THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT JINJA
CRIMINAL APPEAL NO. 0363 OF 2017

MUDWA JOSEPH::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Jinja before Basaza-Wasswa, J. delivered on 27th September, 2017 in Criminal Session Case No. 0150 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

Background

On 27th September, 2017, the High Court (Basaza-Wasswa, J.) convicted the appellant of the offence of Murder contrary to **Sections 188 and 189 of the Penal Code Act, Cap. 120**. On the same day, the High Court imposed on the appellant, a sentence of 30 years imprisonment.

The High Court decision followed trial of the appellant on an indictment that alleged that he, and other unidentified persons had on 23rd November, 2012 at Steel Village in Jinja District, with malice aforethought, unlawfully killed Otwane Emmanuel (the deceased).

The facts as brought out in evidence and accepted by the learned trial Judge are that, on 23rd November, 2012, the deceased was killed at the hands of a group of people, which included the appellant, that lynched him to punish him for allegedly stealing maize. The deceased sustained severe injuries, from which he died, including a smashed head and blisters on his body, after the assailants set his body on fire.

The appellant denied the offence. He said that he was elsewhere at the material time. However, the learned trial Judge believed the prosecution evidence and convicted the appellant, and thereafter sentenced him accordingly. Being dissatisfied, the appellant now appeals to this Court on the following grounds:

> "1. **The learned trial Judge erred both in law and fact when she convicted the appellant without properly considering his defence of alibi.**
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> 2. **The learned trial Judge erred both in law and fact when she convicted the appellant yet he had not been properly identified.**
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> 3. **The learned trial judge erred both in law and fact when she convicted the appellant of murder when the element of malice aforethought had not been properly established.**
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> 4. **The learned trial Judge erred in law and fact when she imposed upon the appellant a sentence of 30 years imprisonment which is manifestly harsh and excessive."**

The respondent opposed the appeal.

Representation

At the hearing, Mr. John Isabirye, learned counsel on State Brief, appeared for the appellant. Ms. Barbara Masinde, a Chief State Attorney in the Office of the Director of Public Prosecutions, appeared for the respondent.

The appellant, who remained at Jinja Government Prison where he was incarcerated, connected to the hearing via Zoom video conferencing technology. This was necessitated by then existing prison regulations that placed restrictions on movement of prisoners from the prison facilities, as a way of preventing contracting and spreading of Covid-19, among the prison population.

Written submissions, filed for both sides prior to the hearing, were adopted with leave of Court, in support of the respective parties' cases.

Appellant's submissions

Counsel for the appellant submitted on each ground independently.

Ground 1

Counsel faulted the learned trial Judge for her decision to reject the appellant's alibi defence yet it was never destroyed by the prosecution evidence. The appellant had set up an alibi defence that between 5.30 a.m to 7.30 a.m on 23rd November, 2012, when the deceased was murdered, he was at his home. The appellant had stated that as was the daily practice, he had only left his house to go to work between 7.00 a.m to 7.30 a.m, on the fateful day. Counsel contended that in light of that alibi, the prosecution was under an obligation to disprove that alibi in accordance with well-established legal principles. He referred this Court to the authority of **Festo Androa Asenua vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1998 (unreported)** where it was held that the duty lies on the prosecution to disprove a defence of alibi and place the accused at the scene of crime as the perpetrator of the offence.

Counsel submitted that the prosecution evidence was insufficient to satisfy the burden to disprove the appellant's alibi. He singled out the evidence of PW1 Awiri Geoffey, which, in his view was implausible. PW1 testified that he was present at the scene of crime, and had observed for close to 20 minutes, when the appellant was assaulting the deceased, yet he also testified that he had been in a hurry to leave the scene of crime and go to fish, which was contradictory evidence. Counsel submitted that the contradictory testimony of PW1 and that of other prosecution witnesses was insufficient to destroy the appellant's alibi. He urged this Court to find that the appellant's alibi was not sufficiently disproved, and to find that appellant's conviction by the learned trial Judge was not justified.

Counsel prayed this Court to allow ground 1 of the appeal.

Ground 2

Counsel submitted that the learned trial Judge erred to rely on the identification evidence given by PW1 and PW2. Both those witnesses had testified that they had seen the appellant at the scene of crime and the learned trial Judge had believed their evidence. However, in counsel's view, in believing PW1 and PW2's evidence, the learned trial Judge focused only on the factors that favoured correct identification of the deceased's assailant by those witnesses, and she did not properly weigh them against those factors that did not favour correct identification. For example, while PW1 testified that he had seen the appellant at the scene, with the aid of light from a security light near the scene, he did not clarify on how bright the security light was.

Further, counsel submitted that PW1 had been untruthful in his evidence. PW1 had testified in examination in chief that he had interacted with the people that were assaulting the deceased to plead with them to stop. Those persons had then told PW1 that they would not stop beating the deceased because he was a thief and they wanted to rid their area of thieves. In cross examination, PW1 had testified that on interacting with the assailants, they had continued to beat the deceased but did not say why they were doing so. Counsel contended that the variance in PW1's evidence as to whether the assailants had given him a reason for beating the deceased was evidence of PW1's untruthfulness.

Counsel further submitted that PW2's evidence was equally implausible. He had testified that due to the violence and harshness of the assailants, he had not been able to go near to them. Counsel contended that, therefore, PW2 had been far from the scene of crime and was unable to observe the assailants, so as to identify the appellant as one of them.

Counsel referred this Court to the authorities of **Abudala Nabulere vs. Uganda, Supreme Court Criminal Appeal No. 9 of 1978 (unreported)**, and **Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (unreported)**, where the principles to guide any Court in dealing with identification evidence in

criminal cases, were articulated. He contended that the learned trial Judge did not properly apply the said principles in handling the identification evidence of the respective prosecution witnesses. Counsel prayed this Court to allow ground 2, as well.

Ground 3

On ground 3, counsel submitted that the learned trial Judge erred to find that the malice aforethought element of the offence of Murder of which the appellant was convicted, had been proven beyond reasonable doubt. The learned trial Judge found as a fact that the appellant had assaulted the deceased with lugabire (tyre sandals) on the head and cheeks, which had caused injuries from which the deceased died. Counsel contended that, however, the evidence of the report from the postmortem examination of the deceased showed that the cause of the deceased's death was unknown.

Counsel further pointed to the fact that PW4's evidence was that the assailants had in the end, set fire on the deceased, and that evidence was supported by PW5 who testified that she had seen burns on the deceased's body. Counsel urged this Court to find that the cause of the deceased's death was due to the burns he suffered to his body. He contended that there was no evidence to suggest that the appellant was the one who set fire to the deceased's body, and the prosecution evidence was that the appellant had assaulted the deceased with a tyre sandal, an act that could not have caused the deceased's death.

Counsel further criticized what he perceived as contradictions in the prosecution evidence as to whether the deceased had suffered any internal injuries. PW1 testified that the appellant and two other unidentified persons had used weapons, such as a tyre sandal, a stick and an iron bar to assault the deceased. The report from the post mortem examination of the deceased, meanwhile, indicated that the appellant had not suffered any internal injuries. Counsel suggested that if the prosecution evidence of the appellant having assaulted the deceased was true, the post mortem examination report would have indicated that the deceased had internal injuries.

It was further contended that the learned trial Judge had erred to treat the inconsistencies in the prosecution evidence on the cause of the deceased' death as minor. In counsel's view, the inconsistencies should have led the learned trial Judge to rule out the prosecution case that the deceased's death had been caused with malice aforethought. The appellant should, therefore, have been convicted of manslaughter. Counsel prayed this Court to allow ground 3, as well.

Ground 4

Under ground 4, the appellant challenged the sentence of 30 years imprisonment that the learned trial Judge imposed on him. In support of ground 4, counsel submitted that there were various grounds for this Court to interfere with the sentence. He referred this Court to the authorities of **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamuno vs. Uganda, Supreme Court Criminal Appeal No. 16 of 2000; and Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2000 (all unreported)** that articulated the circumstances under which an appellate Court may interfere with a sentence imposed by the trial Court. Counsel also referred to the **Judicature (Sentencing Guidelines for Court of Judicature) (Practice) Directions, 2013** that lay down the mitigating factors that a Court should consider during sentencing. He submitted that several of those mitigating factors were submitted for the appellant. There was lack of premeditation on the appellant's part to kill the deceased. The appellant was a first offender. The injuries that the appellant caused to the deceased, and from which he died were less serious. The appellant was of a youthful age and had family responsibilities. Counsel faulted the learned trial Judge for failure to quote from those Sentencing Guidelines, and for failure to consider the plausible mitigating factors raised for the appellant, and consequently arriving at a harsh and excessive sentence of 30 years. He urged this Court to find that the sentence imposed on the appellant was harsh and excessive, to set it aside and substitute in its place a sentence of 10 years imprisonment.

Respondent's submissions

Counsel for the respondent replied to each ground independently, beginning with ground 2 followed by grounds 1, 3 and 4, respectively.

Ground 2

Counsel submitted that the learned trial Judge was right to rely on the identification evidence of PW1, PW2 and PW3 to convict the appellant as those witnesses had, under favourable circumstances, been able to observe as the appellant assaulted the deceased. PW1 Awiri Geoffrey, had made his observations for close to 20 minutes, and although he had done so at 5.30 a.m, in the wee hours of the fateful day, he had been able to make his observations with the aid of bright light supplied by a security lamp next to the scene of crime. PW1 further testified that he had interacted with the appellant as he assaulted the deceased. In addition, PW2 Kibwika Abdallah, had also observed the appellant assaulting the deceased at 6.30 a.m, an hour after PW1 had been at the crime scene. Further, PW3 Dhamulira Christopher, a boda boda rider had stated that he had observed the appellant, at around 7.30 a.m, at the scene and he was among the persons that had assaulted the deceased. Each of PW1, PW2 and PW3 had known the appellant prior to the fateful day.

Counsel pointed out that although PW1 had observed the incident at 5.30 a.m, there was sufficient light to aid him to make a correct identification. Further, PW2 and PW3 who had observed the appellant as he assaulted the deceased at 6.30 a.m and 7.00 a.m, respectively, had made their observations during broad day light, and their cogent evidence had served to corroborate PW1's evidence. She prayed this Court to find that the identification evidence of the appellant as one of the deceased's assailants, was proper and left no possibility of mistaken identity. Counsel prayed this Court to disallow ground 2 of the appeal.

Ground 1

Counsel contended that the learned trial Judge's decision to reject the appellant's alibi was based on the evidence of PW1, PW2 and PW3, that

properly identified the appellant and placed him at the scene of crime. She referred this Court to the authority of **Alfred Bumbo and Others vs. Attorney General vs. Uganda, Supreme Court Criminal Appeal No. 28 of 1994**, where the Supreme Court, quoting with approval from **Ssentale vs. Uganda [1968] 1 EA 365,** stated that the law is that once an accused person has been positively identified during the commission of the crime, then his claim that he was elsewhere must fail. Counsel contended and urged this Court to find that the learned trial Judge rightly rejected, as false, the appellant's alibi that he was at his home at the material time since there was credible evidence that he was at the scene of crime at the material time. She prayed this Court to also disallow ground 1 of the appeal.

Ground 3

Counsel submitted that the element of malice aforethought was sufficiently proved by the prosecution evidence. She contended that the learned trial Judge was alive to the definition of malice aforethought under **Section 191 of the Penal Code Act, Cap. 120.** In the instant case, the appellant had, alongside one Julius and Ahmad, participated in the attack that led to the death of the deceased. The learned trial Judge rightly found that the appellant had struck the deceased on the head, cheeks and back with tyre sandals (lugabire). Julius had struck the deceased with an iron bar, while Ahmad had used sticks. It was further brought out in evidence that the deceased's body had subsequently been set ablaze, causing the deceased to suffer burns from which he died. Counsel contended that death is a foreseeable consequence of setting fire to, and burning a person, and urged this Court to find that the element of malice aforethought was proved in the present case.

Ground 4

Counsel supported the sentence of 30 years imprisonment that the trial Court imposed on the appellant, and submitted that there was no reason to justify this Court to interfere with that sentence. The learned trial Judge had entertained submissions of mitigating and aggravating factors in the circumstances. In her sentencing remarks, the learned trial Judge had been

alive to those factors as well as the period that the appellant had spent on remand, and she passed a sentence, which in counsel's view was neither illegal nor manifestly excessive. Counsel referred this Court to the authority of **Ogalo s/o Owoura vs. R (1954) 21 EACA 126**, where the principles on when an appellate Court may interfere with a sentence imposed by a trial Court, and submitted that none of the reasons articulated in that authority are present in the present case. She urged this Court to maintain the sentence that the trial Court imposed on the appellant.

Appellant's submissions in rejoinder

Counsel for the appellant agreed with the respondent's statement of the principles laid out in the authority of **Alfred Bumbo (supra)**, but he contended that those principles were not applicable to the facts of the present case. In the **Bumbo case**, the prosecution had not adduced sufficient evidence to place the appellant at the scene of crime, and consequently his alibi was not destroyed to warrant the learned trial Judge to reject that alibi.

With regard to the submission on legality of sentence, counsel submitted that the learned trial Judge did not consider the precise period of 5 years and 7 months, that the appellant had spent on remand, and as a result passed an illegal sentence. Counsel urged this Court to set aside the sentence imposed by the trial Court and impose a fresh sentence.

Resolution of the Appeal

We have carefully studied the Court record, considered the submissions of counsel for both sides, and the law and authorities cited. We have also had regard to other applicable law and authorities, not cited.

On a first appeal from a decision of the High Court, as in the present case, this Court has a duty to reappraise the material on record, as presented before the trial Court, and thereafter, to come up with its own conclusions on all issues of law and fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10; and the authority of**

Uganda vs. George Wilson Ssimbwa, Supreme Court Criminal Appeal No. 27 of 1995 (unreported).

We shall keep the above principles in mind as we resolve the grounds of appeal.

Ground 1

Ground 1 relates to the question of participation of the appellant in the murder of the deceased, and the case for the appellant is that the learned trial Judge erred to base on the inadequate identification evidence of PW1, PW2 and PW3 to find that the appellant was correctly identified as one of the persons who had participated in the murder of the deceased. On handling of identification evidence, in the authority of **Abudala Nabulere & 2 Others vs. Uganda, Supreme Court Criminal Appeal No. 9 of 1978 (unreported)**, it was stated as follows:

> **"A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken. For this reason, the courts have over the years evolved rules of practice to minimise the danger that innocent people may be wrongly convicted.**
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> **...**
>
> **Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.**

In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support to identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered.

When, however, in the judgment of the trial court, the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation wade in difficult conditions; if for instance the witness did not know the second accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification."

The learned trial Judge relied on the identification evidence of PW1, PW2 and PW3, and in this appeal, it is contended that she erred to do so. We therefore deem it necessary and shall proceed to reappraise all the relevant identification evidence.

The case for the prosecution at trial, was that the deceased was killed by a group of 3 persons, which lynched him for allegedly being a thief. Several prosecution witnesses claimed to have identified the appellant, as one of the assailants. The case for the appellant, on the other hand, was that he was elsewhere at the material time, and that the prosecution evidence placing him at the scene of crime was mistaken.

The prosecution evidence was as follows. PW1 Awili Geoffrey testified that he was able to identify the appellant as part of a group of 3 persons that had assaulted the deceased. He stated that at about 5.30 a.m on 23rd November, 2012, on his way to the lake to fish, he came across a group,

that was assaulting the deceased. This was at a place near Masese Boda Boda Stage, Jinja. The witness stated in parts of his evidence that the group consisted of 3 men, including the appellant, and other two persons only identified as Julius and Ahamad. He had observed the group assault the deceased, while the deceased's hands were tied with a rope, from his backside.

PW1 testified that each of the assailants used a different weapon to assault the deceased. The appellant used tyre sandals to assault the deceased on the head and cheeks. Julius used an iron bar to hit the deceased at the back of the head, while Ahamad hit the deceased's legs with a stick. PW1 saw that the deceased bled from the impact of the assaults on his body. PW1 testified that he had interacted with the assailants, who told him that they had decided to assault the deceased because he was a thief, and that the assailants wanted to make an example out of the deceased. The assailants accused the deceased of stealing maize produce, and PW1 had seen some maize produce at the scene of crime. PW1 testified that subsequently, the assailants, made up their minds to take the deceased to a nearby police station. They removed all his clothes and left him only in the underpants he was wearing, and a shirt. They continued to assault the deceased. At that point, PW1 left the scene and went to carry out his fishing plans.

As to the prevailing conditions that had assisted him to observe the appellant at the scene of crime, PW1 stated at page 31 of the record that there was a security light at the scene of crime that supplied enough light which had enabled him to observe the attack on the deceased. PW1 also stated that he had known the appellant prior to the incident.

PW1 testified that later on the fateful day, at around 10.30 a.m, as he returned to his home, he got information that a person had been killed and his body dumped in a maize garden. When he went to see the dead body, he identified it as that of the deceased, whom he had seen being assaulted earlier in the day. The body that had been dumped in the garden had injuries and had sustained burns. The matter was reported to the area Local Council leaders.

In cross examination, PW1 stated that he had stood about 3 metres from the scene, when he observed the attack on the deceased, and that he had spent about 20 minutes at the crime scene. He said that, after observing the attack, he had opted not to go and seek the help of the police to stop the attack, because he wanted to continue to his journey to the landing site to tend to his fishing business. PW1 also stated that he had not gone to the police to make a report about finding the deceased's dead body, dumped, in a maize garden. PW1 denied that he had a grudge against the appellant that could have motivated him to give false evidence against him.

We have also considered the evidence of PW2 Kibwika Abudalla, who stated that he had also seen the appellant, as one of a group of three persons, as he assaulted the deceased. At about 6.30 a.m, on the fateful day, he was retiring to go home from doing a night shift for his boda boda riding business, when he saw the three persons mentioned in PW1's evidence, assaulting the deceased. The appellant used tyre sandals to assault the deceased while the other two assailants used an iron bar and a stick, respectively. PW2 saw the deceased in a bad condition, and he was in a distressed condition. The assailants alleged that the deceased was a thief and they were beating him to punish him. PW2 pleaded with the assailants to take the deceased to police. Because he was tired, he left the scene and went to his home. In cross examination, PW2 testified that he had known the appellant before the fateful day.

The other identification evidence was that given by PW3 Dhamulira Christopher. He stated that he was a boda boda rider, and on the fateful day, at about between 6.00 a.m to 7.00 a.m, he was carrying a customer when they passed near the crime scene. PW3 slowed down when close to the crime scene and he had identified the appellant and the other two assailants as they assaulted the deceased. The customer insisted to PW2 to continue with the journey and not get involved. He was able to observe that the deceased was bleeding on the head. In cross examination at page 38 of the record, PW3 stated that he had observed the attack on the deceased for between 3 to 5 seconds.

The evidence given by PW1, PW2 and PW3 was that the appellant was part of a group of 3 persons, that had attacked the deceased, assaulted him and caused him to suffer injuries from which he died. It was submitted for the appellant that the learned trial Judge did not consider the factors that rendered the correct identification of the appellant by PW1, PW2 and PW3, difficult. It was stated that the learned trial Judge considered only those factors that favoured correct identification. In the relevant portion of her judgment, at page 102 of the record, the learned trial Judge, after evaluating the evidence of PW1, PW2 and PW3, stated that:

> **"The evidence shows that there could not have been mistaken identity. PW1, PW2 and PW3, who saw the accused beating the deceased all knew him very well as a resident of their village. PW3 in particular stated that he knew the accused as a fellow boda boda rider and a mechanic who guarded their motorcycles at the stage. PW1 spoke to the accused and the latter answered him while the beating happened (see [10] above), while PW2 and saw the accused beating the deceased after day break. These factors diminished any possibility of mistaken identity."**

We find that the identification evidence given by PW1, PW2 and PW3 satisfied the relevant principles as articulated in the **Nabulere case (supra)**. As the learned trial Judge stated, when considered together, that identification evidence ruled out mistaken identity. PW1 was not challenged in cross examination, when he stated that there was sufficient light at the crime scene, that aided him to see the appellant as one of the deceased's attackers. As such, counsel for the appellant is misguided to ask this Court to reconsider the issue on sufficiency of light at the material time. Further, PW2 and PW3, who made their observations after day break, also observed the appellant as one of the deceased's attackers. Each of those witnesses' evidence served to corroborate the evidence of the other.

Most of the points raised on this appeal, to challenge the said identification evidence, related to secondary matters. These include such matters, as why PW1 opted to go to fish, instead of going to police to report the attack on the deceased, immediately after he had observed it; whether or not PW1 had interacted with the assailants at the crime scene; whether or not PW2

had been able to observe the attack on the deceased, yet he stated that the assailants were too harsh during the attack. Regardless of these points, and for the reasons given earlier, we find that the learned trial Judge proceeded correctly to rely on the identification evidence of PW1, PW2 and PW3 to convict the appellant as charged. Ground 2 of the appeal must fail.

Ground 1

The case for the appellant is that the learned trial Judge erred to find that the alibi defence set up by the appellant was disproved, yet the prosecution evidence had not been sufficient to place the appellant at the scene of crime. In **Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (unreported)**, the Court stated:

> **"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces, evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."**

We found, while resolving ground one, that the identification evidence of PW1, PW2 and PW3 had satisfactorily identified the appellant as one of the deceased' attackers. The appellant set up an alibi that he was at his home at the time of the deceased's attack. However, the learned trial Judge found that alibi to have been false, given the evidence of PW1, PW2 and PW3, in which had properly identified the appellant as one of the deceased's attackers. Having reviewed the evidence of the case, we find ourselves in full agreement with the learned trial Judge. Ground 1 of the appeal must also fail.

Ground 3

Ground 3 alleges that the learned trial Judge erred to find that the malice aforethought element of the offence of murder of which the appellant was convicted, had been proven beyond reasonable doubt. **Section 191** of the **Penal Code Act, Cap. 120,** states:

> **"191. Malice aforethought.**
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> **Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—**
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> **(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or**
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> **(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 the submissions, counsel for the appellant contended that the prosecution evidence was that the appellant had only struck the deceased with tyre sandals (lugabire), on the head and cheeks. Further, that the medical evidence of the post mortem report of the deceased (Exh. P1), indicated that the cause of death of the deceased was unknown, although the deceased's body was at the time of the post mortem examination, found to have blisters, consistent with having suffered burns. Counsel for the appellant urged this Court to find; 1) that the appellant had not inflicted the fatal injuries that caused the deceased's death; or 2) if the appellant is found to have inflicted any injuries on the deceased, those injuries were not caused with malice aforethought, and the appellant should have been convicted of the lesser offence of manslaughter.

With regard to the contention that the appellant did not inflict the injuries that caused the deceased's death, we wish to reiterate our earlier findings that the prosecution evidence established that the deceased was killed, when a group of assailants, that included the appellant, attacked and assaulted him to punish him for allegedly being a thief. The evidence indicated that

the attackers had acted with a common intention in terms of **Section 20 of the Penal Code Act, Cap. 120**, when they assaulted and killed the deceased. **Section 20** states:

> **"20. Joint offenders in prosecution of common purpose.**
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> **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a 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 **Ismail Kisegerwa and Another vs. Uganda, Supreme Court Criminal Appeal No. 6 of 1978**, it was stated:

> **"In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter, it is now settled that an unlawful common intention does not imply a pre—arranged plan — see P —vs— Okute [1941] 8 E.A.C.A. at p.80. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to dissociate himself from the assault. See R —vs— Tabulayenka (supra). It can develop in the course of events though it might not have been present from the start, See Wanjiro Wamiro—vs—R [1955] 22 E.A.C.A. 521 at p.52 quoted with approval in Mungai'a case. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence see Mutebi's case (supra)."**

In the present case, the appellant alongside Julius and Ahamad, shared a common intention to administer extra-judicial punishment to the deceased, because they suspected that he was a thief. They manifested their intention by assaulting the deceased with various weapons, and eventually, one of the

attackers set the deceased on fire. It is obvious that the concerted actions from assaulting to setting the deceased on fire, had caused the deceased's death. We find that each of those attackers is responsible for the act that eventually caused the deceased's death under the doctrine of common intention. It is incontestable that a person who sets another on fire, and death of that person results, acts with malice aforethought in terms of Section 191 of the Penal Code Act. In the present case, the appellant, as one of the joint offenders, who acted in pursuance of an unlawful purpose, had common intention to cause the death of the deceased, and is responsible for the act of setting fire on the deceased, irrespective of whether that act was done by either Julius or Ahamad or the appellant himself. The learned trial Judge was right to find that the deceased's death was caused with malice aforethought, and counsel for the appellant's views, otherwise are misconceived. Ground 3 of the appeal, too must fail.

Ground 4

It was contended that the sentence that the learned trial Judge imposed on the appellant was manifestly harsh and excessive, considering the various factors submitted for the appellant to mitigate the sentence. Counsel for the appellant contended that in imposing the sentence, the learned trial Judge failed to take into account the mitigating factors submitted for the appellant. On the other hand, counsel for the respondent replied that the learned trial Judge had appropriately taken into account all the material factors while sentencing the appellant.

We have reviewed the record from the sentencing proceedings conducted by the trial Court. The appellant's counsel submitted the following mitigating factors at page 86 of the record. The appellant was a first offender and expressed remorse for his role in the killing of the deceased. He was also responsible for his family including 7 children. It was also submitted that at the young age of 21 years, the appellant would benefit from a short sentence, that would help him to reform and become a good citizen.

The prosecution counsel submitted the following aggravating factors. The offence of murder, of which the appellant had been convicted was a serious

offence that attracted the death sentence. The deceased, whom the appellant had killed was also still young, aged 20 years. The offence was rampant and there was need for a deterrent sentence.

The learned trial Judge made the following remarks while sentencing the appellant, at pages 86 to 87 of the record:

> **"The convict Mudwa Joseph with his co-killers took the law into their own hands and took away a human life. Human life is sacred and an appropriate punishment must be passed as an expression of disapproval by the public and the Courts of law of these gang and senseless killings.**
>
> **Taking these factors into account and taking into account the 5 years since 7th December, 2012 that the convict has already spent on remand, he, Mudwa Joseph is hereby sentenced to serve thirty years (30 years) imprisonment. The sentence shall run from the date of his conviction."**

The above excerpt does not bring out the mitigating factors submitted for the appellant. It was submitted that the appellant was a young man aged 20 years, a first offender, but these factors are not brought out in the learned trial Judge's sentencing remarks. We are therefore inclined to find that the learned trial Judge ignored to consider those mitigating factors and we hereby set aside the sentence imposed for that reason.

We have considered a further point of law that arises, although, no submissions were made on it by counsel for either side, which is whether the sentence of 30 years as imposed on the appellant accorded with the principle of consistency in sentencing. This principle was articulated in the authority of **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015**, where the Court stated:

> **"It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."**

In the present case, we find that the appellant participated in the murder of the deceased alongside, one Julius and Ahamad, who were never

apprehended, in an apparent act of mob action. It has been stated that sentences handed down in cases of mob action ought to be lower than would otherwise be in cases that do not involve mob action. In the authority of **Kamya Abdullah and 4 Others vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2015**, the Court stated:

> **"...a mob in its perverted sense of justice thinks it is administering justice while at the same time ignoring the importance of affording suspects the right to defend themselves in a formal trial.**
>
> **Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood."**

In the above case, the Supreme Court imposed a sentence of 18 years imprisonment, after it set aside, for being excessive, a sentence of 30 years imprisonment that had been imposed by the trial Court, and upheld by the Court of Appeal in a case involving murder by mob action. The appellants had been part of a mob that beat up the deceased to punish him for allegedly stealing household items.

In the present case, and considering all the factors of the case, we form the view that the sentence of 30 years imprisonment, that the trial Court imposed on the appellant was harsh and excessive in the circumstances of this case. The appellant had acted, alongside other perpetrators, who were not apprehended, to murder the deceased. It was therefore injudicious to sentence the appellant as though the relevant offence had not been committed in circumstances of mob justice involving other offenders.

We shall, pursuant to the powers vested in this Court under **Section 11 of the Judicature Act, Cap. 13**, including the power to determine an appropriate sentence if this Court sets aside a sentence imposed by the trial High Court, proceed to determine a fresh sentence. We have considered the aggravating and mitigating factors of the case that were set out earlier in the judgment, and we find a sentence of 20 years imprisonment appropriate

in the circumstances of the case. The appellant was arrested on 30th November, 2012, and he spent 4 years, 9 months and 27 days on remand. We shall deduct that period from the sentence we have imposed, which leaves the appellant to serve a sentence of 15 years, 2 months and 3 days imprisonment, to run from 27th September, 2017, the date that the trial Court convicted the appellant.

Ground 4 of the appeal, is therefore, allowed.

In conclusion, the appeal as to conviction, fails. We uphold the learned trial Judge's decision to convict the appellant of Murder as charged. However, the appeal as to sentence, succeeds on the terms set out in this judgment.

We so order.

Dated at Jinja this ..... 22nd ..... day of ..... Dec ..... 2021.

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Elizabeth Musoke

Justice of Appeal

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Cheborion Barishaki

Justice of Appeal

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Hellen Obura

Justice of Appeal