesses. A careful study of the judgment of Court of Appeal shows that the learned Justices took their  
10 responsibility seriously. They re-evaluated all the relevant evidence before they accepted the conclusion of the trial Judge.

On the basis of the evidence PWs 1 and 2 and that of the appellant there can be no doubt that PWs 1 and 2 were familiar with the voice of the  
15 appellant even on telephone. In our considered opinion that is a given. Similarly, there can be no doubt about the fact that the appellant was familiar with the voices of the two sisters-in-law (PWs 1 and 2). Most important is the admission by the appellant in his sworn evidence, in effect that during day time throughout the whole of the 04<sup>th</sup> December, 2008, he  
20 was in and around Kampala.

The appellant did not indicate at what time he stopped participating in election matters. It is common knowledge that Mukono is about fourteen miles from Kampala. Therefore, where there is no evidence of much  
25 traffic jam, a drive to Mukono and back takes a short time. We have just considered part of this aspect.

A careful study of the judgment of the learned trial judge shows that the learned judge properly evaluated in detail all the evidence adduced by both the prosecution and the appellant before he found the appellant guilty of murder. The judge was alive to the important question of circumstantial  
5 evidence. He considered the relationship between the appellant and the deceased after their marriage and especially the evidence of PWs 1, 2 and the Tanzanian student at the Nana Hostel including that of PW9, the Security Officer at that same Hostel.

10 The judge alluded to the evidence of the purchase of the pistol by the appellant. He considered the evidence on soil analysis, the DNA, some damage on the appellants Car No. RAV UAJ 455J. The judge considered the question of how soil from the scene of murder and the appellant's shoes removed from his residence nearly a week after the murder matched.

15

The learned judge considered the evidence of the ballistic expert. He considered the threats by the appellant and the reports by the deceased about those threats which the learned judge described as dying declaration. In the end he concluded that the appellant's alibi had been destroyed by the  
20 prosecution evidence before he convicted the appellant.

On appeal the Court of Appeal referred to the law governing its jurisdiction in the hearing of these cases. When considering grounds 1 and 4 of Appeal, the Court re-evaluated the evidence on the record before the trial  
25 judge (pages 4 to 8 reflect summaries of submissions where the evidence of key witnesses like PWs 3, 4, 6, 11, 15 and 17 about what happened at the scene of crime was alluded to by both appellant's counsel and counsel for the respondent). Thereafter the learned Justices of the Court of Appeal

reminded themselves of law governing their role as a first appellate Court. They referred to the conclusions of the trial Judge that on the basis of the circumstantial evidence which he had considered, he found that the prosecution had proved its case against the appellant. The learned Justices  
5 of Appeal then stated at page 10 of the typed judgment of the Court as follows—

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

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

The Justices held correctly, that though the case was of the High Court of  
25 Kenya, it represented the position of the law on circumstantial evidence even in Uganda. **See Andrea Obonyo & Ors Vs. R(1962) EA 542.**

The learned Justices of Appeal went on to state that—

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

The learned Justices continued at page 11 of the judgment as follows—

5 *“Further, it was the duty of the trial Judge and it is the duty of this Court, on reviewing all the evidence that was adduced, to resolve any doubt in favour of the of the appellant.*

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

*We also observe that though the trial Judge mentioned the appellant’s motor-vehicle Toyota RAV4 registration No. UAJ 455J as one of the pieces of circumstantial evidence, he did not rely on this piece of evidence in*  
20 *convicting the appellant of the murder of the deceased. However the evidence relating to the said motor-vehicle has been submitted upon on appeal, and as such we shall also deal with it and draw our conclusions on the same.”*

25 The learned Justices analysed in detail the other circumstantial evidence such as Exh. P11 and that of its author Dr. Onzivua (PW7); Exh. P9 about the pistol, the evidence of PW23 about the spent cartridges, the evidence of PW21 about the appellant’s shoes recovered from his residence, Exh. P22, the evidence of PW28, the evidence of PW1 and PW2, PW26, PW27.

30

The learned Justices of Appeal took pains to re-appraise the telephone printouts, they considered the conduct of the appellant after the murder of the deceased before they upheld the conclusions of the trial Judge.

In our considered opinion, the two courts below reached proper conclusions on the evidence available. In the circumstances both grounds 1 and 2 are disallowed.

5 With due respect to learned counsel for the appellant, in our opinion counsel has assumed too many unnecessary details to criticise the holdings of both the trial Judge and the Court of Appeal regarding the two courts' respective conclusions on the printouts. He relied on the evidence of PW21 and PW26 (Lugesera) to support the appellant's case. However, in  
10 his evidence about printouts, PW26 stated that mast or base station on printouts means that the caller is within a radius of 30km but not exactly at a place. In our considered opinion this destroys the contention of counsel for the appellant because being within a radius of 30km which includes the scene of crime means that the user of the phone whose number is printed  
15 out was in fact at the scene of crime since the scene of crime is within that radius of 30km. In the present case the two courts below appreciated this fact. Both the learned trial Judge and the Court of Appeal appreciated the significance of the prosecution evidence on telephone printouts. That is why the two courts were cautious when considering the evidence of not  
20 only the two witnesses (PW21 and PW26) but of several other witnesses. The evidence of the sisters, that of PW21, PW25, PW26 and PW29 (No. 335.73 D / Sgt. Kikaawa Fred, whom D / SP. Kyomukama (PW16) instructed to process printouts. The last witness in his testimony (from pages 125 to 131 of the Record of Appeal) shows that he underwent  
25 training in telecommunications frauds. That means he was an expert witness. He enumerated telephones some of which were associated with the appellant, the deceased and the deceased's two sisters and how or when those phones were used between 1<sup>st</sup> November and 9<sup>th</sup> December, 2008.

This period is relevant in this case. Both in his Examination-in-Chief and during cross-examination PW26 who produced the relevant printouts marked as Exh. P19 and 20 explained to the trial Judge how the printouts were obtained indicating when and where the telephones calls were made.

5 Thus, at page 110, during examination in chief, PW26 testified about some changes as follows—

10 *“On page 118 it means the sim card was removed from one handset to another to make other calls ..... On 04<sup>th</sup> December, 2008, at 09:36am the cite changed to mid city base station in Kampala City. It is on a roof top. Then it changed to MTN Towers indoors at 09:42am.*

This is part of the evidence which both the trial Judge and the Court of Appeal analysed with due care before each held that the evidence  
15 incriminated the appellant. Those are two concurring findings of fact. We have not been persuaded that the two concurring conclusions of the two courts are wrong. Indeed the two assessors in their joint opinion relied on part of the phone printouts’ evidence to show that the appellant was in contact with PWs 1, 2 and the deceased but stopped the contact after 4<sup>th</sup>  
20 December, 2008, after the murder of the deceased.

In our considered opinion the two grounds must fail. They are disallowed.

### **Ground 3:-**

25 This ground is couched in the following words—

*“That the Justices of Appeal erred in law and fact when they engaged on speculation and conjecture to the prejudice of the appellant.”*

The written arguments of counsel for the appellant are brief and we quote  
30 in counsel’s words—

“**On speculation and conjecture** whereas the Court of Appeal concurred with appellant during submissions for him on **pages 38 – 40 para 20** by admitting the brutality of the trial Judges foul language at page 101 para 5-10 however they failed short of pronouncing themselves as they expressly ought to have to which we turn to this Court as it may please, to cure the said miscarriage.

In final submissions, the element of participation, in this case, of the appellant killing had not been proved more so in a case where conviction is solely based on circumstantial evidence. Considering the futility by the prosecution in exhuming body of the deceased several months after burial in search of evidence which PW14 dismissed we dare say, the same did not in any way **place or link the appellant to either scene of crime or to the crime itself**. Unfortunately the Court of Appeal which is clothed with the Mandate and duty of re-evaluating the evidence to right the wrongs **of the Trial Court failed or abdicated** from that responsibility in this case and, upheld Trial Judges’ decision which we pray this Honourable Court be pleased to allow this Appeal, quash the conviction and set the appellant free. We rely on **KIFAMUNTE VS. UGANDA SCCA No. 10 of 1997.**”

20

#### **RESPONDENT’S REPLY:-**

On ground three, the respondent reply is very short.—

*In reply the prosecution submits that **Ground Three is vague and has no meaning**. It offends Rule 61 (2) of the Rules of this Court. It should be dismissed.*

With respect to counsel for the appellant, we agree with the contention of counsel for the respondent that the way ground 3 is framed renders it vague. This was not helped by counsel’s submissions on the ground either. Perhaps we must point out a mistake on the part of the respondent. The

rule which the respondent intended to cite is Rule 62 (2) and not Rule 61 (2).of the Rules of this Court which is relevant. It states—

5 “62 (2) *The Memorandum of Appeal shall set forth concisely and under distinct heads numbered consecutively, **without argument or narrative**, the grounds of objection to the decision appealed against, specifying, in the case of a Constitutional Appeal, the points of fact or law or mixed law and fact which are alleged to have been wrongly decided, .....*”

10 On pages 38 and 39 of its judgment, the Court of Appeal considered the judgment of the trial Judge after counsel for the appellant had, during submissions, described the trial Judge’s approach as **conjecture and speculative**. In the last paragraph of its judgment on page 39, the Court of Appeal stated as follows—

15 “Given the fact that there was already evidence before the trial judge that placed the appellant at the scene of crime, and that of PW26, that a telephone call may be picked within a radius of 30km, the trial Judge’s statement above cannot be termed conjecture or speculation. It was an inference and or a conclusion based on solid evidence that was before the  
20 trial Judge.”

The learned Judge was also faulted for engaging in conjecture and speculation when he stated that the appellant had called by phone and offered to take PW1, PW2 and the deceased out for lunch and that he did  
25 this when he was in Arua on 02/12/2008. We find the criticism misplaced because PW18, ASP Mindra, then of Arua Police Station, confirmed in his testimony to the Court that on 02/12/2008, he was with the appellant at Arua Police Station where the appellant was licensing his gun.

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

35

We have carefully studied the evidence on record and the judgment of the trial Judge as well as the judgment of the Court of Appeal. We are satisfied that the third ground of appeal in this appeal has no basis. We disallow it.

5 In view of our conclusions on all the three grounds of appeal, we find no merit in the appeal. Accordingly, we uphold the decision of the Court of Appeal. We dismiss the appeal.

10 **Delivered at Kampala, this ...30th..... day of  
.....September..... 2015.**

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**B.M. Katureebe,  
Chief Justice.**

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**J. Tumwesigye,  
Justice of the Supreme Court.**

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**J.W.N. Tsekooko,  
Ag. Justice of the Supreme Court.**

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**G.M. Okello,  
Ag. Justice of the Supreme Court.**

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**C.N.B. Kitumba,**

**Ag. Justice of the Supreme Court.**