THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL No. 820 OF 2014

(An appeal against conviction and sentence by Justice David Matovu, in Mbarara High Court Criminal Session Case No. 0015 of 2013)

1. AHIMBISIBWE ALLAN ..... }
2. TURAMYE JOHN BOSCO ..... } 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 arises from the decision by Justice David Matovu, in *Mbarara Criminal Session Case No. 0015 of 2013*, in which the learned trial judge convicted the appellants of murder c/ss. 188 and 189 of the Penal Code Act; and sentenced them, respectively, to 25 years and 20 years in prison. Both are aggrieved by the conviction; hence this appeal. The initial grounds of appeal, set out in the memorandum of appeal, are that: -

1. ***The trial judge erred in law and fact when he failed to properly evaluate the evidence on record; thus reaching a wrong decision.***

2. ***The trial judge erred in law and fact when he convicted the appellants on hearsay evidence; thus causing a miscarriage of justice.***

3. ***The trial judge erred in law and fact when he based his decision on fanciful theories to convict the appellants; thus causing a miscarriage of justice.***

4. ***The trial judge erred in law and fact when he convicted the 1st appellant basing solely on a grudge which had long been solved; causing a miscarriage of justice.***

5. ***The trial judge erred in law and fact when he ignored and/ or failed to consider the submissions of counsel for the appellants; thus causing miscarriage of justice.***

6. ***The trial judge erred in law and fact when he considered the prosecution evidence in isolation of the defence; thus causing serious miscarriage of justice.***

However, at the hearing of the appeal, Counsel Mc'Dosman Kabega, filed a supplementary memorandum of appeal for the 1st appellant; with leave of Court. The three grounds in the supplementary memorandum of appeal are that: -

1. ***The learned trial judge erred in law and fact to convict the 1st Appellant on evidence of suspicion, evidence full of inconsistencies, and inadmissible evidence.***

2. ***The learned trial judge erred in law and fact to convict the 1st Appellant in absence of any cogent evidence of his participation in the murder of the deceased.***

3. ***The learned trial judge erred in law and fact when he considered the prosecution's evidence in isolation of the defence; thus causing serious miscarriage of justice.***

The appellants have, in their respective memorandum of appeal, pleaded with this Court to allow their respective appeal, quash the conviction, and accordingly set aside the sentence. Learned Counsel Mac'Dosman Kabega appeared for the 1st appellant; while learned Counsel Jadison Agaba appeared for the 2nd appellant. Ms Betty Khisa, Assistant Director of Public Prosecution, appeared for the Respondent.

The 1st appellant's third ground of appeal is the same with the 2nd appellant's sixth ground of appeal. On the common ground of appeal, Mr Kabega submitted that the learned trial judge made findings basing on prosecution evidence alone; before he had considered evidence adduced in defence of the appellants. On this, Counsel Agaba associated himself with the submissions made by Mr. Kabega on the learned trial judge's treatment of the evidence adduced at the trial. He submitted that the learned trial judge made findings on the issue of participation of the 2nd appellant, basing on the prosecution evidence; while ignoring contrary evidence adduced in defence of the appellants in that regard.

Learned Counsel Kabega also submitted that the learned trial judge did not subject the prosecution evidence to the required scrutiny. Owing to this, Counsel argued, the learned trial judge failed to appreciate that the conflict that had existed between the 1st appellant and the deceased was a disagreement over properties in which the 1st appellant was only protecting the interest of his orphaned niece; who was the grand daughter of the deceased.

With regard to the 1st appellant's first and second grounds of appeal, which cover the 2nd appellant's first, second and fourth grounds of appeal, Mr. Kabega submitted that there was no direct evidence of the participation of the 1st appellant who was not even placed at the scene of the crime. He submitted that the acquittal of Tom Agaba who was A2 at the trial should also have led to the acquittal of the 1st appellant. He pointed out that the prosecution case was based on the alleged grudge between the deceased and the 1st appellant, which led to the suspicion of his participation in the crime. He however submitted that however strong suspicion may be, it cannot be the basis of conviction.

Counsel pointed out that the evidence adduced in Court for the 1st appellant, was that upon receipt of information that the police dogs at Rushere had failed to track those who had killed the deceased, who was his own mother, the 1st appellant went to police at Mbarara to secure more effective

police dogs to track down the perpetrators. It was when he reported to police for this purpose that the police arrested and detained him as a suspect in the murder. This conduct by the 1st appellant, Counsel submitted, clearly exculpated him from any participation in the commission of the crime; and thereby weakened the circumstantial evidence upon which the learned trial judge based his conviction.

Counsel also pointed out that the items, which the investigating officer claimed were recovered from the bar premises, were not subjected to examination to link them to the scene of the crime; which was a fatal flaw. Counsel pointed out that the learned trial judge himself noted the failure to follow up on the items so recovered to link them with the scene of the crime. Learned Counsel then faulted the learned trial judge for finding that the failure to carry out further investigations on the items recovered from the premises serving as a bar, did not affect the strength of the prosecution evidence in this regard.

Learned Counsel also faulted the learned trial judge for basing his conviction on the strength of the evidence of PW11 who claimed that the wife to the 2nd appellant had disclosed to them, while they were at police detention, that her husband (the 2nd appellant) had, at the behest of the 1st appellant, participated in the killing the deceased. Counsel pointed out that PW11 was an inconsistent and most

unreliable witness who even disowned the evidence she had given in Court, in preference for the statement she had earlier given to police over the matter. Counsel submitted that the learned trial judge ought not to have relied on her discredited evidence to convict the appellants.

On the 2nd appellant's first, second, and fourth grounds of appeal, Mr Agaba submitted that the appellant was only connected to the murder by the evidence of the police investigating officer (PW8) and that of PW11 stated above. Counsel pointed out that PW8 was inconsistent in her own evidence; and as such, Court should not have believed her. Counsel pointed out that in her police statement and evidence in Court, PW11 named different persons as the ones who the 2nd appellant's wife had allegedly claimed had paid out the money to the persons contracted to carry out the killing of the deceased. In this, PW11 discounted her own evidence in Court for the statement she had given to police; thus making her very unreliable.

Counsel faulted the trial judge's finding on the effect of the police sniffer dog ending up at the house where the 2nd appellant was found inside a locked house. He submitted that the police needed to have carried out more investigation pursuant to the sniffer dog having ended up in three homes including the one where the 2nd appellant was found in a locked house. Counsel pointed out that both the 2nd

appellant and his wife had given a persuasive explanation for the 2nd appellant being left behind in the locked house; and the two had also given an explanation for the tools recovered from the house where the 2nd appellant was found.

Ms Khisa, learned Counsel for the respondent, supported the conviction; and urged this Court to uphold it, and confirm the sentences. She argued that there was sufficient evidence that what existed between the 1st appellant and the deceased was more than just a grudge; since it was followed by threats by the 1st appellant on the deceased. She argued further that in view of the evidence by PW11 that the 2nd appellant's wife disclosed to her that the appellants had participated in the commission of the crime, evidence in proof of their guilt was therefore not entirely circumstantial. She, then, urged this Court to dismiss the appeal; uphold the conviction, and confirm the sentences, the appellants have appealed against.

RESOLUTION OF THE APPEAL

Pursuant to the provisions of ***Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions***, we, as a first appellate Court, are enjoined to subject the evidence adduced at the trial, to fresh appraisal and scrutiny; following which we must reach our own conclusion thereon. We must however, in doing so, give due regard to the judgment of the trial Court from which the appeal arises. This duty of a first appellate Court has been stated in numerous cases; and is now

well settled. In ***Kifamunte vs Uganda - S.C. Crim. Appeal No. 10 of 1997***, the Supreme Court restated this duty 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."*

The other authorities on this, include ***Pandya vs R. [1957] E.A. 336***, ***Bogere Moses vs U. - S.C. Crim. Appeal No. 1 of 1997***. It is from our own appraisal and scrutiny of the evidence adduced at the trial, that we would either agree with the trial Court in its conviction and sentencing of the appellants, or not. The authorities on the matter also emphasise the point that in carrying out a fresh appraisal of the evidence on record, we as a first appellate Court must be mindful of the fact that we never observed the witnesses testify in Court. Accordingly, our competence to pronounce ourselves on the matter of the demeanour of the witnesses is limited.

The facts of the instant case before us are that one Joavanis Runonzya Kabatangale Mutekanga (hereinafter referred to as the deceased), of Nsikiizi Cell, in Kiruhura District was murdered on the 11th February 2013 from her bed in her

home by some unknown person. The 1st appellant, a son of the deceased, had a misunderstanding with her over properties of his late sister who was a daughter to the deceased. He was indicted together with others, including the 2nd appellant, for the murder of the deceased; and, he and the 2nd appellant were convicted of the her murder, and were sentenced to imprisonment. They are aggrieved with the conviction, and sentence; hence this appeal.

At the trial, the appellants conceded that the prosecution had proved all the ingredients constituting the offence of murder; except their participation in the murder of the deceased. The learned trial judge relied on the prosecution evidence that there had been a grudge between the 1st appellant and the deceased, and evidence that the 1st appellant had paid money to some persons to kill the deceased, and convicted him. For the 2nd appellant, the learned trial judge relied on the prosecution evidence that a police tracker dog had led the police to premises where the 2nd appellant was found hiding, and also evidence that he had been paid money to kill the deceased, to convict him.

From the outset, we consider it important to resolve the common ground of appeal that the learned trial judge made findings basing on prosecution evidence alone; before he had considered evidence adduced in defence of the appellants. It is trite law that Court should not make any

finding on a matter before it has, equally and in a fair manner, considered all the evidence adduced before it by the prosecution and the defence in that regard. We have ourselves looked at the relevant part of the judgment of the trial judge complained against by the appellants.

We find that the learned trial judge considered both the prosecution evidence and that of the defence, regarding the alleged grudge between the 1st appellant and the deceased. He stated the defence case that the 1st appellant's interest in the properties, which was the source of the grudge, was not for himself; but for the benefit of the orphaned Phiona, his niece. Whether the trial judge's finding, based on his belief in the prosecution case, that this grudge had a bearing on the murder of the deceased, is supported by evidence, is a matter we shall advert to in our judgment. Otherwise, we are satisfied that the learned trial judge considered evidence from both sides to make his finding on this matter.

We also find it necessary, at this stage, to deal with the evidence of Tumukunde Caroline (PW11); which the learned trial judge relied on also to convict the appellants. PW11 testified that she was detained at Rushere police station on a civil debt; where she was together with A3 who was herself a suspect in the murder of the deceased. She told Court that A3 disclosed to other suspects in the police cells that Agaba Tomson, who was A2 at the trial, and the 2nd appellant, had

killed a person. She stated further that A3 explained that from her bar, her husband the 2nd appellant was given U. shs. 5,000,000/= (five million) by some persons A3 did not name; after which those unnamed persons went away with A2.

During cross-examination, PW11 was confronted with her own police statements (exhibits D4 and D5), in which she stated that it was the 1st appellant who had paid the money to the 2nd appellant for killing the deceased. She disowned her evidence in Court and urged Court to believe what was contained in her statement to police instead. She had also stated in her police statement that the wife of the 1st appellant had approached her and offered to pay her some money if she could retract her statement inculpating the 1st appellant. However, at the trial, she testified that she never met the 1st appellant's wife at all; and that the 1st appellant's wife had never offered her any money at all.

The learned trial judge noted the inconsistencies between her statement to police and her evidence at the trial; but, nonetheless, believed and relied on her statement to police, and based his conviction on this and other pieces of evidence. We have given this matter serious consideration. We find that PW11, was a most erratic and unreliable witness; and since the learned trial judge expressed surprise at her changing of her statements, he ought not to have founded the conviction of the appellants on such discredited

evidence. A3 was in the company of strangers in the police cells; hence, it is rather strange and hard to believe that she would freely implicate her own husband to these strangers.

Similarly, we find it hard to believe that from a bar of all places, anyone would mindlessly transact a plan to carry out the felony of murder; and this, in the presence of a person like A3 who was a stranger to them. The inconsistencies between PW11's police statement, and the evidence she gave in Court, as to who paid the money over to the 2nd appellant to execute the killing, and the alleged approach by the 1st appellant's wife to her to change her mind about testifying against the 1st appellant, were very damaging to the worth of her evidence. They destroyed her credibility; and adversely affected the veracity of what is contained in her police statement, and her testimony in Court, on this matter.

There was evidence from defence witnesses, corroborated by prosecution witnesses that from police custody, they were tortured to admit to having murdered the deceased. Agaba Tom (A2 who was DW2 at the trial) testified that the District Police Commander (DPC) slapped him from Rushere Police Station for stating that he knew nothing about the death of his own mother; and that at around 9.00 p.m., he was transferred to Kiruhura Police Station. At Mbarara Police Station where he was transferred to with others, he was tortured while being interrogated. From Mbarara Police

Station, he was blindfolded, handcuffed, and shackled; and was taken to Nyamityobora Police Post around midnight, where he was tortured to confess knowledge of the murder of his mother.

Annet Nankunda (who was A3, and DW3, at the trial) testified that she was pregnant at the time of her arrest. She was also beaten by the DPC at Rushere Police Station to force her to confess that the 2nd appellant had murdered the deceased. After four days, the police took her away from the police cells at around 3.00 a.m. blindfolded her and took her to a car where they tortured her; after which they took her back to the cells. The 2nd appellant (who was A4 and DW4 at the trial) testified that upon arrest, he was taken to Rushere Police Post from where the DPC and other policemen beat him up for denying knowledge of the deceased's murder.

Prosecution witnesses corroborated the testimonies of these defence witnesses. Gumisiriza Geoffrey (PW5) testified that he saw A2 Agaba Tomson being beaten at Mbarara police station by a police officer called Tukahirwa. Ruyonzya Mark (PW6) testified that when he followed up the matter of the death of this mother, the police arrested and locked him up allegedly for being stubborn. Kashaija Geoffrey (PW10) testified that from Nyamityobora Police Post, where he was detained as a suspect in the murder of the deceased, the police which included one Tukhairwe from the Central Police

Station (CPS), came several times at night between 8.00 pm to 11.00 p.m. and picked either Geoffrey Gumisiriza (PW5) or Agaba Tom (A2); and took them to a place he did not know.

He testified further that the persons who were taken away by the police would be brought back around 12 a.m. and 12.30 a.m.; and that one time A2 came back from this night experience when his eyes were swollen and were red; and he informed them who had remained at the police post, that he had been tortured. Owing to the severe suffering they had been subjected to, they requested for, and were transferred away elsewhere from Nyamityobora police post. Tumukunde Caroline (PW11) also testified in corroboration of the evidence of A3, that one time the police took away A3 in the night from the police post, and brought her back the next morning.

It is quite evident from the evidence adduced at the trial, regarding the torture and maltreatment the police subjected various suspects to, that even if PW11 had been a credible and reliable witness regarding her testimony about A3's alleged disclosure that the appellants participated in the murder of the deceased, the efficacy of such disclosure might have been questionable. It might have been procured by use of threat on A3, by the police who took her away in the middle of the night and tortured her in a car before bringing her back to the cells. Accordingly, the disclosure by

A3 would still have had very little probative value; hence, not safe to secure a conviction based on it.

Accordingly then, the learned trial judge ought to have rejected the ambivalent evidence by PW11 regarding the disclosure by A3 to her and others, which he himself referred to as distorted testimony. Had he done so, he would have realised that there only remained circumstantial evidence, from which he had to determine whether, or not, the prosecution had proved the guilt of the appellants beyond reasonable doubt; as is required by law. We reiterate here, what was stated in ***R. vs Taylor Wear & Donovar [1928] 21 Cr. App. R 20*** (cited in ***Tumuheirwe vs Uganda [1967] E.A. 328***), that it is no derogation at all that the evidence the prosecution relies upon to prove a case, is circumstantial.

However, it is important to bear in mind, 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***), that circumstantial evidence is quite susceptible to fabrication to cast suspicion on a person. Therefore, before one draws any inference of guilt from circumstantial evidence, there is need to be sure that no circumstances exist that would either weaken, or altogether destroy the inference of guilt. Pursuant to this, it is the duty of Court to apply well-established tests, to establish whether the circumstantial evidence adduced

before it proves the guilt of the accused person beyond reasonable doubt as is required by law to prove guilt.

In ***Janet Mureeba & 2 Ors vs Uganda - S.C. Crim. Appeal No. 13 of 2003***, the Supreme Court reiterated the test applicable to circumstantial evidence as follows: -

> *"There are many decided cases which set out the 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 Kipering 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.***"

There are other authorities, guiding Courts on the tests to apply with regard to circumstantial evidence. These 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 expressed itself clearly on the position of the law regarding 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).***"

It is then our duty, as a first appellate Court, to appraise the evidence before us afresh; to enable us determine whether the learned trial judge applied the requisite mandatory tests, he was under duty to apply, to the circumstantial evidence adduced before him, which he relied upon to convict the appellants, before founding their convictions thereon.

Simply stated, circumstantial evidence is evidence derived from the surrounding circumstances. For it to pass the test, it must present certainty to the exclusion of all reasonable doubt of the guilt of the accused person; which means, it must lead to the irresistible inference that the accused person committed the crime. The inference of guilt of the accused person should only be made, when the inculpatory facts of the case are incompatible with the innocence of the accused person; and are incapable of explanation upon any other reasonable hypothesis than that of guilt. Furthermore,

there should be no co-existing circumstance that would either weaken or altogether destroy such inference of guilt.

With regard to the evidence about the grudge between the 1st appellant and the deceased, the learned trial judge found this to be *'a serious misunderstanding'* that led to the murder of the deceased. He disbelieved the 1st appellant's contention that no grudge existed between him and his deceased mother, as it had been resolved; and that he had no benefit from the contested properties. Our own reappraisal of the evidence reveals that his finding was not supported by evidence. His evaluation of the evidence in this regard was rather wanting. He had no basis for this disbelief as he ignored the prosecution evidence itself that the 1st appellant and the deceased had reconciled; and the 1st appellant even had his wedding reception at the deceased's home.

The learned trial judge made a correct finding that the properties, contested over by the 1st appellant and the deceased, were an inheritance of one Phiona, the 1st appellant's niece and grand daughter of the deceased, and in whose interest the 1st appellant caused the properties to be taken away from the deceased. The document admitted in evidence as *'Exh. D6'*, shows that the deceased's family members handed over the contested properties to the 1st appellant in a family meeting. The document also shows that the 1st appellant was merely protecting the interest of the

orphaned Phiona, who the deceased had not catered for since she took control of the disputed properties after the death of Phiona's mother.

Tukunda Anna Ruyonzya (PW4), corroborated this fact in her testimony when she stated that they, as family members, decided in their family meeting, and took the properties away from the deceased; and handed them over to the 1st appellant as a caretaker for Phiona. Therefore, the Local Council authorities (LCs), and the Resident District Commissioner (RDC) merely gave effect to the family decision. True, the RDC served the contesting parties with written notice of another meeting over the contested properties. However, the RDC's letter to the parties, calling for another meeting, was not exhibited in evidence. On the notice of another meeting, the 1st appellant testified in his defence that: -

> "*The RDC called me saying that he received a call from State House that they should convene another meeting, this was after I received rent for 3 months. This 2nd meeting didn't take place, they had told me it would be around 18th or 19th February, 2013 and my mother was killed.*"

Accordingly then, the finding by the learned trial judge that the 1st appellant '*was aware that the RDC was about to reverse the earlier decisions on the matter*', and further that '*he was the architect of this crime having been aggrieved by*

the move to revisit the decision of the RDC which was due on the 18th February 2013', is not supported by evidence. The evidence led at the trial was clear that the 1st appellant had used lawful and peaceful means to resolve the dispute between him and the deceased; and had made peace with her. Hence, the evidence about the grudge between him and her was not compelling.

Furthermore, his alleged participation in the killing of the deceased was based on mere suspicion. It is worthy of note that however strong suspicion may be, it should not be the basis of a conviction. It should not have led to drawing the inference, from circumstantial evidence, as the learned trial judge did, that the 1st appellant had a hand in the murder of the deceased. Had he properly evaluated the evidence before him in this regard, we believe he would not have reached the conclusion that the *'grudge had a bearing on the person or persons who killed the late Jovanis Ruyonzya Kabatangale.'* Further still, he ignored crucial evidence by the prosecution, of an inculpatory fact that presented a reasonable hypothesis for the murder of the deceased by someone else.

Ruyonzya Mark (PW6) told Court in his testimony that his mother, the deceased, told him to fear two people in the world. The first one was the 1st appellant, who had disowned her as a mother; and the second one was his auntie Kemambazi, who had accepted the 1st appellant as her own

child yet she was not his mother. From this disclosure, it is apparent that none of the reasons given for fearing the two people could justify their killing the deceased. Second, if indeed the deceased feared that either of the two were capable of killing her, and her son (PW6) had to fear them, then the possibility that Kemambazi could kill her offered a reasonable hypothesis negating the drawing of an inference that the 1st appellant was the one who killed the deceased.

The learned trial judge made a finding that the conduct of the 1st appellant, following his receipt of news of the death of the deceased, who was his mother, was not that of an innocent person. The learned trial judge made the following observation about the 1st appellant: -

> *"He was the eldest son of the deceased and at the time of receiving the bad news he was in Mbarara. One would have expected him to rush to Nsikiizi cell in Kiruhura to ascertain what exactly had happened to his mother. The conduct of A1 rushing to a neighbouring district of Mbarara or that of monitoring the progress of the police dogs on telephone, is conduct of a person who knew what he had plotted and it was working on his mind. A1 could not step at Nsikiizi cell because he knew what he had done."*

With the greatest respect to the learned trial judge, we must point out that his finding that the 1st appellant rushed to a neighbouring district of Mbarara when he heard of his

mother's death, is not supported by evidence at all. The correct position is in his own finding in the same passage that the 1st appellant received the bad news of his mother's death, from Mbarara where he was resident, and from where he was carrying out business.

Furthermore, the finding by the learned trial judge that the 1st appellant monitored the progress of the police dogs on telephone from Mbarara, is also not supported by evidence. Evidence by the prosecution and the 1st appellant, is that when he learnt that the sniffer dogs from Rushere Police Station had failed to track his mother's killers, the 1st appellant went to Mbarara Regional Police Hqs., to seek for ~~begtter~~ better and more effective police dogs to help track the killers. He was however delayed at the police station; only to be detained later as a suspect in the case. We find this conduct, of the 1st appellant reporting to police to seek the services of sniffer dogs, to be incompatible with guilt; and did not mean he feared to go to the scene of the murder.

The other circumstantial evidence, which the trial judge relied on, was the police sniffer dog that led the police to A3's premises where the 2nd appellant was found behind a locked door, and the police also recovered some tools from the premises. However, the police investigations following the lead by the sniffer dog left a lot to be desired. The sniffer dog led the police to two premises before that of A3

where the 2nd appellant was found; but no explanation was given why the police restricted their search to the premises of A3 only. It appears that the trail sniffed by the police dog ended at A3's door, because there is no evidence that when the 2nd appellant opened the door, the police dog identified him as the source of the trail that led it to A3's door.

In the case of ***Wilson Kyakurugaha vs Uganda - C.A. Crim. Appeal No. 51 of 2014***, this Court reviewed a number of authorities on evidence derived from the actions of tracker or sniffer dogs. It stated as follows: -

> *"The Court of Appeal for Eastern Africa in the case of* ***Abdallah bin Wendo & Anor vs R. (1953) 20 E.A.C.A. 165,*** *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 a 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.'"

The Court also cited the Kenyan case of ***Omondi & Anor vs R. [1967] E.A. 802***, where at p. 807 the High Court observed as follows with regard to sniffer dog evidence: -

"But we think it proper to sound a note of warning about what, without due 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."

The Court also cited, with approval, the decision by Gaswaga J., in the case of ***Uganda vs Muheirwe & Anor - Mbarara High Court Crim. Session Case No. 11 of 2012***, where the learned judge recast and proposed the following principles to guide trial Courts with regard to admissibility and reliance on dog evidence; as follows: -

"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 required 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 animal's 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."*

After approving of these proposed principles, the Court then stated as follows: -

"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 the reception or admissibility how is such evidence to be considered? 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. Nevertheless, once admitted, it is clear that such

evidence must be treated with caution as it is possible that it may be fallible."

Applying the principles clearly enunciated in the authorities cited above, it is quite evident that the learned trial judge admitted the 'dog evidence' in the instant case before us without complying with these well laid down requirements. Even after admitting the evidence, he exercised no caution about the danger of relying on such evidence in the absence of corroboration by independent evidence. Accordingly then, the dog evidence was of very little probative value to prove the case against the 2nd appellant.

The learned trial judge questioned why the 2nd appellant, who used to be with A3 during weekends only, was in the premises on a Tuesday. He rejected the 2nd appellant's explanation that he was there on Tuesday because the company he was working for had run out of materials, as not convincing; and believed that he was hiding there. With respect to the learned trial judge, we find that he had no persuasive basis for rejecting the 2nd appellant's explanation. A3 explained in her testimony that she had to close the outside door because it led to the bar; behind which was the second room, which was the bedroom where she had left the 2nd appellant when she went to the scene of the crime.

The learned trial judge also made a finding that the pangas, and iron bars found in A3's premises were not items

circumstantial evidence. We find that the inculpatory facts, from the evidence adduced at the trial, did not point irresistibly, or exclusively, to the guilt of the appellants in the murder of the deceased. For instance, the sniffer dog having led the police to two other homes meant that the inculpatory facts of the case were capable of explanation upon some other reasonable hypothesis of some other persons' guilt; other than that of the appellants.

If the learned trial judge had applied the tests laid down for treatment of evidence that is entirely circumstantial, he would have found that the prosecution had failed to prove the case against the appellants beyond reasonable doubt; and would have acquitted them. In the event, we find merit in this appeal; and quash the appellants' convictions. Accordingly, we set aside the sentences appealed against, and order for the appellants' immediate release from prison; except for any of them who is being lawfully held.

Dated at Mbarara; this 7th 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.