THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

CORAM: (KATUREEBE, CJ, KISAAKYE, ARACH-AMOKO, MWONDHA, TIBATEMWA EKIRIKUBINZA, JJSC)

CRIMINAL APPEAL NO. 17 OF 2015

KAZARWA HENRY ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(*Appeal from the decision of the Court Appeal at Kampala before Nshimye, Mwangusya, Buteera, JJA dated the 20th day of January, 2014*)

JUDGMENT OF THE COURT

This is a second appeal filed by the appellant Kazarwa Henry after having been dissatisfied and aggrieved by the judgment and decision of the Court of Appeal. The appellant with two others were indicted on the charge of murder C/s of 188 & 189 of the Penal Code Act. It was alleged that the appellant together with two others in the night of 14th February, 2009 at Kyabazade village murdered Kyakabale Willy. The Court of Appeal upheld the conviction and the sentence of life imprisonment against the appellant.

The appellant appealed to this Court on two grounds as embodied in the memorandum of appeal as hereunder:-

(1) The Learned Justices of the Court of Appeal having found as a fact that Kamugisha Tobias pleaded guilty as a person who murdered late

Kyakabale Willy on the 14th of February, 2009 at Kyabazala, erred in law in the re-evaluation of evidence thereby wrongly confirmed the appellants' conviction of murder.

(2) The Learned Justices of the Court Appeal erred in law when they failed to re evaluate mitigation of sentence basing on circumstances of the case thereby wrongly dismissed the appellants appeal against sentence of life imprisonment.

The appellant prayed

(a) that the conviction be quashed and sentence be set aside

(b) in the alternative the life imprisonment sentence that was imposed against the appellant be reduced.

Background:

The brief background of the appeal is that on the 14th February, 2009 the deceased was attacked on his way from a bar to his home along Kaguta Road Lyantonde. The postmortem report showed that he died of hemorrhage shock resulting from deep cut wounds. Three people were arrested in connection with murder. These were Nyakahangura Kenneth (A_1) Kamugasha Tobias (A_2) and Kazarwa Henry (A_3). During the early stages of the Trial A_2 pleaded guilty to the murder charge. He was convicted on his own plea of guilty to the murder charge. He was sentenced to life imprisonment. The trial proceeded against the two accused persons the appellant and Nyakahangura(A_1). They were found guilty of having committed murder and sentenced to life imprisonment. The appellant appealed to the Court of Appeal and the Learned Justices after reappraising the evidence found that his conviction was based on proper analysis of the available evidence by the trial Court. They accordingly found no merit in the appeal and dismissed it.

At the hearing Mr. Rukundo represented the appellant and Ms Lucy Kabahuma Senior State Attorney represented the State.

Both Counsel filed written submissions which they adopted.

Counsel for the appellant submitted that the prosecution case was mainly premised on dying declaration of the deceased and the evidence of A_2 Kamugisha Tobias who pleaded guilty and was sentenced to life imprisonment. He argued that the Court of Appeal erred in law when after re evaluation of the evidence wrongly confirmed the Appellant's conviction of murder, and yet it found as a fact that Kamugisha Tobias pleaded guilty to the charge of murder of the deceased. He submitted that the Court of Appeal as the first appellate Court had a duty under rule 30 of the Court rules to re-evaluate the evidence and subject it to fresh scrutiny. He argued that it failed to exercise great care when confirming the appellant's conviction. He referred to the testimony of PW3 Basome John where Basome stated:

> **"I was at home sleeping at about 10:00 p.m. when I heard an alarm by Ntwale asking us to help saying Ronald's workers are killing us. When I went to where Ntwale was, I found Kyakabale lying down in a farm. I found that he had been cut behind the neck and arm and he was talking. He told him that Kamugisha Tobias had cut him ...**
>
> **Then Ntwale, Bayendeza, Nakanjako Jane and himself carried the injured man to Atwijukye's home. That they then rang John Jones asking him to bring a vehicle and they took him to hospital. He again said he did not go to hospital with them among others."**

He submitted that the appellant was disputing the ingredient of participation and he argued that the appellant pleaded alibi in his defence which the prosecution failed to discredit or disprove. There was no assessment by Court to verify whether it is true or false. The evidence of the appellant was not shaken during cross examination. Counsel reproduced the appellant's testimony at page 14 of the proceedings lines 1 – 30

> **"On 14th February 2009 I was at the school working from 8:00 a.m. to 6:30 p.m.. Thereafter I went home. I reached at 7:00p.m. and found my wife Kanyesigye Edvance. I was then served with food**

and slept. We were with our child Nayebare Agnes. I slept up to 7:00 a.m. the next day Sunday 15th February 2009. Manager Kiiza Robert came for me to go and wash the cows of Ronald Rutta. I left my wife at home. We sprayed the cows for three hours. I then returned home and was informed that Lubega had called from town. Lubega had caused my arrest earlier on the 12th February 2009 and I do not know his other name, I knew where he stays in town. The arrest was because I had planted trees in the land which was not ours. It is true his brother had instructed us to plant those trees ... On the 6th June I lost my child of one month and we took the body to Rukungiri. I decided to stay and construct a house among others. I never went to Rukungiri to hide. I know George Atwijukye he is from the neighbouring sub-county of Kabasomi while he was Nyarusanji. I was arrested on 17th January 2010 a year after.

Counsel submitted further that section 11 of the Judicature Act gives the Court of Appeal powers of the Court of original jurisdiction when determining the appeals. S.132 of the Trial on Indictments Act and S. 34 (2) of the said Act gives an accused person the Right of Appeal to Court of Appeal against conviction and sentence on a matter of law, fact or mixed law and fact. He argued further that paragraph (e) of the said provision allows Court of Appeal to vary or confirm the sentence where the appeal is against sentence only. He submitted that the legality of sentence of the entire natural life in prison was not addressed by the Court of Appeal. Counsel cited the case of **Attorney General v. Susan Kigula and 417 others Constitutional Appeal No. 3 of 2005** where he quoted the holding "Not all murders are committed in the same circumstances, and all murders are not necessarily the same in character."

He argued that the issues to be determined on the legality of sentence for life imprisonment are:-

(1) whether it should be like in the case of **Tigo Stephen v. Uganda SCCA No 8 of 2008** which held that life imprisonment means the remaining whole natural life of the appellant

(2) Whether it should be like in the case **of Livingstone Kakooza v. Uganda SCCA No 17 of 1993** where Supreme Court held life imprisonment in light of S. 47 (7) of the Prisons Act meant essentially a sentence of 20 years imprisonment. He submitted that the Court takes judicial notice of the fact that there was no cross appeal to maintain the sentence of life imprisonment against the appellant. He prayed that the sentence of life imprisonment be set aside and or reduced.

Counsel for the respondent Ms Lucy Kabahuma in reply opposed the appeal and submitted as follows among others. That the Court of Appeal could not be faulted because the Learned Justices referred to rule 30(I) (a) of the Court of Appeal rules. The rule gives them power to re-appraise the evidence on record as the first appellate Court. They exercised their duty citing the authority of **Kifamunte Henry versus Uganda Criminal Appeal No 10 of 1997** she further submitted that throughout the judgment they re-appraised as shown from paragraph 20 page 6 of the judgment so it was not true that they failed in their duty. She argued that the Justices of the Court of Appeal referred to the case of **Mushikoma Watete and 3 others v. Uganda Criminal Appeal No 10 of 2000**, to explain the defence of alibi and the need for the prosecution to execute the burden of placing the accused at the scene of crime. At page 11 of paragraph 2 the Learned Justices found that the defence of alibi was considered by the Learned trial Judge and by doing so they executed the duty of the 1st appellate Court of re-evaluating the evidence to make a finding of fact on the evidence available. The Learned Justices of the Court of Appeal, she submitted, went further and said that although the trial Judge did not state clearly that he was considering the appellant's alibi, he actually did consider it and discredited it in his judgment. She argued that the Learned Justices considered the defence of the appellant where he stated that on the night of 14th/02/2009

he was in Lyantonde and left for Rukungiri on 15/02/2009. They found that his defence of alibi was properly discredited and agreed with the trial Judge. She prayed that the 1st ground be dismissed.

On the 2nd ground Counsel submitted that in the Court of Appeal, there was no ground specifically addressing the variance of sentence. She submitted that at page 4 of the record of proceedings, the appellant's prayer (b) was to the effect that the conviction and sentence be set aside which Counsel of the appellant prayed for at the hearing of the appeal. She further submitted that by the time the Justices of the Court of Appeal passed the sentence they had in their mind Supreme Court Criminal Appeal No 08 of 2009 **Tigo v. Uganda** where it was held that life imprisonment means imprisonment for the remaining life of the convict.

She further submitted that there was no need for a cross appeal, so it was not true that the respondent did not argue in Court of Appeal to maintain the sentence of life imprisonment against the appellant as submitted by the appellant's Counsel.

She prayed that Court finds no merit in the appeal and upholds the conviction and sentence.

Mr. Rukundo for the appellant submitted in rejoinder that Article 28 (3) of the Constitution was infringed upon as the appellant was not given the opportunity to call witnesses to support his alibi among others. He reiterated his earlier prayer.

Consideration of the appeal

Section 5 (I) of the Judicature Act Cap 13 provides that "in criminal matters in the case of an offence punishable by a sentence of death an appeal shall be to the Supreme Court as follows:

(a) Where Court of Appeal has confirmed a conviction and sentence …. the accused may appeal as of right to a Supreme Court on a matter of Law or mixed law and fact."

Counsel for the appellant faulted the Court of Appeal for failure to properly exercise its duty as the 1st appellate Court. The duty of reappraising the evidence particularly when they found as a fact that Kamugisha Tobias had pleaded guilty to the murder, of Kyakabale Willy. The Court went ahead to confirm the conviction. Rule 30 of the Court of Appeal rules provides

> **"(I) on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction the Court may (a) re-appraise the evidence and draw inferences of fact (b) ....."**

We are alive to the duty of the 2nd appellate Court, which is to determine whether the first appellate Court properly re evaluated the evidence before coming to its own conclusion except in the clearest of cases where the first appellate Court has not satisfactorily re-evaluated the evidence, the appellate Court should not interfere with the decision of the trial Court. See (Criminal Justice Bench Book 1st Edn. 2017 pages 283 and 284.

It was apparent that pleading guilty perse by Kamugisha Tobias (A_2), and the Learned Justices finding it as a fact does not mean that they failed in their duty of re appraising and evaluating the evidence afresh. From the record the Learned Justices of the Court of Appeal first reminded themselves of their duty as a first appellate Court as provided in rule 30 (I) (a) and (b). The Learned Justices cited and or referred to the case of **Kifamunte Henry v. Uganda** also supra.

The question is whether they exercised their duty properly of subjecting the available evidence **to fresh scrutiny** as the law requires and the authorities cited held. We are compelled to quote among other things what the case of **Kifamunte** held:

> **"the first appellate Court has a duty to re hear 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 <u>carefully weighing and considering it</u>."**

The Learned Justices re-appraised as follows at page 6 of the judgment paragraph 20

> **" we shall now proceed to re appraise the evidence. The evidence on record is that the deceased and the accused persons lived on the same village. They knew each other. They met in a bar on the day the deceased was killed. The deceased raised alarm when he was attacked and cut. PW3, 4 & 5 answered the alarm. They found the deceased lying in a pool of blood and the deceased told them he had been cut by the three accused persons. PW4 said he had seen the three accused persons run away. According to PW4 there was moonlight and that's how he managed to see them. The learned trial Judge analysed the evidence of the dying declaration and found it consistent and reliable. He also found that the dying declaration was corroborated by the witness who reported that he saw the three accused persons and there was moon light which enabled him to identify them."**

PW4's evidence was briefly to the effect that on the material night he was in a bar with his wife Jane Nakanjanko (PW5), Kyakabale deceased and left at 10:00 p.m. but left the deceased in the bar. After about 30 minutes they heard an alarm from the road. They woke up and called Kyakabale's wife and run towards the direction the alarm was coming from. It is not clear why they had to call Kyakabale's wife before they knew where the alarm was coming from? He said they found the deceased lying down and his assailants had run away. He saw the accused persons and that they were three Kenneth, Kazarwa and Kamugisha. He said there was moon light and that was how he recognised them. He said the deceased was still talking and had told them that it was Kazarwa, Kenneth and Kamugisha who cut him. He said that there were land wrangles between the two bosses George Atwijukye and Ronald. He took the deceased to George's home together with PW3, Jane Nakanjako and the widow of the deceased. They then went to Kaguta Road and called John Jones. When John Jones delayed he (PW4) went on foot to Lyantonde and took Kyakabale to hospital. While still

treating the deceased at 6:00 a.m. he died. During cross examination he said they had drank waragi from the bar since 7:00 p.m. and they were just chased away by the owner of the bar PW6 at 10:00 p.m. He said they did not get drunk and the scene of crime was between a forest, thick and tall bush. He further said that he saw the accused persons but they were running away and they were in a distance of 10 meters from him. He also said the accused persons found them in the bar and Kenneth was holding a panga. He said he answered the alarm by running and sounding an alarm too.

PW3 testified that he was at home and heard the alarm by PW4 asking them for help saying that Ronald's workers were killing them. He went where Ntwale (PW4) was and found Kyakabale lying down in a farm. He saw that he had been cut behind the neck and arm and he was still talking. He told him that Kamugisha Tobias had cut him. He said he knew Kazarwa Henry as a resident of Kaguta Road.

PW5 said that on the material day 14th February 2009, she went to drink at 6:00 p.m. with her husband PW4 with the deceased. She said that she knew Kazarwa because he worked with Ronald. She said that while at the bar two men came with a panga and sat on the veranda. The men left them there. That she and her husband PW4 left the deceased at the bar drinking, since they were drunk and the bar was going to close. She stated they were drunk though they could walk properly. When they reached home and were going to sleep they heard an alarm of Kyakabale saying people were killing him. They woke up and went with the wife of the deceased. She said they found him when he had been lifted and being brought to his bed. A lot of blood was flowing from the wounds. The deceased said it was Kenneth, Kazarwa and Tobias who cut him with a panga. She said there was a grudge between Ronald and George and the people who cut him worked for Ronald. The deceased was an employee of George. She stated she didn't know the two men who had a panga and she has never seen them again.

She could not recognize them. She said she didn't know if PW3 was there as he found when the deceased was being taken away.

PW6 testified among others that on the 14th February 2009 at around 7:00 p.m. she found Kyakabale (deceased) PW4 and PW5 drinking in her bar. She served them with alcohol (booze) after which they left. After two hours PW4 and Bayendeza came and asked her for a phone to contact his boss saying that Kyakabale attacked but was not yet dead.

The learned Justices found that there was corroboration of the dying declaration in the testimony of PW4 on the identification of the appellant and the two co-accused persons at the scene of crime. They believed that PW4 had seen the appellant when he (PW4) answered the alarm by the deceased and had seen them earlier on the same night in a bar. They didn't accept Counsel for the appellant submission to the effect that the dying declaration was not corroborated.

We find the evidence as summarised herein above full of inconsistencies and contradictions from the start. PW3 said that the deceased told him that it was Kamugisha who cut him. PW4 stated that he told him that it was the three Kamugisha, Kenneth and Kazarwa the appellant. Indeed as Counsel for the appellant submitted if the two were in the same place one heard that it was Kamugisha and the other said it was the three of them how could that inconsistence be minor? Be that as it may it was important that the evidence of proper and correct identification was re-appraised and subjected to fresh scrutiny. PW4 stated that, there was moon light which helped him to recognize the appellant and the two co-accused persons. And that he saw the appellant and his co accused/convicts in 10 meters distance running away from the scene of crime. The scene of crime was between a forest and tall bush which was thick. He said he was coming running also sounding an alarm.

PW5 testified that while they were drinking two men came with a panga and sat on the veranda. She said she didn't know them and could not recognize them even in court and she has never seen them again.

PW4 said that the appellant and the two co-accused found them in the bar. To begin with PW4 and PW5's evidence fundamentally differ in that PW4 said the two men found them there. That Kenneth was holding a panga and he didn't say who the other one was and what he was wearing. PW5 said that two men not three came and left. PW6 who came to serve alcohol (booze) had not come. It is difficult to believe that the appellant was in company of PW4 and PW5 basing on that evidence. It casts a lot of doubt on our mind. There is no evidence showing that the appellant drunk together with PW4 and PW5 as PW4 alluded in his testimony.

But even if the evidence was there which was not the case the evidence available fell short of strengthening the prosecution case to the required standard.

This case depended upon correct and proper identification of the accused person devoid of mistaken identify when the conditions were difficult. It also partly depended upon circumstantial evidence.

The Learned Justices said **"we do not accept the submission of Counsel for the appellant that the dying declaration was not corroborated by any other evidence. We find that the dying declaration was sufficiently corroborated**."

We have to point out that when Ntwale (PW4) testified, he said he heard the alarm from the road, it was only when they reached the scene of crime that they knew it was Kyakabale. While PW5 his wife said they heard Kyakabale raising an alarm and they went and woke his wife up, PW3 said he heard PW4 sounding an alarm saying Ronald's workers are killing us. None of them i.e. PW4 and PW5 was with the deceased when all that was going on.

The evidence is inconsistent in that each witness heard his or her own version so there was no way it could be relied upon.

The appellant claimed that there was moon light which helped him to recognize the appellant, but this was moonlight amidst a forest and thick tall bush. It was not stated how bright it was. The Court of Appeal clearly stated when reappraising the evidence that there was moonlight and the three accused persons who included the appellant were known to PW4 as they were on the same village. The appellant had been with PW4 and PW5 that evening in the bar. As stated earlier the conditions favourable for proper and correct identification were completely lacking. The moonlight perse and the distance PW4 recognised the appellant and the time he spent observing them made it dangerous to convict and confirm the conviction against the appellant. The trial Judge and the Learned Justices of the Court of Appeal did not first caution themselves on the danger of mistaken identity.

The conditions prevailing cast doubt in our mind as to whether the moonlight was sufficient as to pierce through the tall thick bush and forest where PW4 alleged to have recognised the accused persons running from the scene of crime. The evidence doesn't avail the length of time PW4 spent observing the appellant running away. In fact earlier in his testimony PW4 had stated that they found when they had ran away.

It has been reiterated time and again in a series of decisions by this Court and its predecessors, that where prosecution is based on evidence of a single identifying witness the Court must exercise great care so as to satisfy itself that there is no danger of basing conviction on mistaken identity.

See **Abdulla Bin Wendo and another v. R [1953] EACA 166 , Roria v. Republic [1967] EA 583, Abdalla Nabulere & Another v. Uganda Cr. Appeal No 9 of 1978** (**un reported) Moses Kaona v. Uganda Cr. Appeal No 12 of 1981 (unreported) and Bogere Moses and another v. Uganda Cr. Appeal No I of 1997 (un reported**).

It was stressed in the case of **Abdulla Nabulere and another v. Uganda supra**, that **"apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time, the victim had to observe and even the opportunity to hear the assailant are factors to look out for.** The Court said **"All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."** (Emphasis is ours)

In the case of **Isanga Lazaro, Amuza Kimbugwe, Ngobi Mutoigo v. Uganda Criminal Appeal No 10 of 99 (SC)** it was said:-

> **We think that the aforesaid is even more compelling where the prosecution is based on a dying declaration even if the declaration is repeated to several witnesses.**

In the instant case the evidence of moonlight came out from PW4 alone who stated that he saw the accused persons run away 10 meters from where he was. There was no other source of light. None of the witnesses said that they heard the deceased mention the name of the appellant at the time of the attack. But even if the deceased had done so, it could not lessen the legal requirement for caution to ensure that the identification evidence is such as would not leave possibility of mistaken identity before convicting. Indeed there is no indication that the learned Justices and also the learned trial judge considered the quality of the identification evidence as contained in the deceased's dying declaration as above analysed. If they had exercised caution they would have recognized that the identification of PW4 was prone to mistaken identity for various reasons. Firstly there was virtually no time

to positively and correctly identify the appellant because of the distance from which he alleged to have observed the accused persons whom he said were running away.

Secondly the natural vegetation surrounding the scene of crime where the deceased was attacked which was not favourable at all as earlier said.

Thirdly the kind of light available and fourthly, the unreliable evidence of PW4, PW3 and PW5, fifthly, the presumption that Ronald's workers were killing them even before they had identified the attackers.

There was no other evidence from the prosecution like evidence of an investigating officer.

It is apparent therefore that the Court of Appeal did not re-evaluate the evidence which it accepted as corroborative of the dying declaration. This is clear from the whole judgment. It is not enough for Court to merely remind itself of its duty as a first appellate Court and citing the provisions of the court Rules as the learned Justices did and also citing an authority or authorities to that effect. The reappraising has to clearly come out by analyzing afresh the whole evidence and subject it to fresh scrutiny as it's clearly stated in many authorities including the Kifamunte case Supra.

The Court of Appeal referred to the **Supreme Court decision in Criminal Appeal No. 9 of 1987 Tindigwihura Mbahe v. Uganda** where it was held among others-…

> **"evidence of dying declaration must be received with caution because the test of the cross examination may be wholly wanting; and have occurred under circumstances of confusion and surprise; the deceased may have stated this inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in darkness when identifications of the assailant is usually more difficult than day light.**

The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case. It is not guarantee of accuracy. It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration a deceased person, made in the absence of the deceased and not subject to cross examination unless there is satisfactory corroboration."

Also see (Okoth Okale and others v. Republic [1965] EA 55 and Tomas Amukono v. Uganda [1978].

It is clear from the passages as reproduced in this judgment from the court of Appeal judgment, that the evidence of the dying declaration was treated like evidence of a single eye witness who appeared before court and there was an opportunity to subject him to thorough questioning with a view of testing the veracity of his evidence. But as was held in the Nabulere **Abdulla case** supra even in a case of an eye witness who testifies in court more caution has to be taken.

The learned Justices after citing and quoting the **Supreme Court decision in Criminal Appeal No. 10 of 2000. Mushikoma Watete and 3 others v. Uganda**, found that the appellant's defence of alibi was considered by the learned trial Judge in his judgment. They also found that the judge analysed the evidence and made a finding although he did not state that he was dealing with the defence of alibi.

Again here the Court of Appeal judgment shows that the Learned Justices based the finding on isolated evaluation of the prosecution evidence alone as the trial Judge did, which was contrary to the decision it cited of **Bogere Moses and Another v. Uganda (SC) Criminal Appeal No I of 1997** (unreported). It was held among other things that, "**Court must base itself upon the evaluation of the evidence as a whole. Where the prosecution**

adduces evidence showing that the accused was at the scene of crime and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time. It is incumbent on the Court to evaluate both versions judiciously and give reasons why. ... the other version is accepted ....."

The Learned Justices of the Court of Appeal believed the prosecution evidence that the appellant was in a bar of PW6 together with PW4. PW6 was the owner of the bar and she told Court that after PW4 and PW5 had left about half an hour after, PW4 came back and asked for a phone and told her that Kyakabale had been attacked. PW4 also said that they had left Kyakabale drinking. So when PW3 testified saying that he heard PW4 making an alarm and saying that Ronald's workers are killing us, who was PW4 referring to when he said he had already reached home and were going to sleep but at the same time he made the alarm in plural. He used the words "killing us." This evidence casts doubt on the prosecution case. According to PW4 and PW5's evidence it is clear that they were the last persons who were with the deceased in the bar. The evidence of PW3, PW4 and PW5 was unreliable because of the inconsistencies.

The appellant said at that time he was at his home sleeping. He gave a full account of where he was on the 14th February 2009. He stated he was at the school working from 8:00 a.m. to 6:30 p.m. He went home thereafter and was served with food by his wife Kanyesigye Edvance and slept. The next day 15th February 2009 he went to wash Ronald's cows and he left his wife at home and went with one Robert who came for him. He sprayed the cattle and came back home after 3 hours. When he came back home he was informed that one Lubega had called him from town. He said Lubega had caused his arrest earlier on 12th February 2009 because the appellant had planted trees on land which did not belong to them. When he saw police come to his home, instead of waiting to be arrested for nothing he went back to the school where he worked earlier in the day. He thought the Police had come to arrest him again. He said he went back home after doing his work at school. He stated he lost his child on 6th June 2009 and took the body to

Rukungiri. He decided to stay and construct a house. He denied that he went to Rukungiri to hide. He denied having killed Kyakabale. He said he was arrested on 17th January 2010 at the Police Post at, Kiyenje where he had gone to stand surety for his cousin brother. He was driven to Ntungamo and he was asked about the death of Kyakabale which he denied knowledge of.

DW3 was the appellant's wife Kanyesigye Edvance who testified that by the time Kyakabale was attacked on the 14th Feb. 2009 they were at their home sleeping with her husband. She said the appellant earlier went to work on that day and he did not move out at night when he came back from work until 6:00 a.m. on the 15th Feb. 2009. He went to spray cows where he used to work. Then he returned about 9:30 a.m. and they sat on their veranda. She further stated that their house is by the road side and while there Policemen came to their home. The appellant walked away and the police arrested her. She said they lost a child in June 2009 and went to the village to take the body and the appellant stayed there as he was building a house. She testified about the wrangles between George and Ronald because of Kyakabale (deceased) who had cut Ronald's banana plantation. Kyakabale was charged in Court. That Ronald and George were fighting over land. She said sometimes she would take materials in the village and would find her husband (the appellant).

PW11 D/CPL No. 35170 Mugisha Albert testified that on 17th February 2009 while attached to Lyantonde Police Post he was requested by D/CPL Mwesigwa to go with him to conduct a search at Nyakahangura's home on Kaguta Road. He said he had seen the appellant in Lyantonde and he did not remember recording a statement from him before. That he remembered Lubega Frank complaining but he did not know if the complaint was against the appellant. It was a land complaint of malicious damage, criminal trespass etc. but he did not recall many details.

PW10 was D/CPL No 21293 Francis Mwesigwa. He was with DPC and while investigating the murder at Kyabazaala village as they were moving towards

the scene, they reached the home of one of the suspects (Appellant's). He further stated that when they stopped the appellant started running away. The police gave chase but to no avail. He said that before then John Jones had complained about the appellant as the head worker of Lutta with whom they were wrangling. He said he had earlier handled the case of the workers of the two people fighting where the deceased's house was attacked and his windows broken until he locked himself in the house and was rescued by police.

From the evidence above there was no evidence to disprove that he was not in his house in Kyabazaala Kaguta village Road as indeed confirmed by DW3. There was no evidence from the prosecution that he never lost a child in June 2009 though this was not material or relevant to the alibi since it occurred long after the offence had been allegedly committed by the appellant. We concerned that the learned Justices of the Court of Appeal said in the judgment that **the appellant does accept that he was in the area where the offence was committed on 14th- 2- 2009.** We have to point out that the issue is about **"scene of crime"** Scene of crime cannot be enlarged to mean an area. This was a statement by the Court not supported by evidence on record. The many decisions available including the Bogere case cited supra, by the very Court of Appeal the focus was on scene of crime not area of crime. If a murder is committed in Kampala District, it would be too far fetched to say that a suspect has been put at the scene of crime because he or she too was in Kampala District or area of that time. The Learned Justices went on to say**, "the following day 15th-Feb-2009, he was washing spraying cows in the same area."** This was not the scene of crime. It was clear from the appellant's evidence that he left for Rukungiri in June 2009. The murder was on 14-Feb 2009. The Court of Appeal stated that the appellant left for Rukungiri on 15th Feb, 2009 this is not any where in the prosecution evidence. The prosecution evidence was that he ran away when he saw the police truck come to his home. There was no evidence of where he had ran to but these were imports of the trial Court. He was not arrested that very night from the scene of crime as the Court of

Appeal stated. The deceased was attacked at about 10:00 p.m. and was taken to hospital around 11:00 p.m. or slightly after, and the police had been informed. There was no way the appellant could have been put squarely at the scene of crime in light of the evidence available on record. The alibi the appellant raised could not arise since he left his home in June 2009 when the offence was committed in February 2009.

The trial judge wrote as follows:-

> **In addition to this evidence the conduct of the accused persons especially Kazarwa Henry point to behavior inconsistent with an innocent person. He saw a police truck coming to his home the day after the murder and he ran away or walked away fast, if you are to believe him. His version of why he moved in the opposite direction as police came to his home leaving his wife was cowardly act of a guilty person who well knew that his murder of an innocent person had caught up with him. His twist on why he ran away is intended to make a fool of Court and make it believe that he accused was walking away simply because a one Lubega had harassed him..... I am satisfied that he fled to Rukungiri to try and evade arrest after killing the deceased. His conduct after the murder and the fact that the dying declaration names him as stated by three witnesses places him squarely at the scene of crime.**

As we have already discussed in this judgment, the evidence of the weak dying declaration and un reliable evidence of PW4 which the trial judge as confirmed by the Court of Appeal had believed. There could not be proper identification of the appellant. The evidence of conduct or circumstances was so wanting that the appellant could not be put squarely at the scene of crime as the trial judge found and eventual confirmation by the Court of Appeal.

It is trite law which has been stated by this Court over and over again that the prosecution always has the burden to prove the case beyond

reasonable doubt in order to bring the guilt of the accused person home. See **Sekitoleko v. Uganda [1967] EA 531, Justine Nankya v. Uganda SCCR Appeal No. 24 of 1995 (Unreported) citing with approval Okoth Okale v. R. (1955) E.A. 555**

Those decisions emphasise also among others that an accused has no obligation to prove his innocence. Even where he or she opts to keep quiet throughout the trial or offers a very incredible defence, he or she can only be convicted upon the strength of the prosecution case against him or her.

This means that before an accused is convicted the trial judge has to see into it that the prosecution has proved its case to the required standard. In our view for the trial Court to have found that the conduct of the appellant amounted to circumstances which inferred that he put squarely at the scene of crime and was far fetched. This Court in many decisions have set the circumstances the judge have to consider and ensure that they exist before a conviction is entered. It was held: **In Simon Musoke Vs R [1958] EA 715:- "in a case depending exclusively or partially upon circumstantial evidence, the Court must before deciding upon a conviction find that, the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of guilt." See also Teper v. R. (2) AC 480 which held, "it is necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference." While Taylor on Evidence (11th Edn.) page 74 state "the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt**."

Also part of the decision among other things in **Roria v. Republic [1967] EA 583 at page 584 D-E**. was

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner LC said in House of Lords there may be a case in which identity is in question and if**

any innocent people are convicted today I should think that in nine cases out of ten – if they are as many as ten – it is on a question of identity. That danger is of course greater when the only evidence against the accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification."

The circumstances the trial Court relied on were that the appellant walked away or run away when he saw the Police come to his house. But this was the next day after the murder and many hours after. It was not the night of the murder.

Besides the appellant in his testimony stated that he went to Rukungiri in June 2009 to burry his daughter. There was no evidence by the prosecution to discredit or shake it. These were four months after the murder. One has to assume that those four months the appellant was in Lyantonde at his place of work.

The material and relevant issue was the scene of crime whether there was evidence placing him at the scene of crime, i.e. the particular place where the attack was done.

In regard to the inconsistencies in the prosecution evidence which could not have been overlooked by the trial Judge and also by the learned Justices of the Court of Appeal, the evidence of PW3, PW4and PW5 as a whole was inconsistent in the material particulars of the case as already discussed in this judgment.

These inconsistencies were major and deliberate lies to Court. The prosecution through PW10 and PW11 adduced evidence of the wrangles between the workers of Ronald Lutta and one George. Also the appellant and DW3 testified about them. There were police cases that ended in Court. The appellant had been arrested only 2 (two) days before the attack on

Kyakabale. There was no evidence to prove that it was the wrangles which culminated in Kyakabale's attack which resulted into his death.

The law on inconsistencies and contradictions have been stated over and over again by this Court. In **the Bumbakali Lutwama and 4 others SC Cr. Appeal No. 38 of 1989** (unreported) citing with approval **Alfred Tejar v. Uganda Cr. Appeal No. 167 of 1969 EACA** (unreported) it was held among others that "**inconsistencies and contradictions in the prosecution case may be ignored if they are minor or do not point to deliberate untruthfulness on the part of the prosecution witnesses ....."** The learned Justices of the Court of Appeal ought to have reappraised this evidence. If they had done so, they would not have confirmed the trial Court's conviction.

Accordingly we find that the Learned Justices of the Court of Appeal erred in Law and fact when they failed to properly reappraise the evidence before the Leaned trial Judge which resulted into wrongly confirming the appellant's conviction.

The second ground of appeal was to the effect that the learned Justices failed to re-evaluate mitigation of sentence basing on the circumstances of the case and wrongly dismissed the appellant's appeal against the sentence of life imprisonment. We perused the High Court record regarding sentencing proceedings recorded on the 28-4-2011. At page 45 the trial Judge only mentioned Nyakahangura (A_1) and gave reasons for imposing the sentence of life imprisonment. He wrote:

> **"I have noted the reasons and pleas of leniency in mitigation. I have borne in mind the gravity of the offence committed by the convicts. They are each sentenced to life imprisonment.**
>
> **Right of appeal against conviction and sentence explained."**

In the Court of Appeal the appellant had 4 grounds of appeal, namely

(1) The trial Judge erred in law and fact when he relied on the dying declaration adduced by the prosecution to convict the appellant.

(2) The trial Judge erred in law and fact when he ignored the appellants alibi and convicted him of murder.

(3) The trial Judge erred in law and fact when he did not properly evaluate the evidence before Court thereby arriving at the wrong decision.

(4) The trial Judge erred in law when he disregarded Rules of Evidence and procedure thereby rendering the whole trial irregular and a nullity. The appellant prayed for orders that

(a) The appeal be allowed and the judgment of the High Court be quashed and set aside.

(b) The conviction and sentence of the appellant be set aside.

It is apparent that, failure by Court of Appeal to re-evaluate mitigation of sentence basing on the circumstances of the case, was not a ground before the Court of Appeal. We cannot therefore fault the Learned Justices for a matter that was not before them. The appellant's prayer was to have the conviction and sentence set aside. We accept Counsel for the respondent's submissions on this ground. This ground would fail.

Be as it may we are compelled to say something about the way the trial Judge handled the sentencing proceedings. There was no mention of mitigation of sentence. There was a misdirection in law by the learned Justices of the Court of Appeal to have failed to direct themselves on the issue of sentencing when it had been part of the prayers. The judgment of the Court of Appeal simply stated: **I find that conviction was based on proper analysis of the available evidence by the trial Judge. I found no merit in this appeal and accordingly dismiss it. The conviction of the trial Judge is upheld and sentence imposed is confirmed**.

The Learned Justices of Court of Appeal caused a miscarriage of justice, therefore when they confirmed the sentence without properly analysing the judgment and sentencing procedure of the trial judge to appreciate how the sentence came about. They also didn't give reasons for their upholding the sentence of life imprisonment for the rest of natural life of the appellant.

The prayer in the instant case was to quash the conviction and set aside the sentence. The first ground of appeal succeeds, the learned Justices failed in their duty as a 1st appellate Court to reappraise the evidence and subject it to fresh scrutiny which resulted into the wrongly confirming the conviction against the appellant. The conviction is accordingly quashed.

Having quashed the conviction the sentence falls by the wayside and it cannot stand.

In the circumstances of this case we allow the appeal, quash the conviction and set aside the sentence of life imprisonment.

The appellant should be released and set free unless if he is being held on other lawful charges against him.

Dated at Kampala this ..... day of .....

.....

Hon Justice Bart Katureebe,

CHIEF JUSTICE

Hon. Lady Justice Dr. Esther Kisaakye

JUSTICE OF THE SUPREME COURT

Hon. Lady Justice Arach-Amoko

JUSTICE OF THE SUPREME COURT

Hon. Justice Faith Mwondha,

JUSTICE OF THE SUPREME COURT