THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.422 OF 2016

(Arising from Masaka High Court Criminal Session Case No.42 of 2015)

UGANDA::APPELLANT

VERSUS

1. **RO/01788 MAJOR JOEL BABUMBA**
2. **BAGUMA ALEX** **::::::::::::::::::::::RESPONDENTS**

CORAM: HON. MR. JUSTICE ALFONSE OWINY-DOLLO, DCJ

HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE BARISHAKI CHEBORION, JA

JUDGMENT

Introduction

This is an appeal from the decision of John Eudes Keitirima J, delivered on 16th December, 2012, whereby he acquitted the respondents of murder contrary to sections 188 and 189 of the Penal Code Act and ordered their release forthwith.

Background

The prosecution case as accepted by the trial Judge was that the deceased, Kazungu Moses was a resident of Bwanyi Village in Kalungu District where his family owned a huge chunk of land. In 1984, the deceased's siblings sold part of the family land measuring 154 acres to Major Noel Nuwe (Rtd) who in turn sold the same to the 1st respondent, Major Joel Babumba. Upon acquisition of the said piece of land which was neighbouring that of the deceased, the 1st respondent established a Diary Farm thereon comprising chiefly of cows and goats. The deceased, Kazungu Moses later became embroiled in a bitter feud with the 1st respondent who often accused the deceased of permitting his cows to stray into his farm and infecting his animals in the process. Three weeks prior to his death, the deceased had acquired the services of a casual labourer, Justus Nabaasa to attend to his gardens and inspite of his very brief stay at the deceased's home, Justus Nabaasa soon cultivated an intimate friendship with the 1st respondent.

During the wee hours of 31st July, 2012, the body of the deceased was discovered by the road side bearing multiple head injuries and lying in a pool of blood. Next to it was his motor cycle Reg. No. UDH 709T whose front lamp assemblage was extensively damaged and many of his personal belongings including his mobile phone were missing. The post-mortem report attributed the deceased's cause of death to; ".....severe closed head injury not compatible with life, secondary to blunt trauma to the head....."

The respondents were charged and tried for murder contrary to sections 188 and 189 of the Penal Code Act but acquitted.

The appellant, being dissatisfied with the acquittal, appealed to this Court on the following grounds;

1. *The Learned trial Judge erred in law and fact when he found that the cause of death of the deceased was not proved by the appellant.*
2. *The Learned trial Judge erred in law and fact when he found that malice aforethought was not proved by the appellant.*
3. *The Learned trial Judge erred in law and fact when he found that the appellants were not properly identified at the scene of crime.*
4. *The Learned Trial Judge erred in law and fact when he closed the respondents defence case before the prosecution cross examined the defence witnesses and thereby caused a miscarriage of justice.*
5. *The Learned trial Judge erred in law and fact when he failed to properly evaluate all the circumstantial evidence on record and thereby reaching a wrong conclusion and acquitted the respondents.*

At the hearing of the appeal, the appellant was represented by Mr. Semalemba Simon, Assistant DPP while the 1st respondent was represented by Mr. Ochieng Evans and Mr. Nyanzi Mathias appeared for the 2nd respondent.

Counsel for the appellant argued grounds 1, 2, and 4 independently and grounds 3 and 5 together. Counsel for the respondents vehemently opposed the appeal.

We have listened to the submissions of counsel for the appellant and the respondents. We have also carefully studied the Court record. It is settled law that as a first appellate Court, we are required to re-appraise all the evidence adduced at the trial and make our own inferences on all issues of law and fact. See ***Rule 30 of the Rules*** of this Court and ***Kifamunte Henry V Uganda, Criminal Appeal No.10 of 1997*** where it was held that *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

Ground 1

Counsel the appellant faulted the learned trial Judge for holding that the cause of death was not proved by the appellant. He submitted that PW10, Dr. Joseph Mutyogoma who examined the deceased testified that the cause of death was severe closed head injury which was not compatible with life and secondary to blunt trauma to the head. Counsel added that the learned trial Judge erred when he held that the possibility that the deceased died of an accident would not be ruled out because in counsel's view PW4 testified that he heard someone lamenting ".....why are you killing me..." and further, PW4 heard someone say hold his mouth. Counsel added that in view of the evidence of PW10 and PW4, the cause of death by accident had to be ruled out because PW10 clearly stated in Exhibit P5, the medical report that the deceased did not

have any other injuries on the body apart from the head and had the deceased's death been caused by an accident, then he would not have sustained injuries only on the head.

In reply, counsel for the 1st respondent submitted that the learned trial Judge was right in holding as he did because the prosecution did not prove the cause of death to the satisfaction of Court and the evidence on record showed that the death was as a result of an accident. He invited Court to look at the evidence of PW2, the widow of the deceased at page 27 of the Record of Proceedings who described what was at the scene and the fact that the motorcycle was completely damaged. Counsel further submitted that PW10, the medical doctor testified that there was a severe closed head injury which was not compatible with life secondary to blunt trauma to the head. PW10 added that the trauma could have been caused by an accident.

In rejoinder, counsel for the appellant submitted that there was no evidence led by the respondents to show that the incident was caused by an accident. Counsel further submitted that PW9 at page 56 of the Record of Proceedings stated that there was no evidence during investigations that suggested an accident as the cause of death of the deceased and it is for that reason that the Crime of Scene Officer was not called.

Court's decision

It is settled law that there is a presumption that a homicide is unlawful unless excused by law, but the presumption can also be rebutted by evidence of an

accident or that it was permitted in the circumstances. It is also trite that proof of the unlawful nature of any death lies in the external injuries on the body.

Exhibit P.5, the Post-Mortem report which was authored by Dr. Joseph Mutyogoma (PW10) revealed that the deceased's body was drenched in wet clothes which was secondary to blood, there was a large bruise which was 7cm long and 1cm wide which was in the middle of his head, the bones were broken and there was a wound below his eye which was about 3-4cm wide, there was an old wound which was in the healing state on the right knee and there were no other wounds of any type anywhere on the body. He testified that the cause of death was severe closed head injury which was not compatible with life and secondary to blunt trauma to the head. However, during crossexamination, PW10 stated that he did not establish the cause of death and he could not tell what caused the trauma. However, any force could cause that including an accident.

PW2, Kakajeya Grace (wife of the deceased) told Court that when she proceeded to the crime scene, she found other people at the scene and she never saw anything else apart from the dead body of the deceased and the motorcycle on the other side which was in bad shape. He had a wound on the cheek like a stab wound. She further stated during cross examination that the motorcycle was completely damaged and no one said he was involved in an accident. She added that she never saw broken glasses.

PW9, AIP Aggrey Mpamizo Kanyomozi the investigation officer testified that there was damage to the motorcycle and the motorcycle was not subjected to an analysis. He added that he never came across any evidence that suggested an accident.

PW4, Kabigumira Joseph, testified that he went to check on his traps at 3am in the morning with his dogs. He had reached the farms in Bwanyi belonging to the deceased when his dogs started barking. He then heard voices of people and someone lamenting why he was being killed. He was frightened and stood still however, he saw the lights from the motorcycle and heard someone say finish, we hurry and go. He later on identified the voices to be for the respondents.

It was submitted for the appellant that because of the extensive damage of the motor cycle, the deceased would have had injuries on other parts of the body had it been an accident. On their part, the respondents argued that PW2 testified that the motorcycle was completely destroyed concluding that it was due to an accident and this caused the deceased's death.

These submissions are mere possibilities and cannot form the basis of a finding that the cause of death was either by accident or intentional. The arguments do not water down the evidence of PW4 who heard and saw the respondents at the scene of crime.

We therefore find that the cause of death of the deceased was intentional and not by accident.

Ground 1 therefore succeeds.

Ground 2

Counsel for the appellant faulted the learned trial Judge for holding that malice aforethought was not proved by the appellant. He submitted that considering the nature of the injuries which were inflicted on the head of the deceased as indicated in the medical report (exhibit P5) and the head being a vulnerable part of the body clearly showed that whoever inflicted the injuries on the deceased had malice aforethought. Counsel relied on ***Rex V Tubere s/o Ochen, (1945) EACA 63*** for the proposition that in arriving at the conclusion as to whether malice aforethought had been established, the Court must consider the weapon used, the manner in which it was used and the part of the body injured.

In reply, counsel for the 1st respondent submitted that the trial Judge rightly evaluated the evidence on malice aforethought before coming to a conclusion that there was no malice aforethought proved. Counsel further submitted that PW2, testified that there was a grudge between the 1st respondent and the deceased as the deceased's cows would trespass to the 1st respondent's farm and this could have escalated the intention to kill. He relied on ***Mulindwa James V Uganda, Criminal Appeal No.23 of 2014*** for the proposition that suspicion may be strong but the law is clear and settled. Suspicion however strong may not be sufficient to fix a person with criminal responsibility. Counsel further submitted that the trial Judge found that at the time of the

incident, the disputes between the deceased and the 1st respondent had ceased when the 1st respondent fenced off his land to curb the problem.

Court's decision

Malice aforethought is defined under ***Section 191 of the Penal Code Act*** to mean:

1. *An intention to cause death of any person, whether such person is the person actually killed or not; or*
2. *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.*

Malice aforethought, being a mental element of the offence of murder is difficult to prove by direct evidence. It can however be inferred from the nature of the weapon used (whether lethal or not), the part of the body targeted (whether vulnerable or not), the manner in which the weapon was used (whether repeatedly or not) and the conduct of the assailant before, during and after the incident (whether with impunity). See ***R V Tubere S/O Ochen (1945) 12 E.A.C.A 63.***

From the post mortem report, it was the deceased's head; a vulnerable part of the body that was hit and led to his death. PW10 testified that the deceased sustained severe injuries on the head, there was a large bruise which was 7cm

long and 1cm wide which was in the middle of his head, the skull bones were broken and there was a wound below his eye which was 3-4cm wide. Although no evidence of the weapon used was tendered, the courts have held that there is no burden on the prosecution to prove the nature of the instrument which was used in inflicting the harm, nor is there any obligation to prove how the instrument was obtained. ***See Solomon Mungai and Others V R (1965)1 EA 782.*** Even in the absence of a weapon, from the nature of injuries sustained as described by PW10 especially the broken skull bones, we can deduce that the weapon was lethal.

Regarding the conduct of the accused, PW2 the widow's testimony was that she found it strange that the respondents did not not attend her husband's funeral yet he was killed while helping to pick the 1st respondent's cows from Lukaya. In his own testimony, the 1st respondent (A1) stated that he travelled back to Kampala from Arua on 30th July and he called the deceased to help him go with his workers and pick his cows from Lukaya. The deceased met his death while carrying out A1's request.

It is therefore surprising that although he was in Kampala at the time, he did not attend the deceased's burial. This was suspicious conduct on the part of A1.

Ground 2 therefore succeeds

Ground 3 and 5

These grounds concerned the respondents' identity and the circumstantial evidence adduced. Counsel for the appellant referred to the evidence of PW4 who testified that on that fateful day, as he was on his way to check on his traps, he heard someone lamenting why he was being killed and by the help of the motorcycle lights, he was able to identify the 1st and 2nd respondents as they ran towards him. Counsel relied on ***Nabulere and others V Uganda (1979) HCB 77*** for the proposition that where a case depends solely on the identification by a single witness, the Judge should take into account various factors like the distance, the length of time that the accused was under observation, the light and the familiarity of the witness with the accused. Counsel added that the respondents were well known to PW4 as they were village mates and there was ample light from the lights of the motorcycle.

Counsel further submitted that in ***Nabulere (supra)***, Court stated that where the quality of identification is poor, Court should look for other evidence. He stated that there was still other evidence which corroborated the evidence of PW4 to wit; animosity between the 1st respondent and the deceased which emanated from the deceased's cows crossing to the 1st respondent's farm and PW1 had testified that the 1st respondent, had told him to warn his brother (the deceased) to leave his land as he would get problems because his cows had died of being infected with ticks from the deceased's cow. Secondly, the calling of the deceased by the 1st respondent on the day he was murdered requesting

him to transport two of his farm workers to Lukaya to take delivery of the new batch of twelve friesian cows he was expecting to arrive from Kiruhura that same evening yet there was already friction between the two. According to counsel, this was intended to lure the deceased into his trap of being murdered. Further that the evidence of the phone print out marked as exhibit P4 showed that the 1st respondent left Arua on 30th July, 2012 and was in Kampala on the day the deceased was murdered.

In reply, counsel for the 1st respondent submitted that the trial Judge properly evaluated the evidence before holding as he did. Counsel invited Court to look at page 131 of the Record of Appeal where the trial Judge found that the prosecution was relying on circumstantial evidence to prove its case and there were co-existing factors that weakened and destroyed the inference of guilt of the respondents.

Counsel further submitted that the failure to call the scene of crime officer whose evidence was material was an error on the part of the appellant because PW9 had indicated that his report was on file. He relied on ***Bukenya and Others V Uganda (1972) EA 551*** for the proposition that where it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.

Counsel invited Court to extensively analyse the evidence of PW4 who testified that he heard someone saying hurry and twist so that we can go. According to counsel, this contradicted the evidence of PW10, the medical doctor as he did not find any twisted bone in his conclusions. Counsel added that in a letter dated 10th October, 2012, the DPP indicated that the suspicion to warrant preferring a charge against Major Joel Babumba was not well founded and this was because prior to his death, the deceased and the 1st respondent were communicating well. According to counsel, the evidence of PW4 was concocted in order to pin the 1st respondent.

Counsel further submitted that the learned trial Judge was right to weigh the evidence of PW4 with the defence of the respondents because they both raised an alibi. He submitted that the 1st respondent had travelled to Arua between 27th July and 30th July, 2012 as evidence by Exhibit P.1 and P.2, the data print outs. He added that in weighing the testimony of PW4 *visa viz* the respondent's alibi, the trial Judge was right in concluding that the respondents had not only raised an alibi, they went ahead to prove the same.

Counsel for the 2nd respondent associated himself with the submissions of counsel for the 1st respondent. On ground 3, counsel submitted that the only evidence linking the 2nd respondent to the crime was that of PW4 which was evidence of a single identifying witness. PW4 testified that he had identified the 2nd respondent the night of the murder with the help of the light from the moving motor cycle. Counsel added that the witness did not tell Court how long

he had identified the 2nd respondent and also wrote his statement 6 months after the crime had been committed.

Court's resolution

There is no dispute that PW4 was the sole witness who identified the respondents at the scene of crime. It is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification. What is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a decision can reasonably be made that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error. See ***Okwang Peter V Uganda, Court of Appeal Criminal Appeal No.104 of 1999.***

It is important that the quality of the identification evidence is good so as to reduce the danger of mistaken identity. The factors which determine good quality include the distance between the accused, the length of time taken in the identification, the amount of light and familiarity of the witness with the accused. See ***Abdulla Bin Wendo and another V R [1953] EACA 166, Roria V Republic [1967] EA 583.***

According to the testimony of PW4, Kabigumira Joseph, he was moving with his dogs at 3am on the night of 30th July, 2012 and his dogs started barking when he reached the 1st respondent's farm in Bwanyi on Lukaya road. He

heard someone saying *"why are you killing me?"* He was frightened and stood still. He saw a flash light from a motorcycle and heard a person saying *"twist and we hurry and go"*. At that time a motorcycle came passing with flash lights and three people whom he could not recognize at that distance ran away from the approaching motorcycle and hid near where he was. He was then able to recognize A1 (Major Joel Babumba) and A2 (Baguma Alex). He knew A1 because he was a village mate and had also known Baguma for a long time.

Although counsel for the respondent challenged the evidence of PW4 on grounds that the post mortem report does not mention any twist on the deceased's body, we are of the considered view that it does not weaken or negate PW4's evidence regarding what he heard being said. He did not testify that he saw the deceased's bone being twisted.

The respondents raised the defence of an alibi. The 1st respondent in particular claimed to have been in Arua by the time the death occurred on 30th July, 2012. However, PW5 (Okuyo Emmanuel) rebutted this evidence and testified that he left Arua together with the 1st respondent on the 27th of July, 2012. On his part, the 2nd respondent's evidence was that he was at a vigil. However, DW1 could not account for his whereabouts between 10 pm and 5:30 am on the night of the murder.

The trial Judge found that 3:00am was dark and one would need assistance of light to identify anything at that time of the night. Secondly, that the motorcycle which provided light could not have spent a long time to provide

ample lighting at the scene. Thirdly, that PW4 having realized that there was something amiss at the scene, he got so frightened and hid himself. He therefore concluded that these conditions could not have been conducive for proper identification.

We find that PW4 was able to identify the respondents because they were well known to him as village mates and also the light from the motorcycle provided him with enough light for proper identification. Even when the motorcycle was moving past, the accused ran and hid near where PW4 was taking cover.

Counsel for the 2nd respondent took issue with the fact that PW4 wrote his statement 6 months after the crime had been committed. The trial Judge also found the duration of 6 months very suspect. However, we find that PW4 satisfactorily explained reasons for the delay. He attributed it to fear of the deceased's family members' reaction and that he risked being treated as a suspect by police because A1 was a soldier and could kill him. We find no merit on the issue of lapse of time since PW4 sufficiently explained why he made his statement after 6 months.

Regarding circumstantial evidence, it is settled law that generally in criminal cases, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused. See ***Janet Mureeba and 2 Others V Uganda, Criminal Appeal No.13 of 2003 (unreported)***. The trial Judge found that the prosecution was relying on circumstantial evidence to prove its case and there were co-existing factors that weakened and

destroyed the inference of guilt of the respondents. We shall re-evaluate the circumstantial evidence on record.

It was the prosecution's case that there was a rift between the deceased and the 1st respondent as a result of land wrangles. To prove that, PW1 testified that on two occasions, the 1st respondent told him to warn his brother (the deceased) to stop trespassing on his land lest he would be killed. It was PW2's testimony that she was very concerned upon learning that the deceased was going to help the 1st respondent on the fateful day of his murder because of the toxic relationship between them. She stated that she even tried to dissuade him from going but in vain.

PW3's testimony was that four days prior to the deceased's demise, he was very surprised to see Nabaasa Justus, one of the deceased's workers conversing with the 1st respondent near his pineapple garden because he was aware that they were not on good terms. PW6 (Tumuramye Obed) Detective Assistant Inspector of Police who recorded statements in the murder on 8th August, 2012 testified that he established that there was a grudge between the 1st respondent and the deceased emanating from trespass of cows onto his farm.

It was also the prosecution case that one of the deceased's worker and another worker of 1st respondent mysteriously disppeared from the village immediately after the gruesome murder, which pointed to the 1st respondent's guilt. PW2 testified that her worker Nabaasa Justus who had worked with them for only three weeks struck an uneasy relationship with the 1st respondent and

disappeared from the village after the death of the deceased to date. PW6 testified that he established from one of the 1st respondent's worker, a one Nuwahereza a.k.a Kajabura who left together with the deceased on the fateful day that Nabaasa Justus, a casual worker of the deceased disappeared the night of the murder. Further, that Nshija, a worker of the 1st respondent also disappeared hardly a week after.

It was also the prosecution's case that owing to the toxic relationship between the deceased and A1, it was suspicious that A1 made several calls to the deceased on the fateful day. PW6 testified that after he obtained the data print out of A1's phone, he established that A1 had called the deceased four times on that fateful day; at 11:37am, 11:38am, 11:56am and 12:05pm. He further found out that the deceased had called A1's worker, Nuwahereza a.k.a Kajabura at 11:52am. He stated that such communication and engagement of the deceased together with one of his workers to go to Lukaya raised suspicion and could have been A1's planned move to monitor the deceased's life in order to end it.

PW6's evidence regarding data print out of A1's phone was corroborated by PW7 (Corporal Magoola Brian) who stated that when he analysed the printouts, he established that the common thread of communication between the two began around 22nd to 31st July, 2012. A1's Warid mobile number often called the deceased whose mobile number was registered on the MTN Network. He reiterated that the on 30th July, 2012 A1 callled the deceased for times. He

further testified that on 31st July, 2012, A1's Warid number called the deceased number and the deceased returned the call at 8:42:05.

He noted that from 26th to 31st July 2012, A1's MTN line never made any calls from the 22nd to 30th July, 2012 but was only sending and receiving messages. He stated that the Warid network was at that time not providing location of any calls by then but emphasized that basing on location of A1's MTN number, A1 was in Kampala on 30th July, 2012. He observed that A1 was using his Warid number to call the deceased yet that was very expensive.

In his defence, A1 admitted that the fencing off of his land brought about some misunderstandings, however, he kept on educating people on the need to respect other people's land. He also admitted to reporting 2 cases to police that would call the people and caution them not to trespass into other people's land. He stated that it was the family of the late Kazungu and Kamuhanda whose animals would cross over and police cautioned them. Further that another person called Mutahunga bought the land between A1 and the deceased, he erected a fence and the path through the farm was demarcated. The fencing solved the problem of straying of the cows to his farm and hence the misunderstandings ceased.

A1 added that it was disturbing for someone to claim that he had a bad relationship with the deceased because he would call the deceased and engage him in business ideas. That the deceased would also be his broker as he would

sell him cows and this kept a cordial relationship despite the deceased cows straying over to his land.

Upon analysis of the evidence on record, we are satisfied that there was a rift between the deceased and A1 arising out of a land dispute that on a couple of ocassions escalated to police involvement and did not cease by the time of the deceased was murdered. We also find that the incessant calls to the deceased by the 1st respondent on the fateful day were well calculated to lure the deceased to his death. Although he raised the defence of alibi, we are satisfied by the evidence of Okuyo Emmanuel that the 1st respondent was not in Arua during the incident and was placed at the scene of crime by PW4. Additionally, we also find the relationship between Nabaasa Justus, the deceased's worker who had just been hired and A1 and his subsequent disappearance after the murder to be suspicious. The disappearance of Nshija, the 1st respondent's worker shortly after the murder also raises even more suspicion.

We have already held that the respondents were well identified by PW4 because they were well known to him as village mates and also the light from the motorcycle provided him with enough light for proper identification. The above factors in our view strengthen the inference of guilt of the 1st respondent. We are of the considered view that the circumstantial evidence points irresistibly to the guilt of the respondents.

Therefore grounds 3 and 5 of the appeal succeed.

Ground 4

Counsel for the appellant faulted the learned trial Judge for closing the respondents defence case before the prosecution cross-examined the defence witnesses. He invited Court to look at page 74 paragraph 3 of the Record of Proceedings where Court stated that "since the accused persons and their counsel are not in Court, I take it that they have no further defence to adduce. I will therefore direct that the defence closes their case..." Counsel added that he did not apply to cross examine the defence witnesses because the defence counsel was intending to continue with his examination in chief. Counsel prayed that this Honourable Court substitutes the respondent's acquittal with a conviction.

Counsel for the 1st respondent supported the trial Judge's decision of closing the respondents' defence case before the prosecution cross-examined the defence witnesses because the prosecution elected not to cross examine the witnesses.

Court's decision

We have analysed the record of Appeal from the lower Court. Page 74 reflects thus;

***"Nyanzi**: I seek for adjournment to adduce more evidence. I still have 3 witnesses to call it is approaching 6:00pm*

Court: *OK case adjourned till 9th, 10th and 11th of May 2016 at 2:30pm. Bail extended to A1 till then A2 further remanded till then.....*

16.08.2016

David Ndamuranyi Ateenyi for the state

A1 not in Court

A2 not in Court

Counsel for the accused absent

Both assessors in Court.

Ndamuranyi: *The accused are not in Court and their counsel. This matter was coming up for further defence. I seek guidance from the Court.*

Court: *Since the accused persons and their counsel are not in Court, I take it that they have no further defence to adduce. I will order that the defence files their written submissions by 30th August 2016. The state will then file their reply by 14th September 2016 if there is any reply it will be filed by 21st September 2016. This Court will then sum up to the assessors on 30th September 2016."*

From the above discourse, we cannot accept counsel for the appellant's assertion that the trial judge closed the defence case before the prosecution cross-examined the defence witnesses. The evidence on Court record shows that defence counsel intended to adduce more evidence by producing three witnesses which did not happen. As such, the issue of cross examination by

prosecution cannot arise as provided by S.74 of the TIA because no defence witness was led in examination in chief. S.74 of the TIA states thus;

> ***74. Defence.***
>
> *(1) The accused person or his or her advocate may then open his or her case, stating the facts or law on which he or she intends to rely, and making such comments as he or she thinks necessary on the evidence for the prosecution; and the accused person may then give evidence on his or her own behalf or make an unsworn statement, and he or she or his or her advocate may examine his or her witnesses, if any, and after their crossexamination and reexamination, if any, may sum up his or her case.*

From the above provision of the law, it is not mandatory for an accused or his counsel to call witnesses but when they opt to, the prosecution has the liberty to cross examine any such witness. We note that the respondents called one witness each and their counsel intended to call three more witnesses by the time the trial Judge closed the defence case. There appears to be no dispute over cross examination of the same. What appears to be in contention are the alleged three remaining witnesses. We find no merit in counsel for the appellant's excuse that he did not apply to cross examine the defence witnesses because the defence counsel was intending to continue with his examination in chief. We are fortified our view because the said witnesses were never called and thus, the issue of cross examining them could not arise. Be as it may, from

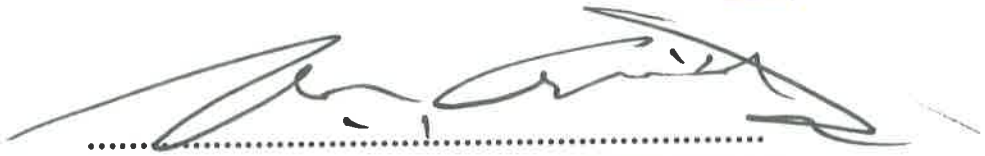
the record, counsel for the prosecution did not make any attempt to inform the trial Judge of his alleged intentions to cross examine any witnesses after the Judge provided the guidance that he sought for. He cannot be seen to fault the trial Judge over the same on appeal.

Ground 4 of the appeal therefore fails.

In conclusion, the appeal substantially succeeds. We hereby set aside the acquittal of both respondents and enter a conviction of murder contrary to sections 188 and 189 of the Penal Code Act. We order for the immediate arrest of both respondents and that a warrant of arrest be issued for that purpose. We further order that upon their arrest, the respondents be produced before a Judge of the High Court of Masaka or High Court Criminal Division Kampala for sentencing.

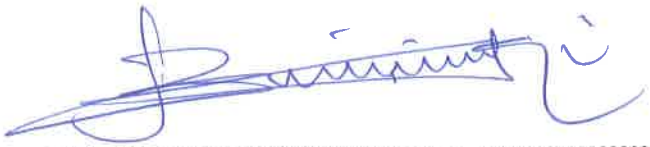
We so order

Dated at Kampala this ....7th....day of ....July.... 2020



.....

HON. MR. JUSTICE ALFONSE OWINY-DOLLO
DEPUTY CHIEF JUSTICE



.....

HON. JUSTICE BARISHAKI CHEBORION
JUSTICE OF APPEAL