

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**  
**CRIMINAL APPEAL No. 14 OF 2010**

*(An appeal against conviction and sentence by Justice Lawrence Gidudu, in High Court Criminal Session Case No. 0123 of 2009, at Kabale)*

1. IP BUKO DIFASI ..... }  
2. No. 22973 D/CPL. KARUHIZE MICHAEL ..... } APPELLANTS

**VERSUS**

UGANDA ..... RESPONDENT

**CORAM:**

1. HON. MR. JUSTICE KENNETH KAKURU, J.A.
2. HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.
3. HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.

**JUDGMENT OF THE COURT**

This appeal is against the decision by Gidudu J. in *Kabale Criminal Session Case No. 0123 of 2009*, wherein the learned trial judge convicted the appellants of murder c/ss. 188 and 189 of the Penal Code Act; and sentenced each of them to 14 years in prison. Both are dissatisfied with the conviction; against which they have now appealed to this Court. The three grounds of appeal, as are contained in the supplementary memorandum of appeal, are that: -

1. *The learned trial judge erred in law and fact when he held that the arrest, detention and release of the deceased on a purported Police bond and his arrest by A2 was dramatic, illegal and an abuse of Police powers.*
2. *The learned trial judge grossly erred in law and fact when he held that the evidence of DW4 was unbelievable for lack of a proper background to the meeting; thereby arriving at the wrong conclusion that the deceased was last seen in the custody and or hands of A2 who got him from A1.*
3. *The learned trial judge erred in law and fact when he held that the time frame A1 and A2 gave/rested their defence on was a naked lie thereby arriving at the wrong conclusion that they together others in the security circles provided a pre-arranged master plan to eliminate the deceased, and handed him to his killers.*

The appellants have therefore pleaded with this Court to allow their respective appeal, quash the conviction, and accordingly set aside the sentence.

Andrew Ssebuggwawo, who argued the appeal for the Appellants, argued the three grounds of appeal together. He vehemently attacked many of the learned trial judge's findings in the judgment as having no basis at all. These included the finding that the arrest and detention of the deceased was illegal, and was a result of a plot hatched by the Appellants to cause the disposal of the deceased. He submitted that there was evidence from the prosecution

witnesses that the arrest of the deceased was lawful; and the police actually charged the deceased with an offence.

He also faulted the learned trial judge for making a finding that the release of the deceased on bond, from police custody, had been stage managed; and that, in reality, the appellants never intended to, and in fact never released the deceased from detention. Counsel argued that this finding was not supported any evidence at all. Furthermore, learned Counsel faulted the trial judge for discounting the testimony by DW4, that he had met the deceased walking at the trading centre in the evening; and giving the ground for rejection of that testimony that the alleged meeting was casual, and there was no background to it.

Principal State Attorney Rose Tumuheise, Counsel for the Respondent, opposed the appeal; and supported both convictions and sentences. She contended in her submission in reply that the learned trial judge's findings, under attack by Counsel for the appellants, were all based on evidence adduced at the trial; much of which, she conceded, was circumstantial. She argued further that the learned trial judge noted the multiple abnormalities in the actions of the appellants with regard to how they treated the deceased while he was under their custody; and therefore, he correctly concluded that all these were designed for, and indeed resulted in, the murder of the deceased.

## RESOLUTION OF THE APPEAL

As a first appellate Court, and in compliance with the provisions of *Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions*, we have to subject the evidence adduced at the trial, to fresh appraisal and scrutiny; and to reach our own conclusion thereon. However, in doing so, we must not disregard the judgment of the trial Court against which the appeal lies. This duty, which is incumbent on us to exercise, is well articulated in numerous cases. In *Kifamunte vs U. S.C. Crim. Appeal No. 10 of 1997*, the Supreme Court reaffirmed this duty when it stated as follows: -

*"We agree that on first appeal from a conviction by a judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole, and its own decision thereon. 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."*

Other authorities on this proposition of the law includes cases such as *Pandya vs R. [1957] E.A. 336*, *Bogere Moses vs U. - S.C. Crim. Appeal No. 1 of 1997*. It is our own appraisal and scrutiny of the evidence led at the trial, that should inform our findings thereon and thus determine whether, or not, to fault the trial Court in its conviction and sentencing of the

appellants. The other point worthy of note, which is emphasised in the authorities on the matter, is that in the exercise of the duty to make fresh appraisal of evidence, as a first appellate Court, we must bear in mind that we have not had the benefit of observing the witnesses testify in Court. This being so, our competence to pronounce ourselves on the issue of the demeanour of the witnesses is incapacitated.

The facts of the case before us are that one Mutekanga Innocent Dallas *alias* Twinomujuni Innocent (hereinafter referred to as the deceased) was arrested and detained at Kabale Police Station. The 1<sup>st</sup> appellant who was the O/C of the Station released him on police bond; but, however, the 2<sup>nd</sup> appellant collected him from the Police Station. The two police officers then went with the deceased to the 2<sup>nd</sup> appellant's office, located at the District Administration Office Block. The 1<sup>st</sup> appellant left the deceased there with the 2<sup>nd</sup> appellant. The following day, the body of the deceased was found some twelve kilometres away; with two bullet wounds on it.

The appellants were indicted, tried, and convicted of the deceased's murder; hence this appeal. At the trial, the appellants did not contest the proof by the prosecution of the ingredients that constitute the offence of murder; save for their alleged participation in the commission of the offence. The learned trial judge himself pointed out the

absence of any direct evidence before him that any of the appellants personally pulled the trigger of the gun that caused death. Counsel for the Respondent conceded, rightly in our view, that the evidence the learned trial judge relied on to convict the appellants was entirely circumstantial.

In *R. vs Taylor Wear & Donovar* [1928] 21 Cr. App. R 20 (cited in *Tumuheirwe vs Uganda* [1967] E.A. 328), the Court stated that it is no derogation that evidence adduced, to prove a case, is circumstantial. To the contrary, circumstantial evidence may offer the best evidence; as it can prove a case with mathematical accuracy. However, as Lord Normand cautioned in *Teper vs R.* 2 [1952] A.C. 480 at 489 (cited in *Simon Musoke vs. R.* [1958] E.A. 715), circumstantial evidence may be fabricated to cast suspicion on a person. Hence, before drawing any inference of guilt there from, Court must be sure that there are no circumstances existing, that either weakens or altogether destroys the inference of guilt.

Accordingly then it is incumbent on Court to apply well established tests, to enable it determine whether the circumstantial evidence adduced before it suffices to prove the case against the accused person to the standard required by law for proof of guilt. In *Janet Mureeba & 2 Ors vs Uganda - S.C. Crim. Appeal No. 13 of 2003*, the Supreme Court restated the test to be applied to circumstantial evidence as follows: -

*"There are many decided cases which set out tests to be applied in relying on circumstantial evidence. Generally, in the criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused. In R. vs Kiperung Arap Koske & Anor (1949) 16 E.A.C.A. 135, it was stated that in order to justify on circumstantial evidence, the evidence of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. That statement of the law was approved by the E.A. Court of Appeal in Simon Musoke vs R. [1958] E.A. 715."*

Other leading authorities in our jurisdiction, on the tests to apply when relying on circumstantial evidence, include *Sharma & Kumar vs. Uganda - S.C. Crim. Appeal No. 44 of 2000*. In *S.C. Crim. Appeal No. 18 of 2002 - Byaruhanga Fodori vs. Uganda [2005] 1 U.L.S.R. 12*, at p. 14, the Court succinctly spelt out the position of the law on circumstantial evidence as follows: -

*"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which weaken*

*or destroy the inference of guilt. (See S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480)."*

This being so, we must examine and determine whether in the case before us, the learned trial judge subjected the circumstantial evidence adduced before him, which he relied upon to convict the appellants, to the requisite mandatory tests he was under duty to apply to such evidence, before founding their convictions thereon. He recast, quite correctly in our view, the tests circumstantial evidence, which he referred to as evidence of the surrounding circumstances, should pass before conviction can be founded on such evidence. He spelt out that the evidence must: -

- "(a) produce moral certainty to the exclusion of all reasonable doubt;*
- (b) be inconsistent with the innocence of the accused;*
- (c) be incapable of explanation on any other reasonable hypothesis than that of guilt;*
- (d) be such that the inculpatory facts are incompatible with the innocence of the accused;*
- (e) lead to the irresistible inference that the accused committed the crime."*

For some of the authorities on that proposition, he referred to the cases of *Uganda vs Leo Mubyazita & 2 Ors [1972]2 ULR 3*,



*Charles Kayumbe vs Uganda [1985] HCB 9, and Uganda vs Albino Ajok [1974] HCB 176.*

It is apparent that the trial judge began his evaluation and scrutiny of the evidence adduced before him, with a predetermined mind. For instance, he began as follows: -

*"It is not in dispute that the deceased was in police custody and was released from custody by A1 but before the deceased could leave the station, A2 arrived and A1 provided transport that took them to A2's office. That was the last time the deceased was seen alive. The following morning he was dead. In view of this undisputed fact, let me examine why and how the deceased was arrested."*  
*(emphasis added)*

With respect to the learned trial judge, we find that he erred in his treatment of evidence adduced at the trial. He made a finding that there was no dispute that the last time the deceased was seen alive was at the office of the 2<sup>nd</sup> appellant; and then proceeded to examine evidence to justify this finding. The proper approach is for Court to examine all the evidence adduced regarding a matter before it; and then reach any conclusion in that regard. Court would be in error for it to reach conclusions on a matter in issue before it, and thereafter examine the evidence adduced, to justify the conclusions it has already reached.

Similarly, Court should not make any finding on a matter before considering all the evidence adduced before it touching on the matter. In *Abdu Ngobi vs Uganda, S.C.Cr. Appeal No. 10 of 1991*, the Supreme Court expressed itself as follows; with regard to treatment of evidence: -

*"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged."*

In the matter before us, Kalema Charles (DW4) testified that he saw the deceased walking in town in the evening of the day the deceased was, on the evidence, granted police bond. This is important, because it means DW4 saw the deceased after the deceased had been taken to the 2<sup>nd</sup> appellant's office. In view of this evidence, the trial judge's finding that the evidence that the deceased was last seen alive with the

2<sup>nd</sup> appellant was undisputed, was unjustified. The learned trial judge should have first considered DW4's evidence in this regard, and resolved it, before coming to any conclusion on the time, or the person with whom, the deceased was last seen alive.

In the same vein, the trial judge faulted the arrest of the deceased by the police from a bar, and termed it as being *'illegal and an abuse of the police powers of arrest'*, contending that *'there was no pending case against the deceased at Kabale Police nor had the deceased committed any offence in PW5's bar that night.'* He then concluded that *'I shall draw a conclusion in this arrest after discussing other aspects of this case.'* With due respect, the learned trial judge was in error in his approach to the consideration of evidence. He ought not to have determined the legality or otherwise of the arrest of the deceased before examining all the evidence before him on this, to enable him reach the necessary conclusions.

In *Okethi Okale v. R. [1965] E.A. 555*, the trial judge had misdirected himself on the onus of proof; and made remark on the defence evidence, stating that: -

*"I have given consideration to this unsworn evidence but I do not think it sufficient to displace the case built up by the prosecution or to produce a 'reasonable doubt'."*

On appeal, the Court responded at p. 559 as follows: -

*"We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in Ndege Maragwa v. Republic (1965) E.A.C.A. Criminal Appeal No. 156 of 1964 (unreported), where the trial judge had used similar expressions this court said:*

*"... we find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution. Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence.*

*In our view, it is the duty of the trial judge ... to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, of course, apply to the consideration whether or not there is a case to answer, when the attitude of the*

*court is necessarily and essentially different.)” (emphasis added).*

Furthermore, the learned trial judge came to a finding that the arrest of the deceased from a bar, when there was no case pending against him at the police, was illegal. We wish to point out that the trial judge erred in this regard. It is not only where a case is pending at the police, against a person, that such a person is liable to be arrested. The Criminal Procedure Code Act provides in section 10 thereof, on powers of arrest by a police officer, as follows: -

*"Any police officer may, without an order from a magistrate and without a warrant, arrest -*

*(a) any person whom he or she suspects upon reasonable grounds of having committed a cognisable offence ... ..*

*... ..*

*(i) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing."*

Prosecution witnesses Kamugisha Keneth Katete (PW5) who tipped the police about the deceased, and No. 32668 D/C Habomugisha Rogers (PW6) who arrested the deceased, testified that the arrest followed information that the deceased had stolen some money in Kisoro. Upon the arrest,

the police found the deceased with counterfeit notes; which constituted another offence. Thus, the arrest of the deceased was in full compliance with the provisions of section 10 of the Criminal Procedure Code Act reproduced above. From the evidence regarding the arrest, and the law applicable, the trial judge's finding that the arrest of the deceased was dramatic and illegal was, with respect, without any basis.

Further still, the trial judge apparently ignored crucial evidence before him regarding the circumstances surrounding the release of the deceased on bond. He did not believe the evidence by PW6 that after the 1<sup>st</sup> appellant had signed the police bond form, he (PW6) and another officer took the deceased to the counter and left him there to sign for and be given his possessions. On this, the learned trial judge stated as follows: -

*"I would not believe such evidence where police officers leave a suspect at the counter and walk away even if he is on bond. It would be the other way round for the suspect released on bond to leave the counter and go away leaving the police officers behind since they are on duty."*

We note from PW6's evidence that his role was to deliver the deceased to the counter, with the police bond duly signed, to enable the deceased collect his personal effects from officers on duty at the counter. There was no contrary evidence showing that PW6 was also the officer responsible

for giving the deceased his personal effects from the counter upon his release on police bond. There was therefore nothing wrong with his leaving the deceased at the counter as he did. We find, again with respect, that the learned trial judge had no basis for disbelieving PW6. He evidently erred and misdirected himself in this regard.

The learned trial judge also faulted the assertion by the appellants that the deceased was granted police bond; after which he was taken to the 2<sup>nd</sup> appellant's office for investigation on an altogether different matter, and was released around 5.00 p.m. He instead believed, and relied mainly on, the evidence of SPC Sunday Amos (PW8) that he took the deceased together with the 1<sup>st</sup> and 2<sup>nd</sup> appellants to the latter's office at Makanga Hill at about 6.00 p.m. He also believed other prosecution witnesses who claimed either to have seen the deceased, or the 1<sup>st</sup> appellant's vehicle, at Makanga Hill Offices around 6.00 p.m. on the fateful day.

We also note that the witnesses testified in Court two years after the events. We therefore find difficulty with the prosecution witnesses specifying the exact time of the occurrences of the events they were testifying about, and yet at the time the events took place they had no reason to check on their respective watches. Second, PW8, whom the learned trial judge believed, gave a questionable account of the time the events occurred. He claimed that he booked out

of Myanjari police post, a distance away from the 1<sup>st</sup> appellant's office, at 6.00 p.m.; and yet he claims to have witnessed the 2<sup>nd</sup> appellant taking the deceased away from the 1<sup>st</sup> appellant's office to his office at Makanga Hill at 6.00 p.m. This means he participated in sequential events at the same time; but in various locations, away from each other!

The learned trial judge then delved in conjecture, when in his judgment he stated as follows: -

*"Was it a coincidence that A2, who had known the deceased as a notorious thief in Kabale arrived at the police station and according to A1, he intercepted the deceased to interrogate him on matters of National Security? Or was this a pre-arranged plot to eliminate the deceased reputed to be a notorious thief in Kabale. Having discussed the time frame given by the defence, I would not labour this issue any further. Whatever was being done, was pre-arranged and moved according to plan. The release of the deceased on the purported police bond was as dramatic as his arrest by a mere phone call by a bar owner to a police officer (PW6) who was not even on duty but was in his house in the police barracks.*

*No charges were preferred save for rumours that the deceased had stolen money in Kisoro; but Kisoro police had not sought assistance from Kabale police to arrest the suspect. Similarly, the alleged counterfeit notes which were*



*the basis of his detention and bond appear to have been mere imaginations. This is so because the deceased would have been charged in Court on a holding charge as the police verify from experts whether the notes were counterfeits or not. The whole arrest, detention and subsequent disposal of the deceased was illegal."*

In the learned trial judge's consideration of the evidence, shown above, he raised two reasonable hypotheses that could explain the arrest of the deceased. One is that the arrest was legal; while the other, is that it was unlawful. He then concluded that it is the unlawful hypothesis, which explains the arrest. In this, he ignored the evidence showing that the arrest was legal. He dwelt instead on the time frame for the release, on bond, of the deceased; and his re-arrest, and later being discovered dead. We have already pointed out that the arrest *per se* was not clothed with any illegality; a matter we will not belabour again. We shall only consider some other matters, which the learned trial judge has raised.

The learned trial judge found that there were no charges preferred against the deceased upon arrest; and that his alleged having been found with counterfeit notes, upon arrest, appear to have been mere imaginations since he was not charged in Court. First, this finding is controverted by the evidence adduced by the prosecution. It was the testimony of D/AIP Tumwesigye Silver (PW4) that he saw a

lock-up book in which it was recorded that Mutekanga Dallas (the deceased) had been detained at Kabale Police Station, for being in possession of counterfeit notes; and the investigating officer was D/C Mubangizi. Second, failure by the police to charge a suspect in Court does not make the grounds for the arrest and detention mere imaginations.

Accordingly then, his finding that '*the whole arrest, detention and subsequent disposal of the deceased was illegal*' was, with respect, not supported by evidence. Be it as it may, the truth is that the arrest of the deceased was lawful; thus seriously weakening the entirely circumstantial evidence, which he relied on. The other reasonable hypothesis made it dangerous and unsafe for him to convict the appellants basing on circumstantial evidence alone. He also made a finding that '*the arrest, detention, and purported release on bond of the deceased was stage managed and tainted with criminality and abuse of powers of the police to arrest citizens*'.

He made a further finding that the release of the deceased was '*clouded in a mystery only known to A1 and A2*' (now the 1<sup>st</sup> and 2<sup>nd</sup> appellants herein). However, there is the testimony of Kalema Charles (DW4) that he knew the deceased with whom he used to take *bushera* local brew. He stated positively that at around 8.00 p.m. of the day the deceased was released on police bond and taken to the 2<sup>nd</sup>

appellant's office, he met and greeted the deceased who was walking on the road at Highland Hotel, Kabale Town, going in the opposite direction.

The learned trial judge rejected this evidence; and termed it as 'casual' and 'unbelievable for lack of proper background to that meeting.' He went further to state as follows: -

*"I have no doubt in my mind that the person who killed the deceased did not find him roaming on the streets of Kabale or along a village path. The killers must have got the deceased from the hands of A2 who himself had got the deceased from the hands of A1 as part of a bigger plan to eliminate what the two police officers believed was a reported criminal in society. The time when the deceased was last in the hands of the accused and the time when he was found dead was, in the circumstance of this case, so short as to reasonably attribute his death to the design and plot of the two accused persons acting in concert with common intention to prosecute an unlawful purpose."*

With the greatest respect to the learned trial judge, we find that his application of inference was rather overstretched. There was no evidence whatever, before him, to suggest that there were any persons with whom the appellants were acting in concert to harm the deceased. If anything, the initial arrest of the deceased had neither been instigated nor effected by the appellants. There is no evidence that the

appellants had anything personal against the deceased. There was no basis then for the learned judge's finding that, in execution of a sinister design, the appellants handed the deceased over to some unnamed persons; to be killed.

Courts of law must always act or rely only on credible or cogent evidence properly adduced before it; and should not indulge in conjecture, speculation, attractive reasoning, unjustified inferences, and reliance on fanciful theories. In the *Okethi Okale v. R.* case (supra), the trial judge had come up with a theory inconsistent with the actual evidence adduced in support of the prosecution case on how the fatal injury had been caused; and he is quoted at p. 557 to have stated thus: -

*"This is a case in which reasoning has to play a greater part than actual evidence."*

On appeal, the Court responded tersely as follows: -

*"With all due respect to the learned trial judge, we think that this is a novel proposition, for in every trial a conviction can only be based on actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches (see R. vs Isaac [1965] Crim. L.R. 174)."*

In the instant case before us, however, although the learned trial judge delved in speculation and fanciful theories, there is a positive, though unintended, import of the inference he drew about the physical participation of the appellants. This is that, thereby, he accepted the appellants' defence of alibi that they were not at the scene of the deceased's murder that fateful night, but were in their respective homes; thus weakening the prosecution case.

With regard to the evidence of DW4, which the learned trial judge discarded promptly as being casual, we are fully aware that as an appellate Court, we had no benefit of observing DW4 testify at the trial; and for this, we are constrained from interfering with the trial Court's finding on matters pertaining to his demeanour. However, the law is that an appellate Court may nonetheless interfere with such finding when the facts show that the learned trial judge's finding, on credibility of a witness, was unjustified.

The Supreme Court has effectively pronounced itself on, and settled this point in a number of cases. In *Fr. Nasensio Begumisa & Ors vs Eric Tibegaga - S.C. Civ. Appeal No. 17 of 2002*, Mulenga JSC stated as follows: -

*"The legal obligation on a first appellate Court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well-settled principle that on a first appeal, the parties are entitled to obtain*

*from the appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal Court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This principle has been consistently enforced ... In Coghlan vs Cumberland (1898) 1 Ch. 704, the Court of Appeal of England put the matter as follows -*

*'Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it might have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. ...*

*When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not;*

and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." (emphasis added)

The Supreme Court similarly pronounced itself on the matter in *S.C. Crim. Appeal No. 10 of 1997 – Kifamunte Henry vs Uganda* [1999] KALR 50; where it also cited *Pandya vs R.* [1957] E.A. 336 and *Okeno vs Republic* [1972] E.A. 32, and *Charles B. Bitwire vs Uganda – S.C. Crim. Appeal No. 23 of 1985*.

Accordingly then, in the instant case before us, we find that there was no reason why DW4 should have furnished a background to his meeting with the deceased that evening. DW4 was quite clear that this was a chance meeting; and they were both walking in opposite directions. Since the learned trial judge rejected the evidence of DW4 on that ground only, and for no other reason, we find this ground to be unjustified; and so, this is a proper occasion for us as an appellate Court to differ from the trial judge in that regard.

The trial judge ought to have considered the evidence of DW4 alongside the evidence adduced by the prosecution and the appellants. DW4's evidence corroborated that of the 2<sup>nd</sup> appellant that upon interrogating the deceased, he set him free. The learned trial judge dwelt at length on the issue of whether the deceased was still with the 2<sup>nd</sup> appellant around 6.00 p.m. or had been released earlier. We have pointed out

that specificity of time was not an issue here since none of the witnesses had reason to check on their watches to determine the time these events took place. What is crucial is that an independent witness saw the deceased later than when he was seen in the company of the 2<sup>nd</sup> appellant.

There was one relevant and compelling evidence adduced at the trial, in fact by prosecution witnesses, which the learned trial judge did not give adequate consideration to, in so far as it had a bearing on the worth of the circumstantial evidence before him. This was the fact that various witnesses who knew the deceased described him as a notorious person who had even been detained a number of times. Kamugisha Keneth Katete (PW5), referred to the deceased as an idler, and a thief who used to steal his chicken. He also knew the deceased as a robber in town. Muhereza Nestori (PW7), the deceased's own brother, testified that the deceased had been to prison three times before, on charges the witness did not know.

Musimenta Obadia (PW10), then DISO of Kabale, who had instigated the initial arrest of the deceased testified that he had learnt that the deceased was a notorious criminal who used to cut people in town; and that LCs used to complain about him as a killer. 2<sup>nd</sup> appellant was a member of the Security Committee. Matsiko Robert (PW11) and LDU Commander testified that he had not known the deceased;



but had heard from people that he was a thief. The 2<sup>nd</sup> appellant who testified as DW2 was Ag. District Special Branch Officer of Kabale. He knew the deceased as the most feared notorious thug in Kabale. Added to this was the allegation that the deceased had stolen money from Kisoro; and was found with counterfeit notes on him.

It was thus unsafe for the learned trial judge to convict the appellants basing on an inference of guilt drawn from evidence, which was entirely circumstantial. The inculpatory facts before him did not exclusively, or irresistibly, point at the appellants as having committed the murder. The facts appear to be compatible with their innocence as they were capable of explanation upon some other reasonable hypothesis, than that of their guilt. The possibility that some unknown person, whom the deceased had wronged, might have killed him, presented a co-existing circumstance convincingly exculpating the appellants from the murder for which they were convicted; thus occasioning this appeal.

Therefore, if the learned trial judge had applied the requisite tests laid down for evidence that is circumstantial, and had considered the sum total of all the evidence adduced before him, he would not have found the appellants guilty of the murder of the deceased as he did; and would not have convicted them. In the result, we find that the appeal has merit. The convictions cannot stand. We therefore have to

quash the convictions appealed against; as we hereby do. It follows then that the sentences imposed on the appellants are also, accordingly set aside. Both appellants must, forthwith, be released from prison and set free; save for any of them who is being lawfully held for some other reason.

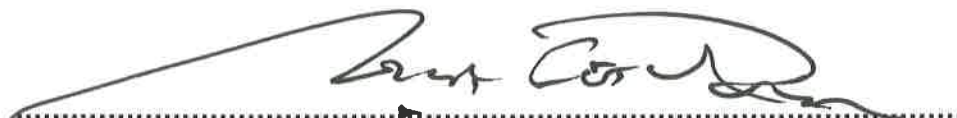
Dated at Mbarara; this 6<sup>th</sup> day of December 2016



1. HON. MR. JUSTICE KENNETH KAKURU, J.A.



2. HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.



3. HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.