THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: MWONDHA, TIBATEMWA-EKIRIKUBINZA, TUHAISE, CHIBITA, MUSOTA, JJSC

CRIMINAL APPEAL NO.71 OF 2021

1. **SEBUWUFU MUHAMMED**
2. **MIRAMBE PHILIP**
3. **KAYIZA GODFREY**
4. **ODUTU SHABAN**.....**APPELLANTS**

VERSUS

UGANDA.....**RESPONDENT**

(Arising from the Court of Appeal Criminal Appeal No 158 of 2019, before Egonda Ntende, Bumugemereire and Madrama JJA dated 25th October 2021)

JUDGMENT OF THE COURT

This is a second appeal, the appellants were dissatisfied with the decision and judgment of the Court of Appeal and appealed to this Court.

The 1st appellant filed a separate memorandum of appeal from the 2nd, 3rd and 4th appellants.

The grounds for 1st appellant are as follows:

1. That the learned Justices of the Court of Appeal erred in law when they upheld the appellant's conviction for the offence of murder without proof of malice aforethought and his participation.
2. That the learned Justices of the Court of Appeal erred in law when they confirmed the appellant's conviction in total disregard of his defence of alibi.
3. That the learned Justices of the Court of Appeal erred in law when they confirmed an omnibus compensation order of Ug. Shs. 100,000,000/=

4. That the learned Justices of the Court of Appeal erred in law when they passed a sentence without considering all mitigating factors.

The grounds of the 2nd, 3rd and 4th appellants are as follows:

1. That the learned Justices of the Court of Appeal erred in law and fact when they upheld the appellants' conviction for the offence of murder c/s 188 and 189 of the Penal Code Act without proof of malice aforethought and their participation.
2. That the learned Justices of the Court of Appeal erred in law and fact when they found that the prosecution had proved common intention among the 2nd, 3rd and 4th appellants whereas not.
3. That the learned Justices of the Court of Appeal erred in law and fact when they confirmed an omnibus compensation order payment of UGX. 100,000,000/= to the deceased's relative without any justification.
4. That the learned Justices of the Court of Appeal erred in law and fact when they passed an imprisonment sentence of 16 years and 10 months against the 2nd appellant, 16 years and 11 months against the 3rd appellant and 16 years and five months against the 4th appellant without considering all the mitigating factors.

We have to mention here that the Coram above stated was reconstituted. The reason being that before delivery of judgment two Justices could not sit as one was ill and another called by the Lord. It was important to rehear the appeal to facilitate quick delivery of judgment.

Background:

The appellants together with Lwanga Stephen, Tasingika Paul, Kitayimbwa Yoweri and Ssentongo Damasseni were indicted before the High Court of Uganda for the offence of murder contrary to Sections 188 and 189 of the Penal Code Act, Aggravated robbery contrary to Sections 286 and 286(2) of the Penal Code Act and kidnap with intent to murder contrary to Sections 243 and 242 of the Penal Code Act.

On the count of murder, it was the prosecution's case that all the 8 accused persons and others still at large on 21 October 2015 at Pine Car Bond Lumumba Avenue in

Kampala District murdered Betty Donah Katushabe (the deceased). On the 2nd count of Aggravated robbery, it was the prosecution's case that the 8 accused persons and others still at large on the same date and at the same time robbed the deceased of her mobile phone, particulars of which were given and at or immediately after the said robbery used deadly weapons to wit cutlasses, commonly known as machetes or pangas and sticks on the said Donah Katushabe (deceased). On the count of kidnap with intent to murder, the prosecution's case was that the accused persons and others still at large on 21st October 2015 at Bwebajja, Wakiso District kidnapped the deceased in order that the said deceased might be murdered.

The learned trial Judge convicted the accused persons as charged on all the 3 counts. For the offence of murder, each of the accused persons was sentenced to 40 years imprisonment. For the offence of Aggravated robbery, each of the accused persons was sentenced to 20 years imprisonment and were ordered jointly and severally to pay compensation of Uganda shillings 100,000,000/= to the family of the deceased. On the offence of kidnap with intent to murder, each of the accused persons was sentenced to 30 years' imprisonment and the sentences were to run concurrently. Lwanga Stephen was found guilty for being an accessory after the fact and was sentenced to seven (7) years imprisonment. The appellants were dissatisfied with the judgment and decision of the trial Court, so they appealed to the Court of Appeal.

The Court of Appeal found that on the count of Aggravated robbery with intent to kidnap and murder the participation of Tasingika Paul, Kitayimbwa Yoweri and Ssentongo Damasseni on all the three counts was not proved beyond reasonable doubt their convictions on all the counts were set aside.

However, their conviction for murder C/s 188 & 189 of the Penal Code Act was upheld but the 40 years imprisonment sentence was reduced to 18 years, one month and nine days' imprisonment for the 1st appellant, 16 years and 10 months' imprisonment for the 2nd appellant, 16 years and 11 months' imprisonment for the 3rd appellant and 16 years and five months' imprisonment

for the 4th appellant. The appellants were dissatisfied with the decision of the Court of Appeal hence this appeal.

Representation

The 1st appellant was represented by Ms. Wakabala Suzan. Mr. Emmanuel Muwonge represented the 2nd, 3rd and 4th appellants.

The respondent was represented by Ms. Nabaasa Caroline, Senior Assistant DPP and Ms. Victoria Nakiseke

1st Appellant submissions

Ground 1

Counsel submitted that after perusal of the record of appeal it showed that the 1st appellant did not participate in the beating of the deceased. Counsel argued that the evidence of PW1, PW2 and PW3 lacked in credibility since none of them confirmed having seen the five suspects including the 1st appellant assaulting the deceased in their initial police statements soon after the fateful incident.

Counsel submitted that Tasingika Paul (A5) in his defence gave a very detailed account of the involvement of a one Sam Kiwanuka alias Damage regarding the arrest of the deceased, reporting a case of theft of motor vehicle Prado worth Ug. Shs.50,000,000/= and handing over the deceased to the said Kiwanuka.

Counsel argued that it was a contradiction for the Learned Justices of Appeal to observe for a fact that the said Kiwanuka was a material witness and yet in the same vein found that the 1st appellant was linked to the arrest of the deceased. Counsel was emphatic that the learned Justices of Appeal found that the said Tasingika acted on behalf of the said Kiwanuka and the 1st appellant was due to give a log book to the deceased to be used as a security, that the 1st appellant had received postdated cheques from the deceased in respect of the outstanding sum of Ug.shs.9,000,000/=.

Counsel submitted that the payment of a debt due to the 1st appellant was still due and well secured by way of postdated cheques and so they could have been no reason for the 1st appellant to demand ferociously judgment of it. Counsel argued

that against such a background, the 1st appellant could not have had the motive to participate in the high handed actions.

Counsel further submitted and made reference to the decision by the deceased to be taken to Pine Car Bond instead of Central Police Station for purposes of negotiating the settlement of the matter. Counsel submitted that the matter to be settled was related to the outstanding sum of shs.50,000,000/= accruing from the sale of a Prado to Sam Kiwanuka and not the outstanding sum of Shs. 9,000,000/= owed by the deceased to the appellant. There was no plausible basis for the appellant's alleged participation as upheld by the Court of Appeal.

Counsel submitted regarding malice aforethought, the definition of malice aforethought in the current legal regime does not include an intention to cause grievous bodily harm. Counsel relied on the case of **Nakisige Kyazike Vs Uganda SCCA No.13 of 2009** which was cited with approval in **Nanyonjo Harriet & anor Vs Uganda SCCA No.24 of 2014.**

Counsel submitted that it is imperative for the Court to determine whether or not the death was a result of the acts complained of, attributed to the 1st appellant and whether the 1st appellant foresaw death as a natural consequence of the acts complained about.

Counsel contended that it is on Court record that the 1st appellant did mobilize transportation of the deceased from the scene of crime to Central Police Station prior to her unfortunate demise. He submitted that had the learned Justices of Appeal sitting as a first appellate Court subjected the evidence on record to fresh exhaustive scrutiny especially with regard to the evidence of a pathologist PW4 alongside the post mortem report EXH 1, they would have found that there was no proof of malice aforethought by 1st appellant. Counsel argued that it was therefore erroneous to uphold a conviction of murder against the 1st appellant.

Counsel submitted that if the finding of the 1st appellant participation is confirmed by this Honorable Court, the conviction for murder be substituted with one of

manslaughter with an appropriate custodial sentence so as to meet the ends of Justice.

Ground 2

Counsel submitted that the learned Justices of the Court of Appeal summarily rejected and dismissed the 1st appellant submissions at page 180, lines 27-29 Vol 1 Record of Appeal.

Counsel submitted that the Court of Appeal sitting as the first appellate Court was enjoined to judiciously consider the merits and demerits of the defence of alibi raised by the appellant prior to the outright dismissal.

Counsel invited the Court to re-evaluate the appellant's alibi as per the record since the first appellate court failed to execute its core mandate.

Ground 3

Counsel submitted that the learned trial Judge meant to award the compensation under Section 286(4) of the Penal Code Act and not Section 126 of the Trial on Indictments Act as the learned Justices of Appeal held. Counsel contended that having acquitted the appellant of the offence of aggravated robbery, the compensation order should have been set aside.

Counsel argued in the alternative that if the Court finds that the Court of Appeal was right to substitute Section 286(4) with Section 126 of the Trial on Indictments Act, then this court should find that the said compensation was without legal basis.

Counsel argued that while Section 126 allows for compensation, the prosecution led no evidence to support the figure of 100m/= that was awarded by the Court of Appeal. Counsel submitted that compensation is at the discretion of the trial Judge after assessment of the loss suffered by the injured party. Counsel submitted that like in civil matters, for loss of life, the party normally gives some guidance to the Court on a figure to award by providing documentary evidence where necessary, proof of existence of dependents among others which was not done in this case.

Counsel further argued that the compensation order is omnibus in that it does not specify how much each appellant was to pay. Counsel contended that this can cause an injustice to one party in case of execution where the compensation can be executed against one likely to have some money/property and yet the order is against all the appellants.

Counsel prayed that this Court sets aside the compensation order as being illegal for lack of guidance on how the figure of compensation was arrived at and it does not specify the liability of each of the appellants.

Ground 4

Counsel submitted that the Court of Appeal did not take into account all the mitigating factors as raised by the 1st appellant. Counsel contended that the 1st appellant has family responsibilities, a wife and 7 children as set out at page 424 line 25 of the Record of Appeal. Counsel submitted that the appellant's continued incarceration continues to hurt his family.

Counsel affirmed that the 1st appellant was taking care of 68 orphans as set out at page 425 line 30 of the Record of Appeal and his business employs over 500 people and a long custodial sentence will lead to collapse of this business which will also affect those who were employed therein.

Counsel relied on the case of **Kazarwa Henry Vs Uganda SCCA No. 17 of 2015** where Court took note of the fact that indeed in upholding the sentence of life imprisonment against the appellant, the Court of Appeal made no mention of the mitigating factors raised by the appellant.

Counsel proposed a sentence of 8 years if the conviction is upheld.

2nd, 3rd & 4th Appellants' Submissions

Ground 1, Counsel submitted that the learned Justices of the Court of Appeal failed to prove the participation of the 2nd, 3rd and 4th appellants in the commission of the offence of murder of Donah Katushabe.

Counsel argued that all the three witnesses of the prosecution to wit PW1, PW2 and PW3 all of whom had legal backgrounds never testified in their police testimonies at the police to have ever witnessed or even identified the 2nd, 3rd and 4th appellants assaulting the deceased Donah Katusabe.

Counsel submitted that the prosecution witnesses gave evidence which was full of inconsistencies and contradictions which went to the root of the case. Counsel contended that PW1, PW2 and PW3 gave completely two different account of events at police and at court as set out at page 41 lines 24-30, page 44 lines 29-37, page 45 lines 1-11 of Vol. 2. Record of Appeal. Counsel submitted that while the witnesses stated that they had not identified the people who assaulted the deceased at police and at Pine Car parking yard, while at court, they made dock identifications which are illegal in Court and tried hard to place the appellants at the scene of crime.

Counsel relied on Section 154(c) of the Evidence Act and submitted that PW1, PW2 & PW3 are not credible witnesses, for telling lies in Court and they gave different versions of events from the ones they gave Police.

Counsel relied on the case of **Alfred Tejar Vs Uganda (EACA) CA No.167 of 1969** for the position that contradictions and inconsistencies will result in the evidence of the prosecution to be rejected.

Counsel submitted that the Court of Appeal exercised its duty in part and not exhaustively and yet it used the same principles and acquitted Tasingika Paul and not the appellants. He argued that the Court ought to have made the same finding for the 2nd, 3rd and 4th appellants since the prosecution evidence failed to place them at the scene of crime.

Counsel submitted that in Uganda, an intention to cause grievous harm does not constitute malice aforethought as held by the learned Justices of the Court of Appeal. He relied on the cases of **Nanyondo Harriet & anor Vs Uganda SCCA 24 of 2002 (unreported)** which was cited with approval in **Nakisige Kyazike Vs Uganda SCCA No.13 of 2009 (Unreported)**. He further contended that Section

191 of the Penal Code Act, Cap 120 defines malice aforethought and the learned Justices of the Court of Appeal ought to have treated the offence of murder as a specific intent offence and not based on speculation or inference.

Counsel argued that since the Prosecution failed to prove the ingredient of malice aforethought, the trial Court or the Court of Appeal ought to have convicted the 2nd, 3rd and 4th appellants with at least the offence of manslaughter.

Counsel submitted that in the event that this Court finds the 2nd, 3rd and 4th appellant to have participated in the commission of the offence, they should be convicted of manslaughter since they acted without malice aforethought.

On ground 2, Counsel submitted that the learned Justices of the Court of Appeal erred in law and fact when they found that the prosecution had proved common intention among the 2nd, 3rd and 4th appellants whereas not. Counsel submitted that upon perusal of the record of appeal, it is clear that the learned Justices of the Court of Appeal did not address this issue and as such failed in their duty as the first appellate Court.

Counsel argued that the 2nd, 3rd and 4th appellants raised a defence that they were never willing participants in committing the offences for which they were charged with, and therefore the Court should not have convicted the appellants without proof of common intention of the appellants.

On ground 3, Counsel submitted that the learned Justices of the Court of Appeal made a wrong decision of maintaining the order of compensation of UGX. 100,000,000/= against the 2nd, 3rd and 4th appellant and this caused a miscarriage of justice.

Counsel submitted that since the Court of Appeal quashed the conviction of the appellants for aggravated robbery, the order of compensation ought to have been set aside.

Counsel argued that the Court of Appeal had no power to impose the 2nd, 3rd and 4th appellant's sentence of the compensation order under a different law and circumstances in absence of cross appeal from the prosecution. He relied on the case of **Kiwalabye Bernard Vs Uganda SCCA No. 123 of 2001 (unreported)** where the Court held that the appellate Court will not interfere with the sentence imposed by the trial Court which has exercised its discretion on sentence unless the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle.

Counsel further submitted that the compensation order is vague, unclear and ambiguous since it did not determine how much each of the appellants would be liable to pay under the circumstances. Counsel relied on the case of **Umar Sebidde Vs Uganda SCCA No.23 of 2020** where this Court held that the trial Court ought to hand down a definite, clear and ascertainable sentence devoid of ambiguity. Counsel prayed that the compensation order is set aside.

On ground 4, counsel submitted that the Court of Appeal used an omnibus method of tackling the issue of sentence of the 2nd, 3rd and 4th appellants which occasioned a miscarriage of justice. He contended that the Court of Appeal ought to have handled each and every appellant separately and individually than bundling them together while sentencing, since each of the appellants had unique antecedents and different reasons for mitigation.

He submitted that 2nd appellant had spent two years and two months on remand, and was 34 years of age, married with 5 children and sole bread winner of his family; 3rd appellant had spent 2 years and one month on remand, was 33 years old, married with 4 children and sole bread winner, 4th appellant had spent 2 years and 7 months on remand, and was 32 years old, married with 3 children and other dependents and sole bread winner of his family.

Counsel contended that the Court of Appeal did not consider the above mitigating factors and this failure to mitigate the appellants' sentences occasioned a miscarriage of justice. Counsel relied on the case of **Kiwalabye Bernard Vs**

Uganda (Supra) and prayed that this ground succeeds and the appellants' sentence be reduced to 5 years' imprisonment.

Respondent's submissions

Counsel for the respondents submitted on the 1st appellant's grounds 1 and 2 the 2nd, 3rd and 4th appellants' grounds of appeal jointly. Counsel divided all the grounds under four distinct heads of: (1) malice aforethought for all appellants (2) A1's participation and his alibi (3) 2nd appellant, 3rd appellant and 4 apellant participation and common intention and (4) compensation and custodial sentences for all appellants.

On malice aforethought, Counsel submitted that this was exhaustively handled by the trial Court at page 387-390, Vol 2 Record of Appeal and Court of Appeal at pages 163-171 Vol.1 Record of Appeal. Counsel submitted that the Court of Appeal found that prosecution *had proved mens rea* against the appellants for the charge of murder upon consideration that as a matter of legal doctrine, the offence of kidnap with intent to murder had been proved. Counsel urged that the learned Justices underscored the fact that since the intention to procure a ransom or benefit for the liberation of the deceased upon payment of UGX. 9,000,000/= was proven, then it was inevitable upon death of the deceased from the beating that the intention to murder was no longer an intention and it was sufficient to prove murder.

Regarding the assertion that the Court of Appeal was wrong in applying English law to demystify the expression malice aforethought under the provisions of Section 188 of the Penal Code Act, Counsel contended that as crime evolves especially the nature and manner it is executed, Courts cannot be expected to let the perpetrators walk scot free without giving proper interpretation of the law given the circumstances under which a crime was committed.

Counsel submitted further that death was a result of the acts complained of and the appellants foresaw death as a natural consequence of the same acts. Counsel contended that this question was answered by the Court of Appeal while analyzing the evidence on injuries inflicted by the appellants as presented by PW3 Dr. Male

Mutumba at pages 164-165 Vol. 1 Record of Appeal and pages 65 and 66 of the judgment. Counsel was emphatic that the appellants cannot be heard to justify that their actions were too minor to alert them that the kind of beating including kicks on the vulnerable parts of the body for such a long time would not be fatal.

Counsel relied on the case of **Rwabugande Moses Vs Uganda SCCA No. 25 of 2014** on the guidelines followed by Court to prove malice aforethought in homicide cases and which include the weapon used, the manner in which the weapon was used i.e whether repeatedly or not, the part of the body targeted i.e whether it is vulnerable or not, number of injuries inflicted, the conduct of the accused before, during and after the incident i.e whether there was impunity.

Counsel submitted that the appellants were described as (kanyamas) strong men kicking a woman in the stomach by men wearing shoes. That the 1st appellant was seen kicking the deceased in her private parts. That it can be deduced from the post mortem and the eye witnesses' account that the injuries were inflicted repeatedly moreover, for over 10 hours. That there was a high degree of impunity as the people who went to intervene for and to rescue the deceased were equally assaulted and the pleas from those who wished to assist via phone calls were assured that she would be killed if the 1st appellant's nine million shillings was not paid.

Counsel submitted that the conduct of the appellants was such that malicious intent could be inferred and included opening a fictitious case against the deceased. Holding the deceased in un-gazetted place, involving police officers to cover ill motive, pretending to take the deceased to Central Police Station, returning her to the scene of crime after the escorting officers boarding off and the 1st appellant's moving to Mengo Court leaving the deceased in the hands of the strong men for continued manhandling and battery.

Counsel submitted that in view of the above, malice aforethought was proved to the required standard as propounded in the case of **Miller Vs Minister of Pensions (1947) 2 ALLER 372**

Regarding participation and defence of alibi of the 1st appellant, counsel submitted that the trial Judge correctly analyzed the evidence and the Court of Appeal exhaustively re-appraised it and correctly sustained conviction against the deserving convicts.

Counsel submitted that the learned Justices analyzed both prosecution and defence evidence including his defence or alibi and came up with a correct finding that the evidence linked the 1st appellant to the arrest of the deceased, keeping her at his office where she was assaulted and his active participation in the battering at a point when the deceased said she had been beaten. This is set out at page 77 of the Judgment at page 176 of the record of appeal, Vol. 1 last paragraph.

Counsel submitted contended that the Court of Appeal rightly found that the 1st appellant's acts were inextricably bound with that of the persons who arrested, took the deceased to Pine Car Bond and assaulted and battered her.

Counsel further submitted that the Court of Appeal specifically addressed the defence of alibi from page 175 of the record of appeal. Counsel reaffirmed that the evidence placing the 1st appellant at the scene of crime and his active participation was clearly demonstrated in the prosecution evidence and properly re-evaluated by the Court of Appeal at pages 175-179 of the Record of appeal, Vol. 1.

Counsel argued that besides eye witnesses' account, the 1st appellant's defence alibi was further destroyed by call data evidence which placed him in the vicinity of pine car Bond via Rwenzori Tower masts at 2pm, 4:30pm and 7:20pm. Counsel relied on the case of **Kato Kajubi Godfrey Vs Uganda SCCA No.20 of 2014** where it was held that the fact that the telephone number was used within twenty kilometers radius, when taken together with the evidence of PW7 and PW8, which is corroborated by the accused's failed alibi defence, are themselves compelling evidence placing him at the scene of the crime.

In the premises, Counsel submitted that grounds 1 and 2 of the 1st appellant are devoid of any merit and should be disallowed.

Regarding the participation of A2, A3 and A4 and common intention, counsel submitted that it was proved and confirmed by the trial Court and Court of Appeal that the unlawful actions of the appellants are traceable to the debt of nine million shillings owed to the 1st appellant.

Counsel contended that on the instructions of the 1st appellant, the deceased was picked and delivered at Pine Car Bond where they found the 1st appellant (rich man). The 2nd, 3rd and 4th appellant were the Kanyamas/strong men who assaulted the deceased together with the 1st appellant. This is set out by PW1 at page 38, line 35 Record of Appeal Vol.2 and page 39, lines 5-13 Record of Appeal Vol.2. Counsel submitted that the Court believed this evidence as well as the evidence proving that A2, A3 and A4 were the same people who manhandled PW3 as corroborated by PW9 at page 92, line 1 Record of Appeal Vol.1

Counsel submitted that the Court believed PW3 evidence in identification of A2 and A3 at page 166, lines 22-25 Record of Appeal Vol.1. That corroboration to the eye witnesses was found in the evidence of the call data for the date in issue where A2's line 0752872601 was located at Buganda Road mast from 9am -4pm at page 180 lines 1-2 Record of Record of Appeal Vol.2.

Counsel further submitted that upon careful analysis of the evidence implicating the 2nd, 3rd and 4th appellant, as well as their unsworn testimonies, Court of Appeal believed the evidence of PW3, PW24 and PW12. That the Justices found that there was strong circumstantial evidence implicating the 2nd and 4th appellants in assaulting the deceased and the evidence clearly proved that the deceased died from being battered by blunt objects stating that the issue of whether it was fists, sticks or other objects was not necessary to establish.

On the question of Common intention, Counsel submitted that this was addressed by the Court of Appeal at pages 113 lines 20-23, page 114, lines 5-10, page 121 lines 10-26 and page 125.

Counsel submitted that the evidence analyzed by the Court of Appeal demonstrates that all appellants as well as Lwanga Stephen who drove the deceased to Police and returned to the scene acted on the directives of the 1st appellant.

Counsel contended that there was overwhelming circumstantial evidence that the 2nd, 3rd and 4th appellants participated in the assault of the deceased while acting on behalf of the 1st appellant.

Counsel submitted that common intention was proved against all the appellants and Lwanga Stephen as well since no one would have complied with A1's instructions unless he had agreed with him to support and participate in the unlawful purpose of recovering Uganda shillings nine million by use of unlawful means. Counsel argued that though the debt could have been legally obtained, it is also true that its payment was secured by cheques which had not yet matured. Counsel submitted that the whole ordeal of torturing a person to death for a liability that she knew and was ready to pay in the due time casts more dirt on the perpetrators

Counsel was affirmed that both Courts below were right to find that the appellants had set out to complete a pre-planned task with a strategy of; first to report a false allegation against the deceased, surveillance, kidnapping, keep her at an un-gazetted place and torture her until she produces the 1st appellant's money failure of which she would be killed. Counsel prayed that Court dis-allows this ground.

On ground 3 which was a complaint about ordering compensation against all appellants, Counsel submitted that Section 11 of the Judicature Act empowers Court of Appeal to have all the powers, authority and jurisdiction vested under any written law in the Court of original jurisdiction. Counsel contended that the intention of the trial Court was to compensate for the loss of life and not phone as can be inferred from the amount of money that the Court deemed fit under the circumstances.

Counsel further submitted that the intention can be traced from the sentencing proceedings where prosecution presented undisputed facts in the Victim Impact

Statement regarding the impact on the family of losing the deceased. That this is set out at page 420 lines 39-41 and page 421 lines 1-10 Record of Appeal Vol.2.

Counsel submitted that by correcting the provision of the law, no miscarriage of justice was occasioned to the appellants since the Court of Appeal neither altered effect of liability nor amount that had already been ordered by the trial Court. She argued that it would instead be a miscarriage of justice for the Court of Appeal not to correct an error relating to misapplication of the law to the intended purpose of the trial Court while sitting in the original jurisdiction.

Counsel argued that Section 39 of the Criminal Procedure Code Act enjoins an appellate Court to make orders conformable with the Judgment. Counsel prayed that this Court finds that the Court of Appeal was right to apply the correct law and further find the order of compensation was formidable to the Judgment.

Counsel submitted that the claim of passing an omnibus sentence is devoid of merit since it is clear from both judgments below that the compensation is to be jointly and severally paid by all appellants who were equally found culpable for loss of life.

Counsel contended that the law provides for a different procedure on how the beneficiaries are to recover their compensation and therefore both Courts below cannot be faulted for not extending their mandate to the civil matters arena. Counsel submitted that if the Court finds that the omnibus issue stands, then the Court should rule that the Civil Court will be in position to address it at the right time.

On ground 4 regarding failure to consider all mitigating factors, counsel submitted that the principle under which an appellate Court should interfere with the sentence has been settled and it is where it is evident that the lower Court acted on a wrong principle or overlooked some material fact or if sentence is manifestly harsh and excessive in view of the circumstances of the case.

Counsel submitted that in reaching its decision, the Court was mindful of all the relevant mitigating and aggravating factors. She contended that it was due to lack of enabling law supporting an appeal on the basis of lenient sentence, that the respondent was deterred from challenging the sentences handed down by the Court of Appeal. Nonetheless, counsel argued that demanding further reduction of this rather lenient sentence on the basis of family and socio-economic status of the appellants amounts to mockery of justice.

Counsel contended that family status and dependency or owning a business empire weighs less where a vulnerable victim is murdered in cold blood without justifiable reasons. She submitted that the circumstances of this case portray a society that has lost all its moral fiber where the actions of the appellants, if left unchecked will leave the unsuspecting citizenry who wish to own property in the hands of the "rich men" who believe they can engage their employees in criminal activities and control government institutions and yet remain untouchable like in this case where police was unfortunately used.

Counsel prayed that this Court upholds the sentence and the incidental order of compensation meted out by the Court of Appeal for ends of justice to be met for both the victims of crime and the society at large.

The 1st appellant filed submissions in rejoinder which have been considered by this Honorable Court.

Consideration of the Appeal

This is a second appeal and the duty of a second appellate Court has been settled in various decisions of this Court. In the case of **Tito Buhingiro Vs Uganda SCCA No. 8 of 2014**, it was stated, "**it is trite law that as a second appellate Court, we are not expected to re-evaluate the evidence or question the concurrent findings of fact by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or reevaluate the evidence or where they are proved to be manifestly wrong on findings of fact, the Court is obliged to do so and to ensure that justice is properly and timely served.**" Whereas "the duty of the first Appellate Court is to reconsider all material evidence that was before the

trial Court while making allowance for the fact that it had never seen or heard the witness, to come to its own conclusion on that evidence. In so doing, the first appellate Court must consider the evidence in totality and not any piece thereof in isolation. It is only through the re-evaluation that it can reach its own conclusion as distinct from merely endorsing the conclusion of the trial Court." (**Kifamunte Henry v. Uganda SCCA No. 10 of 1991**)

We shall be guided by the above principles in resolving this appeal. As already shown above, the 1st appellant filed a separate memorandum of appeal from the 2nd, 3rd and 4th appellants. We shall resolve the grounds jointly in the order in which they appear in the memorandum of appeal and in relation to all the appellants.

Ground 1 of the 1st appellant and Ground 1 of the 2nd, 3rd and 4th appellant

Under this ground, the 1st appellant and the 2nd, 3rd and 4th appellants fault the Court of Appeal for upholding their conviction for the offence of murder without proof of malice aforethought and their participation.

Section 191 of the Penal Code Act provides as follows:

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

(a) An intention to cause the death of any person, whether such person is the person actually killed or not; or

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

In determining the issue of malice aforethought, the Court of Appeal observed as follows:

It follows that an intention to cause grievous bodily harm is sufficient to prove malice aforethought.

In the case of **Nakisige Kyazike Vs Uganda SCCA No.15 of 2009**, this Court stated categorically that:

It is clear from the definition of malice aforethought stated above that for a person to be convicted of murder, the prosecution must prove beyond reasonable doubt that the accused had intention to kill or had knowledge that his or her act would probably cause death of some person.

In view of the above, it was a mis-direction for the Court of Appeal to state that an intention to cause grievous bodily harm is sufficient to prove malice aforethought. In order to prove malice aforethought, the prosecution must prove beyond reasonable doubt that the accused had intention to kill or had knowledge that his or her act would probably cause death of some person.

The issue left for this Court is whether there was sufficient evidence to prove malice aforethought inspite of the mis-direction by the Court of Appeal.
In the case of **Rwabugande Moses Vs Uganda (supra)**, this Court laid down the circumstances from which an inference of malicious intent can be deduced as follows:

The weapon used, (b) the part of the body targeted i.e. whether it is a vulnerable part or not, (c) the manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and (d) the conduct of the accused before, during and after the incident i.e. whether there was impunity.

In the instant case, the post mortem report which was admitted as exhibit P1 showed as correctly pointed out by the Court of Appeal that there was a pool of blood on the back of the deceased's body, there was a bruised left side of the face, there was bleeding into the skin where there was a dark patch. There was extensive bruising of the upper limbs and bleeding into the skin extending from the shoulder joint to the tips of the fingers on the back of arm. There were abrasions on the same limb. There was also extensive bruising of the right lower limb extending

from the middle of the thigh up to the foot. Extensive bleeding on the left thigh from the middle of the thigh to the foot. There was also bleeding on the skin of the left skull. The brain and its coverings were congested with blood. The internal membrane of the heart had bleeding. Organs within the abdomen were congested with blood.

Considering the nature of the injuries, there cannot be any doubt in our mind that the same were inflicted with malice aforethought.

The Court of Appeal further observed as follows:

Having found that there was an intention to procure a ransom or benefit for the liberation of the deceased upon payment of Uganda shillings 9,000,000/=, it is inevitable upon the death of the deceased from the beating that the intention to murder was no longer an intention and it was sufficient to prove murder which is also a capital offence. The finding of intention is the outcome of the proof of an intention to detain the deceased with the purpose of procuring a benefit to prevent the danger of being murdered if the benefit is paid. It would be an inconsistency in the law to find intention to detain for ransom and not to find that the perpetrators of the crime are also guilty of murder upon the death of the victim as a consequence of her detention and battery and assault while in detention.

We accept the above reasoning and conclude that there was malice aforethought proved beyond reasonable doubt in the circumstances of this case.

The second limb of ground 1 related to participation of the appellants in the commission of the offence. It is important to point out that there is a concurrent finding of fact by both the High Court and the Court of Appeal regarding the participation of all the appellants. The principles upon which this Court can interfere with a concurrent finding of fact are well settled. See **Kifamunte Henry v. Uganda (Supra)**. As a second appellate Court we are not expected to re-evaluate the evidence. **However, where it is shown that the evidence was not evaluated or re-evaluated or where they are proved to be manifestly wrong in**

finding fact the Court is obliged to do so and to ensure that justice is properly and timely served" This is not the case in the instant case.

It was argued by Counsel for the appellants that PW1, PW2 and PW3 told Court different versions of events from the one they narrated in their police statements and therefore their evidence could not be relied upon to prove participation of the appellants in the commission of the offence.

In **Chemonges Fred Vs Uganda SCCA No. 12 of 2001**, this Court agreed with the Court of Appeal where it found as follows:

It is well established that where a police statement is used to impeach the credibility of a witness and such statement is proved to be contradictory to his testimony, the Court will always prefer the witness' evidence which is tested by cross examination.
It follows therefore that the trial Court and Court of Appeal were right to rely on the witnesses' evidence which had been tested by cross examination and disregard the police statements.

The Court of Appeal exhaustively re-evaluated the evidence concerning participation of the appellants from page 66 to page 80 of its judgment and we have not been shown any evidence on to depart from the concurrent findings of fact of both the trial Court and Court of Appeal.

The argument of the 1st appellants' counsel that since Tasingika Paul (then A5) acted on the instructions of a one Kiwanuka Sam alias Damage in arresting the deceased does not exonerate him and has no weigh in light of the evidence on record. Besides the principal of common intention binds all of them

In respect of 1st Appellant, section 20 of the Penal Code Act provides:-
When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of that purpose each of them is

deemed to have committed the offence. In the case ***Paul Simbwa v Uganda Criminal Appeal No 17 of 2012*** cited in the case of ***Kisegerwa and Another v. Uganda Cr. Appeal No. 6 of 1978***, the Court elaborated **that in order to make the doctrine or common intention applicable, it must be shown that the accused has shared with the actual perpetuator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence An unlawful common intention does not imply a pre-arranged plan; common intension persons may be inferred from the presence of the accused their actions and the omission of any of them to disassociate from the assault."**

The 1st Appellant attempted to disassociate himself from the other appellants to distance himself from the participation of the commission of the offence and raised a defence of an alibi, but the prosecution witness-evidence on record perforated this defence.

The presence of 1st Appellant at the scene of crime was proved beyond reasonable doubt therefore, in the submissions in rejoinder, the 1st appellant's counsel conceded that the Court of Appeal addressed the 1st appellant's alibi. The Court of Appeal observed as follows:

We have further considered the alibi of the 1st appellant which is to the effect that he was not in Pine Car Bond possibly between 11am and 3:30pm. However, the testimony of PW7 clearly indicates that he found the 1st appellant after they reached Pine Car Bond between 8:30 am and 9:00am on 21st of October 2015. By this time, the 1st appellant was still in his premises at Pine Car Bond. Secondly, the testimony of PW1 and PW3 clearly indicates that they met the 1st appellant after 4 pm on 21st October 2015..... the analysis of the evidence demonstrates that the first appellant was linked to the arrest of the deceased. Secondly, the deceased was kept at his office where she was assaulted. The evidence is that he participated in battering the deceased at one point when she said she had been beaten. He is implicated in treating PW3 as a fellow suspect for the reported theft of a vehicle and made PW3 speak to Kiwanuka on the phone. His acts are inextricably bound with that of the

persons who arrested, took the deceased to Pine Car Bond and assaulted and battered her...

This ground therefore had no merit. The 1st appellant's defence of alibi was considered after re-evaluation evidence by the Court of Appeal and dis-allowed.

We accept the findings of the Court of Appeal and therefore ground one of the 1st appellant and ground 2 of the 1st appellant fail. And also ground 1 and ground 2 of the 2nd, 3rd and 4th appellants fail.

Ground 3 of the 1st appellant and Ground 2 of the 2nd, 3rd and 4th appellant

The learned Counsel for the 1st appellant submissions and the 2nd, 3rd, 4th appellants on the 3rd ground, the complaint was that the Justices of the Court of Appeal erred in law to confirm an omnibus compensation of Shs.100,000,000/= as it did not specify how much each appellant was to pay. Both Counsels argued that without guidance on how much each should pay. That such an order can cause an injustice to one party who has the ability to pay and could end up paying all the money if the others are not able.

In our view, the purpose of an order for compensation especially when its accompanied by the words to be paid jointly and severally, it means that each individual against whom the order is made is responsible for paying up the compensation or damage to the entire amount awarded. The result is that if one party is unable to pay the others named must pay more than their share. In that case, each of the appellant is liable for the whole amount.

The purpose for an order jointly and severally aims at empowering the beneficiaries to get and pursue full payment and if the others cannot pay, joint and several liability favours the would be recipient and in the instant case the family of the deceased.

The objection Counsel has made defeats the very purpose or object on which the concept of joint and several liability is based.

Counsel submitted that, since the Court did not give guidance on how much each should appellant would pay and how the amount was reached at, it was illegal the order was illegal and it should be set aside.

We considered S.126 of Trial on Indictment Act, it provides:-

"When an accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, he suffered material loss or personal injury in the consequence of the offence committed the Court may in its discretion and in addition to any other lawful punishment, order the convicted person to pay that other person such compensation as the Court deems fair and reasonable.

From that provision as reproduced what Counsel were complaining about cannot be said that omission of them make the order of compensation illegal. The order is based on the law as stated, so we find no justification or merit in it. Guidance is given in the provision itself.

The other complaint was that the trial Court proceeded under S.286(4) of the Penal Code Act to order compensation.

According to the record the appellants were acquitted of the charge of Aggravated robbery. The Court of Appeal observed that the trial Judge erred to proceed under S.286(4) of the Penal Code Act and rightly so. The provision deals with loses occasioned by the robbery of property which is not the case in this case.

Apart from the trial Judge citing S.286)4) of the Penal Code Act, there is no evidence to show to our satisfaction that the Judge applied it. We agree with the Court of Appeal decision that it was an erroneous citation of the law by the final Court.

The Court of Appeal after pointing out that it was an erroneous citation of the law, the rightly found that the learned trial judge clearly made the award for loss of life

and the loss was to the family of the deceased. The learned trial Judge ordered the convicts to pay Uganda shillings 100,000,000/= as compensation to the family of the deceased. This was material loss which is provided in S.126(I) as reproduced above and do not see any reason for faulting the Court of Appeal. The compensation order is upheld. Ground 3 fails for the 1st, 2nd, 3rd, and 4th appellants.

Ground 4 of the 1st appellant and Ground 4 of the 2nd, 3rd and 4th appellant

On ground 4, the appellants faulted the Court of Appeal for sentencing the appellants for the offence of murder contrary to Sections 188 & 189 of the Penal Code Act without considering all the mitigating factors.

While sentencing the appellants, the Court of Appeal observed and stated as follows:

We find that the sentence of 40 years imprisonment was harsh and excessive and allow the appeal against sentence. We accordingly considered the circumstances of each of the appellants as well as the precedents and have come up with an appropriate sentence.

We have considered the age of the appellants, the fact that they are first offenders. We have further considered the aggravating circumstances of the unlawful detention of the deceased, the demand for her to pay a debt as well as her brutal beating leading to her death. Such conduct carried out with the complacency of the police is to be abhorred. The police do not work for private people but for the society. In the circumstances after taking into account the period the appellants were on pre-trial detention before their conviction…..

We find that in the circumstances a sentence of 19 years imprisonment would be appropriate for each of the appellants. Taking into account the various periods the appellants spent on remand prior to their conviction, we sentence each of the appellants as follows:

1. **We sentence the first appellant to 18 years, one month and nine days imprisonment which sentence commences from date of his conviction by the High Court on 24th June 2019.**
2. **We sentence the second appellant to 16 years and 10 months imprisonment which sentence commences from date of his conviction by the High Court on 24th June 2019.**
3. **We sentence the 3rd appellant to 16 years and 11 months imprisonment which sentence commences from date of his conviction by the High Court on 24th June 2019**
4. **We sentence the 8th appellant (now 4th appellant) to 16 years and five months imprisonment which sentence commences from the date of his conviction by the High Court on 24th June 2019.**

We do not find any reason to interfere with the above sentences passed by the Court of Appeal. Though the Court of Appeal in considering mitigating factors and aggravated factors it somehow made it in an omnibus way. For A_1 he was the owner of the yard and he was present, he was an older person, the Court found him to be a first offender. But we find that omission to specify could not cause this Court to interfere with the finding as the Court has exercised its duty as it was required under the law. We find that there was no miscarriage of justice.

This ground fails in for the appellants, 1st appellant, 2nd, 3rd, and 4th appellants.

In the result, since all the grounds have failed, this appeal is dismissed. The Court of Appeal decision is upheld.

The appellants shall continue serving the sentences as ordered by the Court of Appeal and as confirmed by this Court.

Dated at Kampala this 6th day of Sept. 2023.

MWONDHA
JUSTICEOF THE SUPREME COURT

TIBATEMWA- EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT

TUHAISE
JUSTICE OF THE SUPREME COURT

CHIBITA
JUSTICE OF THE SUPREME COURT

MUSOTA
JUSTICE OF THE SUPREME COURT

The Judgment delivered as directed by the Hon Justices

Mabeja
6/9/2023.