

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL**

[*Coram: Kasule, Mwangusya & Egonda-Ntende, JJA*]

Criminal Appeal No. 51 of 2014

Wilson Kyakurugaha=====Appellant

Versus

Uganda=====Respondent

*[An appeal from a judgment of the High Court of Uganda sitting at Fort Portal (Batema, J.), in HC-CR-CM- No.00375of 2012, delivered on the 21 February 2014]*

**Judgment of the Court**

**Introduction**

1. The appellant was convicted of the offence of murder of Francis Kahwa contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant together with several co accused persons and others still at large during the night of 22 and 23 of March 2012 at Kisakara village in Kyenjojo district, with malice aforethought, murdered one Francis Kaahwa. All the other co accused persons were acquitted of the offence and only the appellant was convicted.
2. Initially the appellant had set forth 4 grounds of appeal but at the hearing of the appeal, learned counsel for the appellant applied to reframe the first 3 grounds into one ground to the effect that the learned trial judge erred in law and in fact when he relied on the evidence of PW9, which was insufficient, to convict the appellant.
3. After hearing the appeal we allowed the appeal, set aside the conviction, released the appellant and promised to give our reasons for judgment later which we now proceed to do.

**Duty of First Appellate Court**

4. It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have the opportunity to

hear and see the witnesses testify. See Rule 30(1) (a) of the Court of Appeal Rules and Pandya vs R [1957] EA 336; Ruwala vs. R [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC). We shall do so accordingly.

### **Prosecution Case**

5. The prosecution called 10 witnesses to prove their case. None of the witnesses was an eye witness to the murder. This case essentially turned on circumstantial evidence. The prosecution case was that the accused persons including the appellant had made death threats against the deceased following a clan meeting that had ordered A1 to A3 off the land of the Baliisa clan. None of the witnesses specifically mentioned that the appellant had made such a threat.
6. The only evidence that implicates the appellant, if at all, is the evidence of PW4 and PW9. PW4 testified that on the day/night in question the appellant came to their home at about midnight. His father was at that at that home and that is where the deceased too lived. The appellant spent the night there and left early in the morning at about 4.30AM. The following day police officers arrived with a tracker dog and it stopped at the door the appellant had slept in. After asking PW4 some questions the police party and their dog left.
7. PW9 was the dog handler. He stated that he was the vice to the one in charge of the Canine unit at Kyegegwa Police Station. He testified that he had received 5 months specialised training at Nsambya and had been with the canine unit since 2009. He was asked by the DPC Kyegegwa to deploy with a sniffer dog to Kihuura Police to assist in the investigation of a murder case. We shall set out his testimony during examination in chief that implicates the appellant.

‘We went to the scene with detectives to the scene where the body of Francis Kaahwa was found. I studied the body, told the local people to move aside and then set the dog. The scene had been preserved. There was no blood on the ground so it seems that the body was just introduced at the scene. I introduced the dog to the body and it started running across Kihuura TC, a distance of one kilometre. It ran for about 3 kilometres to the home of Stephen Nyamutale and it rotated in the bed room and came out. We found Nyamutale’s wife at home. The dog went to an abandoned house of Nyamutale’s father. Thereafter it went by an old woman’s home until Wilson Kyakurugaha’s house and it sat in front but the door and

windows were locked inside except for one window. We sent one small boy inside through the window. He opened and we went inside. The dog went into the bedroom, and we found two mattresses tied and property in a kaveera but the owner was no inside. We then went back to Nyamutale's house. She told us that Wilson had come in about 1.00am and left very early in the morning. After sometime the dog jumped out of the pick up onto A4. The local people told us that the person the dog jumped onto was A4. We arrested him and took him to the Police station. The dog was not tracking the scent of the deceased. To do that it would have moved from the body to the home and stopped there. It would not have gone to the home of A4. The dog was tracking the person who killed Kaahwa who Kyakurugaha.'

8. The trial judge found that the all accused persons had a case to answer and ordered them to proceed with their defence. When the case resumed for the hearing of the defence case, there was a new judge who proceeded from that point until judgment and sentence.

### **Defence Case**

9. The appellant testified on oath and was never cross examined. He stated that he knew the deceased who was his step brother and great friend. No grudge existed between the two of them. On 22 March 2012 in the evening he was at his home. After supper he went to see his sick father at about 9.00pm. He stayed overnight since the father was in a coma. The deceased came there too. He even brought food at the appellant's father's home. With regard to the mattresses that they found tied up at his home he stated that this was for school going children who study in Kampala and do not want them to get dirty.
10. In the morning the appellant and his neighbours were informed of the death of Kaahwa by a child. They went to the scene where the body was found. The police dog found him at the scene but did not come to him. It followed a trail of the scent. The dog went to his father's house and then to his house and it sat there. They left the scene and went home to arrange where the body would be put. The police vehicle with the dog came and passed the appellant. The dog was resting peacefully. It never reached out wanting to bite the appellant as alleged. He denied being arrested with the aid of the dog.

## Submissions of counsel

11. Mr Muhumuza Kaahwa, learned counsel for the appellant submitted that the only evidence against the appellant is the evidence of PW9. It is the evidence of a sniffer dog which was introduced both at the scene and in evidence by PW9, the dog handler. P10 drew the sketch map of the dog sniffer. It was introduced as P8. The name of the dog was Lee. PW9 stated that this dog assisted him in his endeavour to arrest the appellant as shown in PE8. Lee moved a distance of three kilometres from where the body of the deceased was found. It first entered the house of one Nyamutale, from there it moved to the house of the Appellant where it found the door locked. Upon inspection a child was used to enter that house through a window. The Door was opened. It had been locked both from outside and inside. Lee entered and sniffed. Then went out through the window. It did not find the appellant in the house. After moving from the house of the appellant on the way back to the scene the appellant was found on the way. Lee jumped from the vehicle and moved to the appellant. According to PW9 Lee had executed its duty by holding onto the Appellant, confirming that it is PW9 who committed the offence.
12. In the home of the Appellant they had found two mattresses tied in a kavera. The appellant was identified by the people around as Wilson Kyakuruhaga.
13. The appellant in his evidence stated that when Lee was introduced to the scene where the dead body was, he was there. Lee did not sniff or identify him at the initial instance. It only did so afterwards. The learned trial judge relied on that evidence to convict the appellant together with finding property tied or wrapped in his house; coupled with the fact that the house was locked from both inside and outside which meant the appellant had gone through the window, which was not normal behaviour.
14. Mr Kaahwa submitted that the evidence of sniffer dogs is not fully developed within our criminal justice system. Reliance on evidence of sniffer dogs should be taken with caution. He referred to the cases of Abdallah Bin Wendo and Anor v R [1953] 20EACA165 and Omondi And Anor v R 1967 EA 802. These cases say that the evidence of sniffer

dogs should be admitted with caution and great care. There should have been evidence of the experience of the dog handler in training and handling of the dog. And secondly the experience of the dog itself. There should be evidence to show the number of arrests and degree of accuracy effected by the dog ending up in successful prosecution. There should be evidence about the conduct of the accused before and during arrest when confronted by the dog.

15. PW9 indicated that he had just undergone training for about 5 months as a dog handler. He did not inform court how closely in touch was he with Lee and how familiar was he to Lee. He did not inform the court about the character of Lee. It would seem that he got in touch with Lee when he was called by his boss, the DPC. There was no dog at Kyenjojo. He had to use the one at Kyegegwa. It is not clear how many times he had used Lee. He did not tell the court the age and experience of Lee in being used to track fugitives. And whether it had been consistently accurate or returned false results at times. This is coupled with the distance Lee had moved, the environment it had gone through; the time it took to execute its duty. He began at 8.00AM and only made an arrest at 5.00PM.
16. The deceased was found at a secondary scene and not the primary scene. The body had been moved from where it had been killed to the scene where it was found. The appellant was at the scene when Lee arrived. Lee did not sniff at him. The totality of that evidence was insufficient and inadequate.
17. The learned judge relied on the so called conduct of the appellant when he concluded that the appellant must have used the window to leave the house. There is no law that bars a human being from going through a window. No one had seen the appellant go through a window. The appellant was living with children and the property that had been tied for a child or children going to school. The Judge relied on the evidence of going through the window to conclude that this was evidence of bad character. The Judge said the accused had not explained which children he was taking to school.
18. The alibi of the appellant was not destroyed. The other evidence is simply hearsay and simply circumstantial evidence. The participation of the

Appellant was not proved beyond reasonable doubt. The appeal should be allowed and conviction and sentence set aside.

19. Mr Brian Kalinaki, the learned Principal State Attorney, appearing for the respondent opposed the appeal. He submitted that Mr Kafuuzi, at the trial, stated that the accused persons would give unsworn testimony. And what was before the court must be the unsworn testimony of the appellant. With regard to the merits of the case there was land wrangle in the family between the deceased and appellant and his colleagues. The Appellant threatened to kill the deceased according to the evidence of PW3.
20. Mr Kalinaki submitted that on the fateful night the appellants and others were seen having a drink at Kihura at Kabawhezi's place. The deceased was also in the same place. When the deceased saw them he got scared and decided to leave the place. Together with PW2 they left the place. As they were leaving the appellant with the others were seen to be following them. The others were on a motor cycle. The appellant was on foot. The motor cycle went ahead of the appellant. PW3 met the deceased. And then found the appellant on the way. The following day the deceased was found dead.
21. When the police dog was introduced to the body of the deceased it moved for a distance of 3 kilometres. It went to the home of the deceased's father. They found PW4 and deceased's father. It went to a particular bed room. Upon interrogation PW4 said that the appellant arrived at that place after mid night. He slept in that bedroom where the dog went. He had left that place at 4.30AM in the morning. From there the dog went to the house of the appellant. They found mattresses tied and other belongings. The owner was not there. The owner was the appellant. The appellant was found on the way as police was retreating. The dog jumped on the appellant. They realised that he was the owner of the house.
22. Mr Kalinaki submitted that there having been a history of a grudge between the appellant on the one hand and PW1 and the deceased on the other hand. And the circumstances under which the dog moved around to track the appellant left no other explanation apart from the appellant having participated in the offence. The appellant's counsel attacked the training of the dog handler for being only 5 months. It is not established that one has to go for a definite period of time. The dog handler should show that he is trained in handling those dogs. Mr Kalinaki supported the

decision of the learned trial judge to convict the appellant. He prayed that this court upholds the conviction.

### **Analysis**

23. The trial judge noted in his judgment that the evidence of PW4 destroyed the alibi of the appellant. Relying on that evidence together with the evidence of the PW9 he found that the evidence sufficient to conclude that the appellant had murdered the deceased. The learned trial judge stated in part,

‘A4 explained that he slept at his father’s place, since he was in coma. He was a very sick father. PW4 Ruth Baguma who was nursing the dying man told court indeed A4 went and slept there. He went there at midnight and knocked. PW4 asked who was knocking. On hearing that it was A4 she opened for him and made a bed for him. Strangely enough, he left early in the morning at around 4.30am. This witness closed the door.

.....  
 PW4’s evidence is important for it destroys A4’s alibi. A4 said he took food to the old man at 9.00pm and slept near the old man. Bu the same A4 says the old man was already in coma. A dying man in coma would not eat his food. The same A4 said he saw Kaahwa when he brought food to the sick man. Kahwa could not have brought food when he actually lived in the same house with his sister in law and the sick old man. Kahwa was not married and was living in Nyamutale’s house. ....  
 A4’s alibi is spiced with lies and is completely destroyed by PW4’s testimony. He was seen walking from Kihura trading centre following Kahwa and his scent was picked up and followed by the sniffer dog from the dead body to his bedroom. The same police dog arrested him as he by passed the police vehicle that was moving from A4’s house back to the scene of crime.’

24. We have perused the evidence of the appellant. It was on oath. He was not cross examined. We find this very odd. He was not challenged on his story. Secondly the appellant did not state, going by the available record that he had brought food to his father, as the judge asserts he did. There is no basis for suggesting that the appellant had said he brought food to a dying man.

25. The learned trial judge concluded that PW4 had destroyed the alibi of the appellant. We are not sure which way this was done. An alibi is simply a claim by an accused to have been elsewhere other than at the scene of crime at the time the offence was committed. It is not known where this

offence was exactly committed in times of location. Neither was the time the offence was committed established. PW4 does not place the appellant at any scene of crime. However she does testify that the appellant came to his father's home at about midnight rather than at 9.00pm as the appellant testified. PW4 further testified that the appellant left early in the morning, at 4.30am. The learned trial judge concludes that this was strange behaviour. It may be or may not be. The appellant was not cross examined at all and the so called strange conduct put to him for his response.

26. The main evidence against the appellant is the evidence of the sniffer dog, 'Lee.' This evidence has been attacked by counsel for the appellant as insufficient to found a conviction for a serious offence. The Court of Appeal for Eastern Africa in the case of Abdallah bin Wendo and anor v R [supra] observed at page 167,

'We are fully conscious of the assistance which can be rendered by trained police dogs in the tracking down and pursuit of fugitives, but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identification of a suspect by an *homo sapiens*. We do not wish it to be thought that we rule out absolutely evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who has trained the dog and who can describe accurately the nature of the test employed. In the instant case the dog master was not called and the evidence as to what the dogs did and how they did it is most scanty. This kind of evidence will not do in a case where an accused person is arraigned on a capital charge and the learned counsel for the crown in this appeal has most properly conceded that it must be left out of account.'

27. Sniffer dog evidence was considered in the Kenyan case of Omondi and Anor v R [1967] E A 802 where the High Court observed as follows at page 807,

'But we think it proper to sound a note of warning about what, without undue levity, we may call the evidence of dogs. It is evidence which we think should be admitted with caution, and if admitted should be treated with great care. Before the evidence is admitted the court should, we think, ask for evidence as to how the dog has been trained and for evidence as to the dog's reliability. To say that a dog has a thousand arrests to its credit is clearly, by itself, quite unconvincing. Clear evidence that the dog had repeatedly and faultlessly followed a scent over difficult



country would be required, we think, to render this kind of evidence admissible. But having received the evidence that the dog was, if we might so describe it, a reasonably reliable tracking machine, the court must never forget that even a pack of hounds can change foxes and that this kind of evidence is quite obviously fallible.’

28. The High Court in Uganda has followed, and correctly in our view, the principles set out in the foregoing cases in dealing with reception of dog evidence. One of the most recent such cases is Uganda v Muheirwe and Anor HCT-05-CR-CN-0011 of 2012 at Mbarara High Court District Registry. After a review of comparative jurisprudence from around the world and from Uganda too, Gaswaga, J., proposed the following principles to guide trial courts with regard to admissibility and reliance on dog evidence. He opined,

‘[24] Therefore, from the above discourse, the following propositions are made as principles that may govern the considerations for the exclusion or admissibility of and weight to be attached to tracker (sniffer) dog evidence:

(1) The evidence must be treated with utmost care (caution) by court and given the fullest sort of explanation by the prosecution.

(2) There must be material before the court establishing the experience and qualifications of the dog handler.

(3) The reputation, skill and training of the tracker dog [is] require[d] to be proved before the court (of course by the handler/ trainer who is familiar with the characteristics of the dog).

(4) The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial. And the trail must not have become stale.

(5) The human handler must not try to explore the inner workings of the animals mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.

(6) The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth-eliciting process of cross-examination.

(7) It should be borne in the mind of the trial judge that according to the circumstances otherwise deposed to in evidence, the canine evidence might be at the forefront of the prosecution case or a lesser link in the chain of evidence.’

29. We would approve of the first 6 principles as providing sound guidelines in dealing with dog evidence. We wish to add that there are two aspects that are important to be observed. Firstly what is the threshold for such evidence to be received by the trial court? Secondly after reception or admissibility how is such evidence to be considered?
30. In the first place with regard to admissibility we regard it essential that the training and experience of the dog handler and his association with the dog in question be established. Secondly there must be established in evidence the nature of training, skill and performance of the dog in question with regard to the particular subject at hand, be it tracking scents, or drugs, or whatever specialised skills it allegedly possesses so as to establish its credentials for that skill. The foregoing are prerequisites before the admissibility of such evidence.
31. Nevertheless once admitted it is clear that such evidence must be treated with caution as it is possible that it may be fallible.
32. In the case before us it was the only evidence available against the appellant apart from what the judge referred to as the strange conduct of the appellant, and the finding that his house had been locked from inside and there were mattresses that had been found tied up. No evidence was led to establish the training, skills and previous performance of the dog 'Lee' in tracking scents. Neither was the experience and training of the dog handler and his connection with Lee established satisfactorily. There was no description as to how the dog operated. For instance in this particular case the prosecution case was that there were several people who had participated in the crime. Assuming all of them or most of them had been at the scene where the body was found how would the dog be able to distinguish between multiple scents and chose to follow one particular scent or was it capable of picking only one scent? Was such scent to be picked up from the body or the surrounding matter around the body?
33. We are satisfied that the learned trial judge admitted this evidence without it passing the foregoing admissibility criteria. The prerequisite facts that needed to be established before such evidence was admitted in evidence were not established. Nothing in the testimony of PW9 touched on the training, skills and performance of Lee in previous cases. This evidence should not have been admitted in this case. Without this evidence nothing links the appellant with the crime in question. There is no evidence of previous threats made by the appellant.

34. For the foregoing reasons we allowed this appeal and acquitted the appellant of the charge of murder.
35. Before we take leave of this case, we note that the case for the prosecution was heard by Chibita, J, as he then was. He ruled that the accused persons had a case to answer. Then the case for the defence was heard by Batema, J., who finally delivered the judgment in this case. Though no appeal was made on this point we must point out that this is really contrary to section 20 of the Judicature Act, which states in part,
- ‘Subject to any written law, every proceeding in the High Court shall, so far as is practicable and convenient, **be heard and disposed of by a single judge**; and proceedings in any action subsequent to the final judgment or order shall, so far as is practicable and convenient, be taken before the judge before whom the trial or hearing took place.’
36. Can this trial be said to have been heard and disposed of by a single judge? Section 20 of the Judicature Act requires in our view one single judge to try and determine a proceeding so far as it is practicable and or convenient. That single judge must be one and the same rather than the possibility of multiple judges hearing bits and pieces of the case and finally the judgment being pronounced by the last judge who handles the file. This must be the antithesis of a fair trial.
37. Except where it has been established that it is no longer practicable or convenient, only a judge who has tried the case, that is heard all the evidence in the case should be the one to dispose of that case on the basis of the evidence adduced before him. A judge who has not heard and seen the witnesses testify at first instance to make the decision at that instance that finally disposes of the matter leaves much to be desired. The law in our view assumes that the trial will take place before a single judge who will dispose of that proceeding. It is not expected that the matter will be heard by a multiplicity of judges in a cumulative manner with the last one giving judgment in the matter.
38. The position that obtains in respect of proceedings before the High Court is different from the proceedings in the Magistrates courts where the Magistrates Courts Act, vide Section 144 specifically authorises multiple magistrates to try acriminal matter.
39. It states,

**‘144. Conviction or commitment on evidence partly recorded by one magistrate and partly by another.**

(1) Whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the trial and is succeeded, whether by virtue of an order of transfer under this Act or otherwise, by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his or her predecessor, or partly recorded by his or her predecessor and partly by himself or herself, or he or she may re-summon the witnesses and recommence the trial; except that—

(a) in any trial the accused may, when the second magistrate commences his or her proceedings, demand that the witnesses or any of them be resummoned and reheard;

(b) the High Court may, whether there is an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was held, if it is of opinion that the accused has been materially prejudiced by that evidence, and may order a new inquiry or trial.

(2) Whenever any magistrate, after judgment has been delivered in any case, but before sentence has been passed, ceases to exercise jurisdiction in the case and is succeeded, whether by virtue of an order of transfer under this Act or otherwise, by another magistrate who has and who exercises that jurisdiction, the magistrate so succeeding may sentence or may make any order in the case which he or she could have made if he himself or she herself had delivered judgment in the case.

40. There is no similar or equivalent provision in the Trial on Indictments Act or the Criminal Procedure Code or the Judicature Act. With regard to proceedings in the High Court the operating provisions are section 20 of the Judicature Act. It may be possible, under that section, where it is shown that it is not practicable or convenient for the judge who started the trial to complete it, for another judge to take over the part heard case and continue with the trial on the record of proceedings before him. This is the exception rather than the rule.

41. In this particular case the judge who wrote the judgment relied on the record of proceedings with regard to the case for the prosecution as he did not see or hear the witnesses testify. He was at a disadvantage in assessing the veracity of these witnesses' testimony not having had the opportunity to watch their demeanour and comport in court.

42. No reason is available on record as to why the judge who tried the case initially; heard all the prosecution case and ruled that there was a case to answer for all defendants did not complete the trial of this case.
43. As a matter of practice we would encourage that the traditional practice that had traditionally obtained at the High Court where one single judge conducts wholly the proceedings in each criminal case and disposes of the matter be maintained. Where for some reason that is not practicable or convenient the new trial judge should initially determine, after hearing from the parties, whether or not the trial should proceed *de novo* or on the old record.

Signed, dated and delivered at Fort Portal this 18<sup>th</sup> day of December 2014

Remmy Kasule  
Justice of Appeal

Eldad Mwangusya  
Justice of Appeal

Fredrick Egonda-Ntende  
Justice of Appeal